



## COVID-19 NewsBrief – 30 September 2021

### **COVID-19 Rent Relief: Financial Burden to be Shared by Landlords and Tenants**

While it may be argued that it's a case of closing the stable door after the horse has bolted, the government has introduced changes to the Property Law Act 2007 that propose insertion of a clause in all commercial property leases to encourage businesses and tenants to share the financial burden of COVID-19 restrictions and thus enable more businesses to remain solvent through the COVID-19 epidemic.

As part of the COVID-19 Response (Management Measures) Legislation Bill introduced to Parliament on Wednesday this week, measures are being taken to help businesses resolve disputes over commercial rent, as well as provide greater certainty for landlords and tenants by protecting residential tenancies from being terminated during COVID-19 Alert Level 4.

The proposed amendment to the Property Law Act will see insertion of a clause into commercial leases requiring a "fair proportion" of rent to be paid where a tenant has been unable to fully conduct their business in their premises due to the COVID-19 restrictions.

Such clause already exists in most Auckland District Law Society (ADLS) leases but it now appears that the concession will be extended to all commercial leases.

In announcing the changes, the Justice Minister said that "landlord and tenant would need to agree on the amount of rent that is fair. They could also agree that the clause does not apply".

The proposed new provisions to be inserted into the Property Law Act imply a covenant into certain leases in operation in the affected period. The affected period means all or any of the period that:

- starts on 28 September 2021, and
- ends on the date on which the Epidemic Preparedness (COVID-19) Notice 2020 expires or is revoked.

The implied covenant ensures that a fair proportion, agreed by the lessor and lessee, of the rent otherwise payable by the lessee for the rental period will cease to be payable for the period starting on the date when there is an epidemic, and the lessee, or any sublessee of the lessee, is unable to gain access to all or any part of the leased premises to conduct fully their operations from all or any part of the leased premises, because of reasons of health or safety related to the epidemic, and ending when the inability ceases.

In the implied covenant, rent payable by a lessee for a rental period includes any contribution to the outgoings on the leased premises payable by the lessee for that rental period.

Any dispute arising under the implied covenant will be referred to arbitration under the Arbitration Act 1996 unless the parties agree to an alternative dispute resolution process such as mediation.

The proposed law change would only apply to leases which do not already provide for adjusted rent payment terms during an epidemic emergency, such as the aforementioned ADLS leases. Therefore, agreements made prior to 28 September 2021 to adjust rent obligations to reflect the COVID-19 situation would not be affected by the implied clause.

Once the proposed law change is passed, the implied covenant will take effect from 28 September 2021.

The issue here, as we have discussed before, is what constitutes a "fair proportion" of rent and outgoings. We have seen instances where rental and outgoings abatements have been as high as 80% and as low as zero.

We again recommend that landlords and tenants take a pragmatic approach and recognise that there are numerous factors to be considered in determining the extent of the loss caused to tenants by not being able to access their premises during a lockdown.

Our suggestion is that recognition be made by both parties that lockdowns are likely to be only temporary measures that affect a relatively short time period in relation to the entire duration of a lease and that, in the interests of a sound ongoing commercial relationship, both parties approach this issue in good faith and pragmatism.

Please remember, whether you are an affected landlord or tenant, we have alternative dispute resolution skills available within Ecovis KGA and are readily available to assist in this regard.

### **Business Debt Hibernation Scheme**

We thought it timely to remind business owners whose cash flows have been impacted adversely by the latest lockdown measure of the business debt hibernation scheme.

This is a government initiative created in response to COVID-19 and was introduced in 2020 during the first lockdown.

It helps companies, trusts, and other business entities affected by COVID-19 to manage their debts, but sole traders are not eligible for the scheme.

If business debt hibernation is right for a business, it can assist in debt management as follows:

- An arrangement is set up for the existing debts, such as paying creditors only a percentage of what the business owes them as it falls due and deferring the balance.
- A business can derive up to a month of protection while it sets up the arrangement. This means that most creditors cannot enforce their debts, for instance by applying for the business to be liquidated.
- If the creditors agree, a business can obtain a further 6 months of protection.

A business will still need to pay off its debts in full. Business debt hibernation helps a business manage its debts while it is protected, but the debts are not forgiven. It is only for existing debts the business already has at the time the business enters the scheme. Any new debts will be subject to the terms and conditions the creditors set.

Some debts are not covered by business debt hibernation, specifically, employee wages and debts to secured creditors with a General Security Agreement.

Business debt hibernation allows a cash-strapped business some breathing space in that it reduces the burden of existing debts so a business can stay solvent and start trading normally again. It is a new option to consider alongside borrowing money, or processes like creditor compromises or voluntary administration.

Applications for business debt hibernation close on 31 October 2021.

We do add the caveat that the scheme is fairly narrow and rigid in its approach and may not be entirely suitable, but that still leaves other options, such as a creditor compromise available.

If you think your business may benefit and ensure its longer-term survival from such a moratorium, please get in touch with us to discuss the best possible option for you.

At Ecovis KGA we have a dedicated team to help you through these times and are well placed to assist in exploring what options are available and other measures to help protect your business.