

**Hon Kris Faafoi**  
Minister of Justice

**Proactive release – COVID-19: Options to resolve commercial lease disputes and COVID-19 Response (Management Measures) Legislation Bill: additional policy approvals for commercial leases and residential tenancies**

Date of issue: 15 December 2021

The following documents have been proactively released in accordance with Cabinet Office Circular CO (18) 4.

| No. | Document   | Comments          |
|-----|--|-------------------|
| 1   | <b>COVID-19: Options to resolve commercial lease disputes</b><br><i>Cabinet Paper</i><br>Office of the Minister of Justice<br>Lodged: 8 September 2021   | Released in full. |
| 2   | <b>COVID-19 Options to Resolve Commercial Lease Disputes</b><br><i>COVID-19 Ministerial Group Minute CMG-21-MIN-0021</i><br>Cabinet Office<br>Meeting date: 9 September 2021   | Released in full. |
| 3.  | <b>COVID-19 Response (Management Measures) Legislation Bill: additional policy approvals for commercial leases and residential tenancies</b><br><i>Cabinet Paper</i><br>Office of the Minister of Justice<br>Lodged: 21 October 2021     | Released in full. |
| 4.  | <b>COVID-19 Response (Management Measures) Legislation Bill: additional policy approvals for commercial leases and residential tenancies</b><br><i>Cabinet Minute CAB-21-MIN-0431</i><br>Cabinet Office<br>Meeting date: 26 October 2021 | Released in full. |

**In Confidence**

Office of the Minister of Justice

COVID-19 Ministerial Group

**COVID-19: Options to resolve commercial lease disputes**

**Proposal**

- 1 This paper provides options for resolving commercial lease disputes in the context of the current COVID-19 Alert Level restrictions.

**Relation to government priorities**

- 2 This paper relates to the Government's overarching priority of a COVID-19 recovery plan for all New Zealanders. It also contributes to Labour's 2020 Election Manifesto commitment to provide practical support for businesses to get through COVID-19.

**Executive Summary**

- 3 Current Alert Level restrictions may justify providing support for parties to resolve commercial lease disputes. This paper outlines some high-level options for Cabinet's consideration.
- 4 In 2020, as a result of COVID-19 restrictions and a resultant loss in revenue, many commercial tenants had issues meeting fixed costs, such as rent. When the pandemic began, some commercial leases provided for a reduction of a fair proportion of rent where the tenant cannot access the premises in an emergency. Many commonly used the Auckland District Law Society (ADLS) template lease, which includes a rent reduction clause (included at Appendix One).
- 5 In July 2020, the Government agreed to make subsidised mediation and arbitration services available for unresolved commercial lease disputes. This was intended to support tenants and landlords to come to agreements to fairly share the financial impacts of the Alert Level restrictions, rather than tenants wearing the burden alone. Uptake of the service was low, and it was discontinued on 30 June 2021.
- 6 Additional financial support is now available for businesses impacted by COVID-19. On 14 December 2020, Cabinet agreed to a sustainable and proportionate economic support package for use in the event of further resurgences of COVID-19 in the community [CAB-20-MIN-0531]. Support now available to businesses includes the Resurgence Support Payment, which is intended to support businesses to cover fixed costs such as rent.
- 7 As current Alert Level restrictions continue, it becomes more likely that some parties to commercial leases (particularly in Auckland) will again have disputes about the payment of rent. While anecdotally there have been few

reports of disputes to date, numbers may increase as Alert Level restrictions continue.

- 8 I have directed Ministry of Justice officials to provide improved guidance and information for commercial tenants and landlords in light of these circumstances. I have also considered two further broad options to support parties to commercial leases, and seek Cabinet's preference on which, if any, to progress:

8.1 **Option A:** Revived subsidised mediation and arbitration service

8.2 **Option B:** Amending the Property Law Act 2007 to insert an implied clause in commercial leases requiring a rent reduction in emergency situations, with the following characteristics:

8.2.1 it is based on clause 27.5 of the Auckland District Law Society (ADLS) template

8.2.2 it would apply after the law receives Royal Assent

8.2.3 it applies only to leases that do not already provide for the payment of rent during an emergency

8.2.4 it would require parties to seek arbitration to resolve disputes about the implied clause (without financial support from the Government for this process)

8.2.5 parties to the lease could agree to opt out of the clause and establish their own arrangements.

- 9 I note that these options were developed in short timeframes without in-depth analysis, and have not been consulted extensively. No engagement with commercial parties has been undertaken.

- 10 If Cabinet agrees to progress legislative change, I also seek Cabinet's decisions on whether to progress this option under urgency or on a longer timeframe. If the changes are not passed under urgency, they will likely not take effect until mid-2022 at the earliest, when rent relief support in the context of lockdown restrictions may no longer be relevant.

## Background

*Many commercial tenants struggled to pay rent during COVID-19 restrictions in 2020*

- 11 The COVID-19 crisis had a significant impact across the economy, especially on small and medium enterprises (SMEs). In 2020, many faced a severe loss of revenue as a result of the COVID-19 Alert Level restrictions on business activity that was necessary to eliminate the epidemic. Any loss of revenue can make it difficult to meet fixed costs, such as rent.

- 12 When the pandemic emerged, some commercial leases already provided for a reduction of a fair proportion of rent where the tenant cannot access the

premises in an emergency – many commonly used the Auckland District Law Society (ADLS) template lease, which includes a rent reduction clause. However, there were also many leases that did not have such a clause. In those cases, tenants had no legal right to a rent reduction during the COVID-19 Alert Level restrictions. They also had no legal basis from which to negotiate a rent reduction. These tenants relied on the goodwill of landlords to offer rent relief. While some parties reached agreements, not all did, and a number of disputes arose in 2020.

- 13 Not all businesses were affected in the same ways, given the many different leasing arrangements that exist. Some industries have been particularly affected, including hospitality and retail.

*Cabinet previously agreed a package to support commercial lease negotiations*

- 14 In 2020, the Government provided financial support to businesses in the form of a wage subsidy, to keep workers in jobs, and the Small Business Cashflow Scheme, providing one-off loans to help small to medium-sized businesses with non-wage fixed costs. The Government did not provide financial support for commercial rents, preferring tenants and landlords to come to an agreement to fairly share the financial impacts of the Alert Level restrictions.
- 15 On 2 June 2020, the Cabinet Economic Development Committee agreed to a package of proposals amending the Property Law Act 2007 to support commercial tenants and landlords to resolve rental disputes that had arisen during the COVID-19 Alert Level restrictions. This package included a subsidised arbitration service.
- 16 The agreed amendments did not proceed. Instead, in July 2020, the then Ministers of Justice and Finance agreed to make subsidised mediation and arbitration services available for unresolved commercial lease disputes.
- 17 The voluntary mediation and arbitration service was launched in September 2020. Take-up of the service was very low, with 966 enquiries received as at 30 June 2021, but only 20 cases settled during the service availability period. It appears some disputes were able to be resolved without a formal process needing to take place. However, low take-up may also have been due to the service being voluntary and set up some months after the lockdowns had ended. The service was discontinued from 30 June and the unused funding returned to the Crown.

*Additional support is now available for businesses impacted by COVID-19 restrictions*

- 18 On 14 December 2020, Cabinet agreed a sustainable and proportionate economic support package for use in the event of further resurgences of COVID-19 in the community [CAB-20-MIN-0531]. Support now available to businesses includes the Wage Subsidy Scheme and the Resurgence Support Payment, which is intended to support businesses to cover fixed costs such as rent.

**Current Alert Level restrictions may justify providing support for parties to resolve commercial lease disputes**

- 19 As current Alert Level restrictions continue, it becomes more likely that some parties to commercial leases (particularly in Auckland) will again have disputes about the payment of rent.

*Numbers of disputes are starting to increase as the lockdown continues*

- 20 My officials have held meetings with the Property Law Section of the New Zealand Law Society (NZLS) during the current period of restrictions. They reported that some parties who reached an agreement during previous lockdowns now understand their legal position and are more amenable to similar arrangements without the need to consult lawyers. Since the emergence of the pandemic, new lease negotiations have focused more on solutions for the possible scenario of future lockdowns, and so many new lease agreements provide for a rent reduction in such situations, often at a fixed proportion.
- 21 However, as of this week, the NZLS reported small but an increasing number of enquiries so far regarding the payment of commercial rents during Alert Level 4.

**Improved guidance for commercial landlords and tenants will be made available**

- 22 A key gap in the current system is a lack of information and guidance on how to agree a fair reduction of rent where businesses are unable to access their premises. Improved information and guidance for commercial landlords and tenants on how to agree a fair reduction in these circumstances would help fill this gap.
- 23 I have therefore directed my officials to update the Government guidance on the Ministry of Justice website on the implications of COVID-19 business restrictions for commercial tenants and landlords. The guidance will include factors to consider in determining a fair proportion of rent that would cease to be paid. It may also include practical examples and scenarios to assist parties to reach an agreement that suits their situation.
- 24 Real examples of successful dispute resolution outcomes may also provide useful guidance for tenants and landlords, particularly in relation to the determination of a fair proportion of rent for reduction. A number of such cases have been through formal arbitration since the initial COVID-19 Alert Level restrictions.
- 25 Arbitration decisions on commercial lease disputes are private and confidential and I have asked officials to explore whether a sample of outcomes could be publicised in an anonymised form. This will likely require the agreement of the parties and the arbitrator. It should be possible to find a small number that would be willing for the results to be made public with identifying information removed.

- 26 This approach may assist parties to reach an agreement that suits their situation without interfering with existing contractual arrangements. It can also be implemented relatively quickly and cheaply, depending on the ability to find and publish relevant arbitration decisions. However, the guidance issued will not have binding effect, and may be of only limited usefulness when there is a dispute or intransigent party.

**Two options that the government could take to support the parties**

- 27 I have considered two broad options for providing support for parties to commercial leases in light of the current COVID-19 restrictions. An assessment of these options is provided at Appendix Two. If Cabinet agrees support is justified, I seek Cabinet's preference on which option(s) to pursue of the following:
- 27.1 **Option A:** Revived subsidised mediation and arbitration service
- 27.2 **Option B:** Amending the Property Law Act 2007 to insert a clause in commercial leases requiring a rent reduction in emergency situations.
- 28 These options are not likely to fully address issues faced by businesses in relation to commercial lease disputes, because financial issues remain as a result of the impacts of Alert Level restrictions. The options need to be weighed against other government interventions for providing support to businesses during Alert Level restrictions.
- 29 I consider that the key objective in considering options remains as per the Government's approach to business support in 2020. The Government supported tenants and landlords to come to agreements to fairly share the financial impacts of the Alert Level restrictions, rather than tenants wearing the burden alone.
- 30 I also note that, because lease arrangements are agreements between private parties, care needs to be taken not to disrupt these arrangements more than is necessary to support a fair result. Such private arrangements are a fundamental part of our civil law system and are protected by the principle of sanctity of contract.

**Option A: Revived subsidised mediation and arbitration service**

- 31 This option would revive the voluntary mediation and arbitration service subsidised by the Government in 2020 for tenants and landlords who could not reach agreement on rent abatement. This would be delivered via contracted providers, who would deliver a fixed-rate, streamlined mediation and arbitration service.
- 32 This option would mean that:
- 32.1 all parties, including those whose leases do not include rent abatement or arbitration clauses, could access subsidised mediation to support reaching agreement about rent



- 32.2 parties whose leases include clauses allowing for a rent abatement in the case of emergency, and for disputes to be resolved by arbitration, could access subsidised arbitration.
- 33 This option would have the advantage of providing parties with existing rent abatement and arbitration clauses in their leases with a timely and cost-effective option to resolve any outstanding disputes about the application of these clauses.
- 34 However, I do not recommend this option because it would not be effective for resolving disputes for those tenants without rent abatement or arbitration clauses in their leases. Without a legislated right to a rent reduction, these tenants would still be disadvantaged. As was demonstrated during the service's operation last year, mediation is unlikely to resolve many disputes in these instances as it is not a binding process and relies on the mutual agreement of the parties involved.
- 35 As funding for the previous service has been returned to the Crown, this option would require additional funding for the Ministry of Justice to contract providers to deliver the mediation and arbitration service. If Cabinet prefers this option, I expect that \$6 million might be needed for this purpose. This estimate is based on uptake of the original scheme. If Cabinet prefers this option, I will confirm the necessary allocation and seek the necessary appropriations.

#### **Option B: Amendments to the Property Law Act 2007**

- 36 I have also considered inserting an implied clause into commercial leases that would require a fair rent reduction in emergency situations. Practically this would mean parties must agree on what rent is fair in the circumstances. This would require amendments to the Property Law Act 2007.
- 37 This option is likely to involve significant complexity in its design. This is because of its potential application to many different types of commercial parties and arrangements and their varying circumstances.
- 38 Limited data is available on how many leases currently include a rent reduction clause, including the ADLS clause. However, anecdotal evidence from property lawyers indicates that, since March last year, where possible, parties have been actively considering how to deal with this pandemic in their contracts, including by using the standard ADLS clause or providing for something specific to the property.
- 39 If Cabinet prefers legislative change, on balance, the most beneficial approach to address commercial lease disputes would be to insert an implied clause based on clause 27.5 of the ADLS template.
- 40 This clause would entitle tenants who are unable to gain access to their premises to fully conduct their businesses due to an emergency to the reduction of a "fair proportion" of rent and outgoings until the tenants are again able to fully conduct their business from the premises.

- 41 This approach has a range of benefits:
- 41.1 As it is currently included in some commercial leases, the ADLS clause is familiar to landlords and tenants and has previously been the basis of negotiations and agreements in response to COVID-19 restrictions. This would also promote consistency across the commercial sector and between parties to commercial leases.
  - 41.2 There is now some limited case law providing guidance for parties on how clause 27.5 should be interpreted. Officials could consider how to make clear that this material continues to apply when interpreting a clause that is implied by statute into leases.
  - 41.3 Adopting clause 27.5 would be relatively simple to draft, meaning this could be developed in a timely manner.
  - 41.4 The clause is sufficiently flexible to apply to a wide variety of lease arrangements and to deal with the varying impacts that COVID-19 has had on different businesses.
- 42 However, a disadvantage of the ADLS clause is that it does not stipulate what a “fair proportion” of rent would be and provides no guidance on this point. Because the default dispute resolution position is arbitration, there is limited case law to assist with that determination. What case law does exist provides some guidance.
- 43 As it would be based on the ADLS clause, the text of the clause would not directly reference COVID-19 restrictions and could apply to other emergencies. However, the legislation could be drafted in such a way that the clause only has effect during certain periods, for example, while an Epidemic Notice is in force.
- 44 Any change to the law should also allow parties to prospectively agree to opt out of the clause, and establish their own arrangements. This maintains some degree of freedom of contract.
- 45 This option will also have the effect of treating debt owed to landlords differently from other debts. This means that landlords take a share of lessee’s losses in a way that other creditors do not.

*A bespoke clause would not effectively address rent dispute issues*

- 46 I have also considered other options for legislative change, including a bespoke clause. A bespoke clause, compared to the ADLS clause, could specifically target situations where the Government considers a rent reduction is appropriate, such as where tenants have suffered material losses due to COVID-19 restrictions. A bespoke clause could also provide clarity around the appropriate reduction of rent by providing factors that must be considered in determining what is fair.



47 However, I do not consider this option would effectively support parties to resolve commercial lease disputes. Compared to other options, it has several disadvantages:

- 47.1 In departing from the ADLS clause, it would lose advantages of familiarity, consistency and the ability to rely on existing case law (noting that case law is limited in relation to the ADLS clause)
- 47.2 It would introduce complexity, for example, in determining when loss is sufficient for the clause to apply.
- 47.3 It may lead to more disputes as parties litigate over what the new clause means.
- 47.4 It is likely to be more complex to draft and therefore may not be the timeliest option.

**Other issues that would need to be resolved under Option B**

*The new clause would apply to only leases which do not already include an emergency rent reduction clause*

- 48 There are also options as to whether a clause would be implied into all leases, or only leases which do not currently have a clause providing for changes to how rent should be paid during an emergency.
- 49 Implying a clause into all leases has the advantage of greater simplicity in the drafting of the legislation. It would also avoid arguments about whether a lease contains such a clause. However, it involves overriding lease arrangements that already cater for rent reduction in emergencies. Depending on the content of the clause, this could be a significant interference in private arrangements.
- 50 Inserting a clause only into leases that did not already provide for the payment of rent during an emergency would be far less of an intrusion into private arrangements. However, there are some drafting challenges associated with this option, particularly in carving out leases with existing emergency clauses with sufficient certainty.

*Dispute resolution*

- 51 I have also considered whether an implied clause should specify how disputes about its application should be dealt with, or whether it should be silent and allow disputes to be resolved according to the normal processes provided in the particular lease agreement.
- 52 I propose requiring parties to seek arbitration to resolve disputes about the implied clause. Requiring arbitration in all cases would provide efficiency in terms of time and cost for parties as well as certainty and consistency. This approach would also be consistent with other implied clauses concerning the payment of rent in the Property Law Act.

- 53 Arbitration tends to be the dispute mechanism of choice in commercial leases and by parties in a contract. Arbitration is a private dispute resolution mechanism by an independent third party that can be chosen by the parties. It is generally – though not always – a quicker, cheaper alternative to a court process and allows parties to tailor the process to their particular dispute and does not necessarily require legal representation.
- 54 Generally, arbitral decisions cannot be appealed or reviewed in full and are final and binding. This avoids the costly and time-consuming appeals process that may occur in normal civil litigation. The scope of the grounds for an appeal are very limited unless the parties agree otherwise.

*Government financial support for arbitration*

- 55 I also considered whether the Government should provide financial support to parties who are arbitrating disputes about the implied clause, as was proposed in 2020. If Cabinet only agreed to progress Option B, I do not consider the same justification for financial support now exists, because:
- 55.1 An implied clause based on the ADLS clause should be more familiar to commercial parties, unlike the bespoke clause proposed last year. It is therefore less likely to give rise to disputes.
- 55.2 Because it would only apply to leases where there is no clause providing for the payment of rent during an emergency, the implied clause would likely apply to a smaller number of leases.
- 55.3 Providing a subsidy may incentivise parties to litigate their disputes, rather than resolve them in a timely fashion.
- 55.4 Arbitration is already often the default dispute resolution mechanism in commercial leases and if included would apply in any case.
- 55.5 For parties that are unable to resolve their disputes, private arbitrators are already providing fixed-cost, streamlined arbitrations to resolve commercial rent disputes.
- 56 If Cabinet decided to progress both Option A and B, then I propose that the subsidised arbitration service created by Option A should also be made available in respect of the implied clause created by Option B.

**There are options regarding the timing of legislative change**

- 57 If Cabinet agrees to progress legislative change, I seek Cabinet's decisions on whether to progress this option under urgency or over a longer timeframe. The benefits and risks of each option are outlined below.

*Progressing changes through urgent legislation could mean proposals are in effect within one month*

- 58 Progressing these changes through urgent legislation would allow them to have effect in the current outbreak and would provide support for parties to

commercial leases engaged in rent disputes. This would achieve the objective of the proposals, to ensure that commercial tenants and landlords share the financial impacts of the COVID-19 restrictions.

- 59 However, these timeframes would not allow opportunity for full consideration of the changes, or allow public and expert input on the proposals. Given that the proposals will restrict the freedom and sanctity of contract, consultation would limit unintended consequences as far as possible.
- 60 The NZLS has indicated a number of complexities with the proposals that need to be worked through carefully. These include risks such as complications with the interaction of the implied clause with existing terms which may already cover some degree of rent relief in emergency situations. If this is not clear, there could be significant uncertainty for parties that may require them to seek legal advice, and even increase the likelihood of disputes.

*Progressing changes in a longer timeframe could mean proposals are not passed until mid-2022 at the earliest*

- 61 Progressing these changes in a longer timeframe would allow for fuller analysis and consideration of their impacts and for public consultation to occur.
- 62 However, if the changes apply prospectively **s9(2)(g)(i)** this would mean changes would not take effect for the current outbreak, or any possible further outbreaks that might occur in the next 9-12 months before a full select committee process is run. It is possible that by the time the legislation is passed, it is less relevant for the COVID-19 response.
- 63 Given the passage of time if a longer process was followed, a retrospective option would be unworkable and be even less justified than under urgency. This is because it would affect otherwise lawful enforcement action taken in this period. This would have a significant impact on landlord's rights and create uncertainty.

*There are options about the timing at which the implied clause would apply*

- 64 Generally, legislation should only take effect from the date it receives Royal Assent. This is consistent with the fundamental legal principle of the presumption against retrospectivity (reflected in section 7 of the Interpretation Act). However, an implied clause would have greatest relevance to leases affected by the most recent lockdown. This means that it is necessary to consider whether this legislation should have a retrospective effect.
- 65 There are two options regarding the date from which a legislative change could take effect.
- 65.1 **Option 1:** the implied clause applies retrospectively, for example, from 18 August 2021, the first day in the most recent move to Alert Level 4.

65.2 **Option 2:** the implied clause would only apply after the law receives Royal assent (preferred option)

66 Having considered these options, and the evidence that this issue is not as widespread as the 2020 Alert Level 4 lockdown, s9(2)(g)(i)

*Option 1 applies more widely but has a significant retrospective effect*

67 Option 1 would have a retrospective effect because it would imply the clause into leases from a date before the Bill receives Royal Assent, such as the date the country moved to Alert Level 4. This would mean that tenants would be entitled to negotiate a reduction of a fair proportion of rent that covered that earlier period, before the law was passed.

68 For the following reasons, s9(2)(g)(i)

68.1 It would negatively affect landlords' rights, because otherwise lawful action to enforce rights under the lease before the Bill receives Royal Assent would become invalid.

68.2 The change does not fall within the limited exceptions set out in the Legislation Design and Advisory Committee Guidelines where retrospective legislation may be appropriate. In particular, the clause would not entirely be to the benefit of those affected, does not validate matters generally understood and intended to be lawful, and is not essential to public safety.

68.3 The changes are not in response to a new emergency situation, where the impact on leases has not been previously understood. The prospect of COVID-19 restrictions limiting trade have been known for some time. New leases would have been entered in, and old leases renewed, on the understanding that such restrictions were possible.

68.4 The case for retrospectively limiting rights is weak where businesses are able to fully operate by the time the law is passed. This is because the period where the business could not trade was relatively short and the resurgence payment would likely have been available. Businesses who are at Alert Levels 3 or 4 when the Bill receives Royal Assent would still get the benefits of the law from that point onwards.

68.5 It creates complexity and uncertainty for landlords and tenants. This may result in additional disputes.

*Option 2 has no retrospective effect*

69 s9(2)(g)(i) option 2, does not have retrospective effect because it only implies the clause in leases from the date of Royal Assent. Applying the law prospectively has the following advantages:

- 69.1 It is consistent with the presumption against retrospectivity by only affecting landlords' rights from the date the Bill becomes law.
- 69.2 It is clearer and simpler to apply, because it is not necessary to consider how the law applies to enforcement action taken, or proceedings commenced, before the Bill is law.
- 70 I also consider a prospective clause would be effective. This is because:
- 70.1 The clause will be triggered for businesses who are in areas at Alert Level 3 or 4 at the time it receives Royal Assent (provided the business cannot fully operate). It may be triggered for some businesses in Alert Level 2 if businesses cannot fully operate.
- 70.2 If the clause applies, the "fair proportion" requirement is flexible. While the rent does not automatically cease for earlier periods, earlier payments could potentially be factored in. However, this is not required by the clause and may depend on the extent of time that has passed between the earlier affected period and the law coming into effect.
- 70.3 The extended notice periods for cancellation of leases, that were inserted into the Property Law Act in response to the move to Alert Level 4 in March 2020 still continue to apply. Leases cannot be cancelled until the rent is 30 working days in arrears.
- 70.4 The clause would apply to any future moves to Alert Levels 3 and 4.

### Next steps

- 71 If Cabinet decides that there is justification for the Government to support parties to resolving commercial lease disputes, and agrees to one of the options above, I will report back to Cabinet as appropriate with the necessary next steps to progress the agreed option.

### Financial Implications

- 72 The proposal to revive the subsidised mediation and arbitration service (option A), or to provide financial support for arbitration as part of Option B, would require additional Crown funding if agreed by Cabinet. If Cabinet agreed to either option, I expect that \$6 million might be needed for this purpose.

### Legislative Implications

- 73 Option B in this paper requires legislation to implement. If Cabinet agrees, I propose making these changes through a new Bill to amend the Property Law Act 2007.
- 74 If a Bill is agreed, I also seek agreement to issue drafting instructions to the Parliamentary Counsel Office.

- 75 There are options outlined in the paper regarding the timeframes for legislative change. I would determine the dates for introducing a new Bill into the House and other steps in the legislative process following consultation with the Leader of the House, depending on the timeframes agreed by Cabinet.

### Regulatory Impact Statement

- 76 The options in this paper have been developed urgently and are based on limited information with which to assess the potential impacts of the options.
- 77 The Regulatory Quality Team at Treasury have provided the following comment: "The Treasury has exempted the proposal because it is intended to manage the short term impacts of a declared emergency event, and is required urgently to be effective. This exemption is subject to the condition that for any resulting regulatory changes either a Regulatory Impact Statement is provided when a proposal is brought back to Cabinet for final approval, or the legislative proposal to amend property law is made temporary, and can only be made permanent subject to the Post Implementation Review of these changes after a set period."

### Human Rights

- 78 While there is no general protection for property under the New Zealand Bill of Rights Act, the legislative proposals in this paper do change obligations under leases which impacts on a landlord's exercise of their property rights. Applied prospectively, the restrictions are considered necessary to protect the property rights of businesses and assist businesses in surviving COVID-19. The restrictions will only apply temporarily. The proposals require any changes to be fair and appropriately consider the position of landlords.
- 79 However, if the changes are implied retrospectively, the limits on rights are greater. The right to natural justice in section 27(1) of the New Zealand Bill of Rights Act may potentially be seen as including a right to non-retrospectivity in civil matters, although the authority is not clear on this point. s9(2)(h)

### Consultation

- 80 This paper has been prepared within short timeframes meaning engagement on the proposals has been limited. The following agencies have been consulted on this paper: The Treasury, and the Ministry of Business, Innovation and Employment.
- 81 Consultation with businesses on these proposals has not been undertaken. High level discussions about the options were held with the Property Law Section of the New Zealand Law Society.

*Ministry of Business, Innovation & Employment comment*



- 82 The Ministry of Business, Innovation & Employment (MBIE) has concerns about implying the clause contemplated by Option B into all existing leases. Best practice would be to only imply this clause into new leases signed after the relevant provision comes into effect. Implying such a clause into pre-existing contracts will override existing decisions between commercial parties as to the appropriate allocation of risk between them.
- 83 MBIE also considers that the practical impact of this clause is to transfer losses that may have been suffered by lessees to lessors – presumably in order to allow lessees to meet obligations to other creditors/support their shareholders. In this regard MBIE notes that the allocation of losses between creditors, when a person is unable to pay their debts, is ordinarily addressed through insolvency law. Insolvency law:
- 83.1 Provides that, where a person is unable to meet their debts, all creditors of the same class should take on an equal share of losses – rather than some creditors being privileged over others. Requiring lessors to take on losses suffered by lessees, ahead of other creditors, is a departure from current policy
- 83.2 Seeks to provide clear, and consistent rules for how losses should be apportioned between parties. MBIE does not consider that legislating for a fair proportion test, without providing clarity as to the factors that should be taken into account in determining how that test should be applied, meets this goal. While this approach does provide the maximum of flexibility for arbitrators, because the decisions of an arbitration are confidential, it will inevitably create a situation where inconsistent decisions are made as to what the appropriate factors are to take into account in determining a fair proportion. This will result in an arbitrary allocation of losses across the economy which is inconsistent with the policy aims of insolvency law.

### Proactive Release

- 84 This paper will be proactively released within 30 business days of Cabinet confirmation.

### Recommendations

The Minister of Justice recommends that the COVID-19 Ministerial Group:

- 1 **note** that many commercial tenants and landlords have come to agreement on rent abatement in the event of a resurgence of COVID-19 since previous lockdowns or other emergency situations;
- 2 **note** that the current Alert Level restrictions increase the likelihood of commercial rent disputes, and that these conditions may justify support for parties to resolve disputes;

3 **note** that I have instructed my officials to update the Government guidance on the Ministry of Justice website on the implications of COVID-19 business restrictions for commercial tenants and landlords;

4 **agree to**

**EITHER**

4.1 **Option A:** Revived subsidised mediation and arbitration service

**AND/OR**

4.2 **Option B:** Amending the Property Law Act 2007 to insert an implied clause in commercial leases requiring a rent reduction in emergency situations, with the following characteristics:

4.2.1 it is based on clause 27.5 of the Auckland District Law Society (ADLS) template

4.2.2 it would only apply after the law receives Royal assent

4.2.3 it applies only to leases that do not already provide for the payment of rent during an emergency

4.2.4 it would require parties to seek arbitration to resolve disputes about the implied clause (without financial support from the Government for this process)

4.2.5 parties to the lease could agree to opt out of the clause and establish their own arrangements

**If the COVID-19 Ministerial Group agrees to Option B:**

5 **invite** the Minister of Justice to issue drafting instructions to the Parliamentary Counsel Office for a Property Law Amendment Bill, to be enacted:

**EITHER**

5.1 **under urgency:** to respond more directly to the current COVID-19 response, and agree that the Minister of Justice introduce a Property Law Amendment Bill as soon as possible, following consultation with the Leader of the House; and

5.2 **agree** that the Minister of Justice be authorised to make additional minor policy decisions, in discussion with the Minister of Finance or the Minister of Small Business, as appropriate

**OR**

5.3 **by mid-2022 at the earliest:** to allow for consultation on the amendment Bill and avoid unintended consequences, noting that the

**IN CONFIDENCE**

Minister of Justice would seek approval to introduce an amendment Bill in due course, following consultation with the Leader of the House.

Authorised for lodgement

Hon Kris Faafoi

Minister of Justice

Proactive Release

**IN CONFIDENCE**

**Appendix One:** *Auckland District Law Society 2012 commercial lease template, clause 27.5*

***“No Access in Emergency***

If there is an emergency and the Tenant is unable to gain access to the premises to fully conduct the Tenant's business from the premises because of reasons of safety of the public or property or the need to prevent reduce or overcome any hazard, harm or loss that may be associated with the emergency including:

- a. A prohibited or restricted access cordon applying to the premises.
- b. Prohibition on the use of the premises pending the completion of structural engineering or other reports and appropriate certifications required by any competent authority that the premises are fit for use.
- c. Restriction on occupation of the premises by any competent authority.

Then a fair proportion of the rent and outgoings shall cease to be payable for the period commencing on the date when the Tenant became unable to gain access to the premises to fully conduct the tenant's business from the premises until the inability ceases.”

**Appendix Two: COVID-19: Options to resolve commercial lease disputes**

|  |   |
|--|---|
| <b>Option A: Revived subsidised mediation and arbitration service</b><br>This option would revive the voluntary mediation and arbitration service subsidised by the Government in 2020 for tenants and landlords who could not reach agreement on rent abatement. This would be delivered via contracted providers, who would deliver a fixed-rate, streamlined mediation and arbitration service.   |   |
| <i>Efficacy</i>  | ✓ Would provide parties with existing rent abatement and arbitration clauses in their leases with a timely and cost-effective option to resolve their outstanding disputes<br>✗ Mediation unlikely to resolve disputes for parties without rent abatement and arbitration clauses   |
| <i>Feasibility</i>   | ✗ Time would be required to contract and establish service  |
| <i>Cost-effectiveness</i>  | ✗ Could be expensive, depending on uptake   |
| <i>Equity</i>  | ✓ Would not interfere with existing contractual arrangements<br>✗ Unlikely to assist businesses most in need of assistance  |
| <b>Option B: Implied rent abatement clause into some commercial leases</b><br>This option would amend the Property Law Act 2007 to imply the Auckland District Law Society clause into commercial lease agreements with no rent reduction clause, requiring a reduction in rent due to the impacts of an emergency.<br>This clause would entitle tenants who are unable to gain access to their premises to fully conduct their businesses due to an emergency to the reduction of a “fair proportion” of rent and outgoings until the tenants are again able to fully conduct their business from the premises. |   |
| <i>Efficacy</i>  | ✓ Would require parties to negotiate a fair reduction<br>✗ May have unintended consequences, e.g. through the interaction with insolvency law   |
| <i>Feasibility</i>   | ✗ Legislative change may not be a timely response, reducing effectiveness<br>✗ Option with broadest application would involve significant retrospectivity that is not clearly justified   |
| <i>Cost-effectiveness</i>  | ✗ If not coupled with financial support, may require businesses to pay for arbitration or court proceedings   |
| <i>Equity</i>  | ✓ Would promote the sharing of the impacts of COVID-19 between landlords and tenants<br>✗ Interferes with private contractual arrangements<br>✗ Gives preferential treatment to lessors above other creditors of businesses impacted by restrictions – for example, suppliers of stock that may have spoiled over lockdown<br>✗ May adversely affect commercial lessors with a larger number of tenants if they are required to proceed with multiple arbitrations simultaneously |



# COVID-19 Ministerial Group

## Minute of Decision

*This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.*

### COVID-19: Options to Resolve Commercial Lease Disputes

Portfolio Justice

On 9 September 2021, following discussions with officials and Ministers, the COVID-19 Ministerial Group [CAB-21-MIN-0353]:

- 1 **noted** that many commercial tenants and landlords have come to agreement on rent abatement in the event of a resurgence of COVID-19 since previous lockdowns or other emergency situations;
- 2 **noted** that the current Alert Level restrictions increase the likelihood of commercial rent disputes, and that these conditions may justify support for parties to resolve disputes;
- 3 **noted** that the Minister of Justice has instructed his officials to update the Government guidance on the Ministry of Justice website on the implications of COVID-19 business restrictions for commercial tenants and landlords;
- 4 **agreed** to amend the Property Law Act 2007 to insert an implied clause in commercial leases requiring a rent reduction in emergency situations, with the following characteristics:
  - 4.1 it is based on clause 27.5 of the Auckland District Law Society template;
  - 4.2 it would only apply after the law receives Royal assent;
  - 4.3 it applies only to leases that do not already provide for the payment of rent during an emergency;
  - 4.4 it would require parties to seek arbitration to resolve disputes about the implied clause (without financial support from the Government for this process);
  - 4.5 parties to the lease could agree to opt out of the clause and establish their own arrangements;
- 5 **invited** the Minister of Justice to issue drafting instructions to the Parliamentary Counsel Office for a Property Law Amendment Bill to be enacted under urgency to respond more directly to the current COVID-19 response;
- 6 **agreed** that the Minister of Justice introduce a Property Law Amendment Bill as soon as possible, following consultation with the Leader of the House;



- 7 **authorised** the Minister of Justice to make additional minor policy decisions, in discussion with the Minister of Finance or the Minister of Small Business, as appropriate;

Gerrard Carter  
Cabinet Office

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Proactive Release

**In Confidence**

Office of the Minister of Justice

Cabinet

**COVID-19 Response (Management Measures) Legislation Bill:  
additional policy approvals for commercial leases and residential  
tenancies**

**Proposal**

- 1 This paper seeks agreement to make changes to the Property Law Act and Residential Tenancies Act amendments in the COVID-19 Response (Management Measures) Legislation Bill.

**Relation to government priorities**

- 2 This paper relates to the Government's overarching priority of a COVID-19 recovery plan for all New Zealanders. It also contributes to Labour's 2020 Election Manifesto commitment to provide practical support for businesses to get through COVID-19.

**Executive Summary**

- 3 Property Law Act amendments are being progressed in the COVID-19 Response (Management Measures) Legislation Bill that would imply a clause in some commercial leases. This clause will require the parties to the lease to negotiate a 'fair proportion' of rent due to the COVID-19 restrictions impacting on access to the premises.
- 4 The amendments have been now been considered at select committee. In response to submitters' concerns and the select committee recommendations, I am seeking Cabinet agreement to the following changes:
  - 4.1 make the changes apply retrospectively from 18 August 2021;
  - 4.2 include a requirement to consider the lessee's loss of income in determining a 'fair proportion' of rent; and
  - 4.3 include a requirement that the parties must respond to each other within 10 working days of communication about the implied clause.
- 5 Making the changes retrospective to the beginning of the Delta outbreak is a significant step that has some risks, particularly around enforcement actions that have been taken by landlords since 18 August 2021. However, I consider this change to be justified because of the increased benefits to tenants impacted by the restrictions.
- 6 There are some risks with making the other changes because it means departing from the established standard 'no access in an emergency' clause

that has been widely used in the commercial sector. These risks are not substantial because the changes do not depart from the key aspects of the clause that is familiar to landlords and tenants.

- 7 The proposed PLA changes are included in the attached Supplementary Order Paper (SOP), which I provide for Cabinet's agreement. The SOP also includes minor clarifications made to the provisions.
- 8 There are additional changes to the Residential Tenancies Act amendments that also require Cabinet approval and are included in the SOP. These relate to reducing the proposed notice period for tenants in boarding houses, when the amendments will be repealed, and providing for situations where tenants need to terminate tenancies which they are unable to move into due to public health restrictions.

## Background

### *Property Law Act amendments*

- 9 On 9 September 2021 the COVID-19 Ministerial Group agreed to amend the Property Law Act 2007 (PLA) to insert an implied clause in commercial leases requiring a rent reduction in emergency situations [CMG-21-MIN-0021]. It was agreed that the clause would:
  - 9.1 be based on clause 27.5 of the Auckland District Law Society (ADLS) template; and
  - 9.2 only apply after the law receives Royal assent.
- 10 Clause 27.5 in the ADLS lease template (the ADLS clause) provides for a 'fair proportion' of rent cease to be paid, where the tenant cannot access the premises to operate their business, because there is an emergency such as an epidemic.
- 11 On 23 September, the Cabinet Legislation Committee agreed that these changes progress through the COVID-19 Response (Management Measures) Legislation Bill (the Bill) [LEG-21-MIN-0145].
- 12 On 27 September 2021, Cabinet agreed that the PLA amendments would apply retrospectively on and after date of the policy announcement [CAB-21-MIN-0394], which was 28 September 2021.
- 13 The Bill was introduced on 28 September 2021, had its first reading on 29 September 2021, and was referred to the Finance and Expenditure Committee. Parliament agreed that the Bill be reported back to the House by 14 October 2021.
- 14 On 18 October 2021, Cabinet noted that I was considering a number of proposed amendments to the provisions in the Bill, and that I intended to report back to Cabinet on 26 October to seek approval for a SOP [CAB-21-MIN-0426].

*Residential Tenancies Act amendments*

- 15 The COVID-19 Ministerial Group agreed to amend the Residential Tenancies Act 1986 (RTA) to include the termination provisions set out in clauses 4 and 5 of (now expired) Schedule 5 of the RTA, except as modified by the proposals outlined in the paper under CMG-21-SUB0017 [CMG-21-MIN-0017 refers].
- 16 The amendments to the RTA in the Bill seek to restrict residential tenancy terminations during future Alert Level 4 lockdowns. The amended provisions allow the Minister responsible for the Act to make a COVID-19 tenancies order which applies to an area when necessary or desirable to support an order under the COVID-19 Public Health Response Act 2020 which generally restricts people from moving house.
- 17 Unless certain exceptions apply, termination or expiry of a tenancy is not allowed while a COVID-19 tenancies order is in place. Landlords generally cannot initiate a tenancy termination while a COVID-19 tenancies order is in effect, except in specified circumstances.
- 18 Landlord-initiated tenancy terminations (including termination orders issued by the Tenancy Tribunal on application by the landlord) issued before the COVID-19 tenancies order came into effect are generally suspended or rendered to be of no effect. Tenants can still elect to terminate the tenancy on the set date by providing written notice to the landlord.
- 19 Tenant-initiated tenancy terminations issued before the COVID-19 tenancies order came into effect are not automatically suspended or rendered to be of no effect, however, tenants can still elect to prevent the termination by providing written notice to the landlord. The amended provisions also provide that the Tenancy Tribunal may conduct its proceedings as it sees fit (including on the papers) for a 12-month period after the COVID-19 Response (Management Measures) Legislation Act 2021 comes into force.

**I recommend several changes to the PLA proposals, following select committee**

- 20 The Finance and Expenditure Committee (the Committee) received over 200 submissions, of which almost half commented on the PLA amendments. Oral submissions similarly contained significant feedback on the amendments.
- 21 In its report, the Committee discussed some of the key concerns of submitters about the amendments and made several recommendations about areas that could be considered further by the House.
- 22 I have considered the Committee's recommendations. I now propose several changes to the PLA amendments as a result from consultation on the Bill. These are to:

22.1 make the changes apply retrospectively from 18 August 2021;

- 22.2 include a requirement to consider the lessee's loss of income in determining a 'fair proportion' of rent; and
- 22.3 include a requirement that the parties must take all reasonable steps to respond to each other within 10 working days of communication about the implied clause.
- 23 The Bill is expected to be considered by the Committee of the whole House in the current sitting week. Because of this urgency, an SOP reflecting my proposed changes is attached for Cabinet approval.

*Make the changes apply retrospectively from 18 August 2021*

- 24 Some submitters proposed making the changes apply from an earlier date than 28 September 2021, in order to recognise the full impacts of the current Alert Level 3 and 4 restrictions on businesses.
- 25 A fundamental legal principle is the presumption against retrospectivity (reflected in section 7 of the Interpretation Act). However, I consider that the implied clause would provide the greatest benefit if extended to leases affected at the beginning of the most recent lockdown.
- 26 I propose that the amendments would apply from 18 August 2021, the first day of the current higher Delta Alert Level restrictions. This change would have more significant implications in terms of retrospectivity. There may be lawful enforcement actions taken by landlords that would become invalid, with significant complexity in the unwinding of lawful actions that may need to be addressed by the courts. On balance, however, I consider this justified considering the extraordinary circumstances posed by the COVID-19 epidemic response.

*Requirement to consider the lessee's losses in determining a fair proportion of rent*

- 27 I propose that, in determining a 'fair proportion' of rent, the parties must consider the loss in income experienced by the tenant. This would be linked in the Bill to the losses specifically due to the tenant's inability to gain access to the premises to fully conduct their operations, due to the epidemic.
- 28 Submitters were concerned that the benefit of the implied clause should be targeted towards businesses that had suffered the most impact from the COVID-19 restrictions. Submitters suggested that criteria should apply limiting the implied clause to only some businesses, such as small sized businesses, or to those who have a specified level of loss. In addition, they also commented that 'fair proportion' was unclear and should be defined, proposing that a range of factors be set in the legislation about what would be used by the parties to determine what was fair.
- 29 I do not support limiting the clause to only some businesses, by stipulating eligibility criteria. That approach would be inflexible, could have arbitrary and unintended results, and be complex to include, because there is no simple mechanism to use to determine who should be eligible. Instead, making the

lessee's loss relevant to determining a 'fair proportion' would avoid arbitrary results, while making it clear that revenue loss was a relevant factor. It would give an indication that the assessment of what is fair should include considering the impact on the tenant's ability to operate the business, without being too prescriptive.

*Introducing a timeliness requirement for communication between the parties*

- 30 I also seek Cabinet's agreement to include a requirement that the parties to a commercial lease must take all reasonable steps to respond to each other within 10 working days of communication about the implied clause. This would indicate in the legislation that parties should work together quickly to reach an agreement. The Property Council suggested such a requirement, proposing 14 days in their submission. However, using working days is more consistent with the PLA.
- 31 This requirement would be included as part of fulfilling the implied clause. Ultimately, if a party was not responding in a timely manner, initiating arbitration would be required to overcome any unwillingness to reach an outcome.

*I have also authorised minor drafting amendments to improve the Bill*

- 32 My officials have also worked with Parliamentary Council Office in order to make additional clarifying minor amendments following feedback from submitters. I have approved these to be made in the attached SOP, and they include:
- 32.1 clarifying that enforcement action relates to action taken to cancel a lease under the PLA;
  - 32.2 clarifying that existing proceedings in a court or tribunal need to consider the application of the implied clause until they are finally determined;
  - 32.3 amending clause 11 and new clause 4A to clarify that the rent affected is only that within the affected period (which is defined as the period from 18 August 2021 until the expiry of the Epidemic Notice); and
  - 32.4 clarifying that parties to a lease can pursue mediation or other non-binding or binding dispute resolution procedure, before a referral to arbitration, and clarifying that the Disputes Tribunals jurisdiction over these matters is unaffected.
- 33 Because of my recommendation for the amendments to be retrospective to 18 August 2021, the mandatory consideration of rent payments made between 18 August and 28 September 2021 is no longer necessary and has been removed.



**Some of these PLA changes depart from the ADLS clause**

- 34 I note that two of the proposed PLA changes, requiring consideration of loss in determining the fair proportion of rent and the timeliness requirement, depart from the wording of the ADLS clause. Following the ADLS clause was originally agreed because it is familiar to landlords and tenants and has previously been the basis of negotiations and agreements in response to COVID-19 restrictions. The clause is also sufficiently flexible to apply to a wide variety of lease arrangements and to deal with the varying impacts that COVID-19 has had on different businesses.
- 35 Moving away from the ADLS clause may diminish some of these advantages. It may affect the extent to which emerging case law on the ADLS clause can be used to assist with interpreting and applying the implied clause.
- 36 It is difficult to know the extent that any disparity may have on the application of the implied clause, or to estimate the scale of those for whom the implied clause will apply.
- 37 However, the distinctions between the implied clause and the ADLS clause are relatively minor in substance. In particular, the implied clause continues to apply to leases in the same circumstances as the ADLS clause, where parties cannot access the premises to fully conduct their business. This consistency in terminology is important.
- 38 The implied clause now expressly requires parties to consider the loss of income of the lessee in determining a fair proportion of rent. While this is not expressly stated in the ADLS clause, I consider this would be a relevant consideration in assessing what would be fair rent in the circumstances of each lease. Further, the requirement to consider loss of income is inclusive suggesting there will be other relevant factors to be considered.
- 39 The timeliness requirement may pose the most risk of disparities between those with the implied clause and those without it, from a procedural perspective. If a party does not take reasonable steps to respond within 10 working days, it may accelerate the speed with which a dispute is brought to arbitration. There is no comparable provision in the ADLS clause. While this difference may mean that disputes progress more quickly under the implied clause, I consider this approach is justified given that this clause will only apply in situations where parties have not already been able to reach an agreement.

**Residential Tenancies Act amendments**

- 40 The COVID-19 Ministerial Group agreed to amend the RTA to include the termination provisions set out in clauses 4 and 5 of (now expired) Schedule 5 of the RTA, except as modified by the proposals outlined in the paper under CMG-21-SUB0017 [CMG-21-MIN-0017 refers]. In accordance with this recommendation, Schedule 5 of the Bill as introduced provides for termination by 28 days' notice under sections 66U(1)(a) and (b)(ii) of the RTA.

- 41 Sections 66U(1)(a) and (b)(ii) enable boarding house landlords to terminate tenancies on the grounds that the tenant:
- 41.1 has caused, or threatened to cause, serious damage to the premises;  
or
  - 41.2 had endangered, or threatened to endanger, people or property; or
  - 41.3 has caused, or threaten to cause, serious disruption to other tenants;  
or
  - 41.4 is using the premises for an illegal purpose.
- 42 On further consideration and in response to submissions on the Bill, 28 days' notice is too long in the circumstances outlined above (the usual notice period is 48 hours). Boarding house landlords need to be able to manage the boarding house safely, taking into account the health and safety of the other boarding house tenants. It is recommended that the notice period for termination under sections 66U(1)(a) and (b)(ii) be reduced to seven days.

*Repeal of RTA amendments*

- 43 Schedule 5 of the Bill as introduced provides that the RTA amendments would expire three years after commencement. It is instead recommended that the repeal date is aligned with the repeal of the COVID-19 Public Health Response Act 2020 (CPHR Act), as the RTA amendments rely on the CPHR Act.

*Enabling tenants to terminate tenancies which they are unable to move into due to public health restrictions*

- 44 Where tenants are unable to move into a new rental property due to movement restrictions under a COVID-19 public health order, it is appropriate that they have the right to terminate the new tenancy agreement on short notice. The SOP provides that tenants in such a situation can give two days' notice to terminate the new tenancy agreement, so they can remain in their current rental property, and do not have to pay rent for a property that they cannot occupy. Tenants could still seek to negotiate with their new landlord to temporarily reduce rent or delay the start date.

*Other minor changes made to the RTA amendments*

- 45 The Associate Minister of Housing (Public Housing) has made other minor, technical and clarification changes to Schedule 5 of the Bill under her delegated authority. This includes providing for seven days' notice of the revocation of a COVID-19 tenancies order or of its amendment so that it ceases to apply to an area. This will give landlords and tenants time to adjust to the new rules, and to start making any necessary arrangements.

**Financial Implications**

- 46 There are no direct financial implications arising from these proposals.

## Legislative Implications

- 47 This paper seeks agreement to table the attached SOP at the Committee of the whole House stage of the COVID-19 Response (Management Measures) Legislation Bill. The SOP reflects the changes to the PLA and the RTA amendments proposed in this paper.

## Impact Analysis

- 48 The Treasury's Regulatory Impact Analysis (RIA) team determined that the original property law changes were exempt from requirements to provide a Regulatory Impact Statement (RIS) on the grounds they intended to manage the short-term impacts of the declared COVID-19 emergency and were required urgently to be effective. The proposals in this paper to amend the earlier decisions are still exempt from RIA requirements on the same grounds. The exemption remains conditional on the proposal being temporary.

### *Residential Tenancies Act*

- 49 Cabinet's impact analysis requirements apply to the proposal to amend the Residential Tenancies Act 1986 to allow tenants to remain at their current place of residence despite the termination of their residential tenancy.
- 50 Treasury has not exempted the proposal from impact analysis requirements. The Treasury and the Ministry of Housing and Urban Development had previously agreed on the nature and timing of a Supplementary Analysis Report (SAR) in relation to the December 2020 Cabinet paper "Economic response to future resurgences of COVID-19" (CAB-20-MIN-0521).
- 51 The SAR assesses proposals to make amendments to the RTA if there was a widespread re-emergence of COVID-19 in the community and a re-escalation in Alert Levels. The Ministry of Housing and Urban Development has committed to updating the SAR to encompass the additional proposals in this Cabinet paper, with the updated scope and timing to be agreed with Treasury.

## Human Rights

- 52 The Crown Law NZBORA advice on the draft Bill found that while the original provisions may have an adverse effect on the property rights of lessors, the Bill of Rights Act provides no substantive protection for property rights. As such, they were considered to be not inconsistent with the Bill of Rights Act.
- 53 This paper proposes extending the retrospective period in which these changes apply, meaning the limits on rights are greater. I consider this limit justified, given that the restrictions will only apply temporarily, and the proposals require any rent reductions to be fair.

## Consultation

- 54 This paper has been prepared within urgent timeframes meaning engagement on the proposals has been limited. The following agencies have been

consulted on this paper: The Treasury, and the Ministry of Business, Innovation and Employment.

*Ministry of Business, Innovation and Employment comment on PLA amendments*

- 55 The Ministry of Business, Innovation and Employment notes that retrospective application of this relief raises complexities in terms of enforcement taken since 18 August 2021. This will create uncertainty in terms of the rights of lessees and lessors that will need to be resolved by the Courts.

**Proactive Release**

- 56 This paper will be proactively released within 30 business days of Cabinet confirmation.

**Recommendations**

The Minister of Justice recommends that Cabinet:

- 1 **note** that on 9 September 2021 the COVID-19 Ministerial Cabinet Group agreed to amend the Property Law Act 2007 to insert an implied clause in commercial leases requiring a rent reduction in emergency situations, based on the clause 27.5 of the Auckland District Law Society template [CMG-21-MIN-0021];
- 2 **note** that on 23 September 2021 the Cabinet Legislation Committee agreed that these changes progress through the COVID-19 Response (Management Measures) Legislation Bill [LEG-21-MIN-0145];
- 3 **note** that on 27 September 2021 Cabinet agreed that the Property Law Act amendments would apply retrospectively on and after date of the policy announcement [CAB-21-MIN-0394], which was 28 September 2021;
- 4 **note** that the Finance and Expenditure Committee discussed some of the key concerns of submitters about the amendments and made several recommendations about areas that could be considered further by the House;
- 5 **agree** to changes to the Property Law Act amendments, in light of submitters concerns and the Finance and Expenditure Committee recommendations, to:
  - 5.1 make the changes apply retrospectively from 18 August 2021;
  - 5.2 include a requirement under the implied clause for the parties to consider the lessee's loss of income, in determining a fair proportion of rent;
  - 5.3 include a requirement that the parties must take all reasonable steps to respond to each other within 10 working days of communication about the implied clause;
- 6 **note** that other minor drafting changes have also been made to the Property Law Act amendments in order to improve the clarity of the provisions;

*Schedule 5 – Amendments to the Residential Tenancies Act 1986*

- 7 **note** that the COVID-19 Ministerial Group agreed to amend the Residential Tenancies Act 1986 (RTA) to include the termination provisions set out in clauses 4 and 5 of (now expired) Schedule 5 of the RTA, except as modified by the proposals outlined in the paper under CMG-21-SUB-0017;
- 8 **note** that in accordance with the above recommendation, the Schedule 5 provisions in the Bill as introduced provides that the notice period for termination under 66U(1)(a) and (b)(ii) of the RTA is 28 days;
- 9 **agree** that Schedule 5 is amended to provide the notice period for termination under 66U(1)(a) and (b)(ii) of the RTA is seven days;
- 10 **note** that Schedule 5 as introduced provides that the Schedule 5 provisions will be repealed three years after commencement;
- 11 **agree** that Schedule 5 is amended to provide that it will be repealed on the repeal of the COVID-19 Public Health Response Act 2020;
- 12 **agree** that the Schedule 5 provisions provide for seven days' notice of the revocation of a COVID-19 tenancies order or amendment so it ceases to apply to an area;
- 13 **agree** Schedule 5 include a provision to enable tenants to give two days' notice to terminate a new tenancy where they are restricted by a COVID-19 public health order from taking possession;
- 14 **note** that the Associate Minister of Housing (Public Housing) has made a number of minor, technical and clarification changes to Schedule 5 of the Bill under her delegated authority [CMG-21-MIN-0017 refers]
- 15 **approve** the attached Supplementary Order Paper, that reflects the proposals and improvements outlined in paragraphs 5 to 14, to be considered at the Committee of the whole House stage of the COVID-19 Response (Management Measures) Legislation Bill.

Authorised for lodgement

Hon Kris Faafoi

Minister of Justice



# Cabinet

## Minute of Decision

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### COVID-19 Response (Management Measures) Legislation Bill: Additional Policy Approvals for Commercial Leases and Residential Tenancies

Portfolio Justice

On 26 October 2021, Cabinet:

#### Amendments to Property Law Act 2007

- 1 **noted** that on 9 September 2021, the COVID-19 Ministerial Group agreed to amend the Property Law Act 2007 to insert an implied clause in commercial leases requiring a rent reduction in emergency situations, based on the clause 27.5 of the Auckland District Law Society template [CMG-21-MIN-0021];
- 2 **noted** that on 23 September 2021, the Cabinet Legislation Committee agreed that these changes progress through the COVID-19 Response (Management Measures) Legislation Bill [LEG-21-MIN-0145];
- 3 **noted** that on 27 September 2021, Cabinet agreed that the Property Law Act amendments would apply retrospectively on and after date of the policy announcement [CAB-21-MIN-0394], which was 28 September 2021;
- 4 **noted** that the Finance and Expenditure Committee discussed some of the key concerns of submitters about the amendments and made several recommendations about areas that could be considered further by the House;
- 5 **agreed** to changes to the Property Law Act amendments, in light of submitters concerns and the Finance and Expenditure Committee recommendations, to:
  - 5.1 make the changes apply retrospectively from 18 August 2021;
  - 5.2 include a requirement under the implied clause for the parties to consider the lessee's loss of income, in determining a fair proportion of rent;
  - 5.3 include a requirement that the parties must take all reasonable steps to respond to each other within 10 working days of communication about the implied clause;
- 6 **noted** that other minor drafting changes have also been made to the Property Law Act amendments in order to improve the clarity of the provisions;



**Schedule 5 – Amendments to the Residential Tenancies Act 1986**

- 7 **noted** that on 7 September 2021, the COVID-19 Ministerial Group agreed to amend the Residential Tenancies Act 1986 (the RTA) to include the termination provisions set out in clauses 4 and 5 of (now expired) Schedule 5 of the RTA, except as modified by certain grounds;
- 8 **noted** that in accordance with the above decision, the Schedule 5 provisions in the Bill as introduced provide that the notice period for termination under 66U(1)(a) and (b)(ii) of the RTA is 28 days;
- 9 **agreed** that Schedule 5 be amended to provide the notice period for termination under 66U(1)(a) and (b)(ii) of the RTA is seven days;
- 10 **noted** that Schedule 5 as introduced provides that the Schedule 5 provisions will be repealed three years after commencement;
- 11 **agreed** that Schedule 5 be amended to provide that it will be repealed on the repeal of the COVID-19 Public Health Response Act 2020;
- 12 **agreed** that the Schedule 5 provisions provide for seven days' notice of the revocation of a COVID-19 tenancies order or amendment so it ceases to apply to an area;
- 13 **agreed** that Schedule 5 include a provision to enable tenants to give two days' notice to terminate a new tenancy where they are restricted by a COVID-19 public health order from taking possession;
- 14 **noted** that the Associate Minister of Housing (Public Housing) has made a number of minor technical and clarification changes to Schedule 5 of the Bill under her delegated authority [CMG-21-MIN-0017];

**Amendments to Local Electoral Act 2001**

- 15 **agreed** that the Bill be amended to remove amendments to the Local Electoral Act 2001;

**Supplementary Order Paper**

- 16 **approved** the release of the Supplementary Order Paper to the COVID-19 Response (Management Measures) Legislation Bill [PCO 24110-1/2.30], amended as required, to give effect to the above proposals.

Michael Webster  
Secretary of the Cabinet