

Government confirms intention to introduce arbitration scheme for commercial COVID-19 rent disputes

By Belinda Green and Hannah Stanley

Many commercial tenants found their leases were inadequate to deal with the consequences of the COVID-19 restrictions. In a welcome step, the Government has confirmed its intention to introduce legislation that will imply rent abatement clauses into all eligible leases, and provide a process where abatement disputes may be referred to subsidised arbitration.

Leases without solutions

For those who have commercial leases, there were questions around whether there is a right for tenants to obtain rent relief as a result of the COVID-19 lockdown restrictions and, if so, what that relief should look like. Some leases contained a clause allowing a fair proportion of rent to be suspended during an emergency situation, but it was not clear what a fair proportion might mean. Other leases did not expressly provide for any abatement of rent.

When we wrote about this previously, we explained how arbitration or mediation could help parties reach a resolution. The usefulness of alternative dispute resolution has clearly been recognised by the Government, which earlier this month confirmed its intention to introduce legislation to address concerns around leases that don't have a fair proportion rent abatement clause by implying such a clause into commercial lease agreements that meet certain criteria and modifying others, and to allow all disputes in relation to such clauses to be resolved by way of subsidised arbitration.

Proposed legislation - implied lease clauses and access to arbitration

A Cabinet Minute dated 3 June 2020 has outlined the Government's intention to issue legislation. The Cabinet Minute is an outline of the Government's intentions only, and further detail is required. However, we know that the overall intention is to introduce legislation that will do

three things:

- Amend the Property Law Act 2007 to imply a fair proportion rent abatement clause into all leases for eligible businesses.
- Require that disputes in relation to the implied clause be resolved by way of arbitration.
- Provide a \$6,000 subsidy for arbitrations required as a result of the implied clause.

Eligibility Criteria

The eligibility criteria are clearly aimed at supporting smaller businesses. The Cabinet Minute proposes that three eligibility criteria must be met for a business to be able to make use of the implied rent abatement clause:

- The business must have 20 or fewer full-time equivalent staff per lease site.
- It must be a New Zealand-based business.
- There must not be a pre-existing agreement for rent abatement with the landlord.

Rent abatement

The implied clause is intended to provide that a fair proportion of rent and outgoings cease to be paid when a tenant's business has suffered a material loss of revenue because of the restrictions put in place to combat COVID-19.

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fair proportion of rent and outgoings cease to be paid when a tenant's business has suffered a material loss of revenue because of the restrictions put in place to combat COVID-19.

The Cabinet Minute says that clear rules will be provided to determine what a fair proportion of rent is, with the intention that the financial burden from the COVID-19 lockdown be fairly apportioned between landlord and tenant. The financial position of the parties, impact of the COVID-19 restrictions, mortgage obligations and financial support options are just some of the factors that are suggested as being relevant to determining what a *fair proportion is*.

The Cabinet Minute anticipates that a wide range of outcomes might result – not just a simple rent abatement, but also rent deferral or perhaps banded reductions over successive periods. The parties will be able to negotiate a fair proportion of rent and outgoings between themselves.

Dispute resolution by arbitration

If the parties don't come to any agreement, any disputes under the implied clause must be settled by arbitration. The Cabinet Minute records that the Government will support access to arbitration by providing a Government subsidy for streamlined

arbitrations at a rate of \$6,000 per arbitration.

Details awaited

The Cabinet Minute is an indication of the Government's policy on this matter, but it is far from the final product. The Cabinet Minute anticipates that the implied clause might be similar to the *No Access in Emergency* clause found in the Auckland District Law Society lease 2012 Edition. However, it also acknowledges that parties have found that clause difficult to apply, and in particular, found it difficult to determine what a *fair proportion* of rent means. Modifications to provide greater certainty are expected, but just what form those modifications might take remains to be seen. We also don't know yet what it means for a business to be *based in New Zealand*, how full-time equivalent employees per lease site will be measured, or what it means for a business to have suffered a *material loss of revenue* as a result of the COVID-19 restrictions. Nor is there any detail about how the implied clause will work with leases that already have the *No Access in Emergency* clause or a version of it. It appears that parties who have an express abatement clause but have not yet come to an agreement on how much rent to abate will be able to access subsidised arbitration by operation

already have the *No Access in Emergency* clause or a version of it. It appears that parties who have an express abatement clause but have not yet come to an agreement on how much rent to abate will be able to access subsidised arbitration by operation of the implied clause, but it is unclear as to what extent the two clauses might be reconciled or need modification.

The Cabinet Minute also provides no detail on the arbitration process itself, other than to confirm that appeals of an arbitral decision would be allowed under the grounds established in the Arbitration Act 1996. Will there be any requirement to publish decisions, or make outcomes known? Arbitration is usually a private process, but there is a public interest in the initial decisions under this regime.

Arbitration

In the Cabinet Minute, the Government noted a concern that parties were not reaching a fair resolution and that there is no one size fits all solution. Arbitration is an appropriate and sensible resolution process to address these issues. NZDRC already has a reduced cost and fixed fee arbitration and mediation service available specifically to help commercial lease parties. This is a fast and cost-effective means of resolving a rent review dispute. You can find more information on that service at www.nzdrc.co.nz/expertise/property-disputes/covid-19-lease-disputes/

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