



## **PROPERTY LAW BILL**

To : Justice and Electoral Committee

Re : Property Law Bill

### **SUBMISSION BY THE PROPERTY COUNCIL OF NEW ZEALAND INCORPORATED ON THE PROPERTY LAW BILL**

**PROPERTY COUNCIL OF NEW ZEALAND INCORPORATED** (at the address for service given below) makes the following submission on the Property Law Bill ("the Bill"):

#### **Background**

1. The Property Council is a not for profit organisation that represents New Zealand's Commercial, Industrial, Retail, Property Funds and Multi Unit Residential Property Owners. The Property Council represents all the forms of commercial property and property investment in New Zealand.
2. The Property Council actively involves itself with central, local and other government associated bodies, promoting the views, goals and ideas of our members.

#### **Consultation**

3. In preparing this submission, the Property Council has reviewed the Bill and discussed the implications of the proposed changes with key members of the Property Council. Consultation has also taken place with the New Zealand Council of Shopping Centres ("the NZCSC"), whose members are significantly affected by a number of changes proposed in the Bill.
4. The Property Council prepared this submission with the assistance of Bell Gully.

## **Principal Submission**

5. The Property Council supports the updating of the current legislation, particularly to provide greater clarification in regard to certain areas of law relating to leasing. However, the Property Council harbours reservations about the Bill, in particular the clauses that impact on lease agreements and subrogation rights.
6. The Property Council, of course, represents building owners and managers. Certain proposed clauses contained in the Bill are likely to hinder building management and potentially compromise investment. In addition, the emphasis on the individual tenant's rights is likely to be to the detriment of the collective tenants in a multi occupancy property, whether that property be a shopping centre, an office building or a mixed use development.
7. It is the considered view of the Property Council that Parliament needs to strike a balance between the rights of individual tenants and the needs of a collective tenancy. To achieve that balance, specific amendments to the Bill are necessary.

## **Clause 224 (Consent not to be unreasonably withheld)**

8. Clause 224 will mean that consent cannot be unreasonably withheld by the landlord to a change of use for the premises, even if the lease actually specifies that changes of use are at the discretion of the landlord. This is an example of the clause intended to give greater rights to an individual tenant. However the exercise of those rights is likely to adversely impact on the wider group of tenants within a shopping centre, office building or mixed use development.
9. The NZCSC notes that it is standard practice for a landlord of a shopping centre to be very specific as to the use to which each particular premises in the centre can be put. This is to ensure that there is the correct tenancy mix for the centre and to ensure the continuing success of the centre.
10. Unless the landlord is able to achieve the correct tenancy mix, a shopping centre may be at risk of too many retailers in a shopping centre selling the same type of

goods. Customers are unlikely to visit the centre in the same numbers because of the lack of variety in the offering, and individual tenants will then suffer.

11. It is, however, important that the landlord also be able to control uses in office buildings and in mixed use developments. In the case of an office building, for instance, tenants will be concerned to ensure that certain uses (which may impact on the amenity of the building) are not undertaken. In addition anchor tenants will require assurance that competitors will not be allowed into the building.
12. In the case of multi use developments it will be important to achieve the correct balance of uses to guarantee the ongoing success of the development and to ensure that different uses operated in proximity to each other are workable. For instance an occupier of office premises would not want a potentially noisy use such as a gym to operate immediately above or below its premises.
13. Therefore, whatever the type of development, the landlord generally needs to retain full discretion to consider changes of use so that the landlord can balance the rights of individual tenants against the interests of the development as a whole.

**Clause 225 (Consent to assignment / sublet / change of use etc. not to be unreasonably withheld)**

14. Many modern leases (such as the *BOMA Standard Office Lease*) set out fairly detailed lists of conditions that have to be satisfied by a tenant before a tenant can assign or sublet. Generally those conditions will have been the subject of negotiation between the parties and the result will be that the tenant has a clear understanding of the information that will need to be provided when an application is made to the landlord, and the criteria which will have to be met before consent is granted.
15. It is therefore proposed that clause 225 should provide that requirements set out in the lease are deemed to be reasonable, given that these will be requirements expressly accepted by the parties. This will ensure that:

- the landlord is not put in a position of having to later justify the requirements to be met; and
- the tenant has a full understanding of the process to be followed to obtain consent from the landlord.

16. Both parties can also have the security of knowing that any party operating in the premises will be a party generally suitable for the premises.

### **Clause 226 (When consent is unreasonably withheld)**

17. Clause 226(1)(b) provides that it is unreasonable for a landlord to withhold consent to an assignment/subletting etc. if the tenant is bankrupt/in liquidation/in receivership.

18. Modern leases provide the landlord with the right to terminate the lease in circumstances where a tenant is insolvent. An obligation on the landlord to deal with applications under clause 225 in these circumstances will act as an unreasonable fetter on the landlord's rights to deal with the lease in circumstances where the rent is not being paid.

19. The breadth of the provisions is also such that the landlord will also be forced to consider an application for change of use. It is hard to see how a change of use will assist the tenant in these circumstances as the tenant will be without funds to operate a new business.

### **Definition of Working Days**

20. This definition is relevant to clauses 244, which deals with cancellation of the lease for the tenant's failure to pay rent.

21. While it is reasonable to link certain time periods and certain requirements in the lease to a working day period this has an unfair effect on the landlord in the case of the tenant's failure to pay rent and simply makes the period longer before the landlord can taken action to get the breach remedied.

### **Clause 244 (Cancellation of lease for breach of covenant to pay rent)**

22. Clause 244 provides that rent must be in arrears for at least 15 working days before a lease can be cancelled on written notice. Many leases (such as the *BOMA Standard Office Lease*) provide for termination after rent has been due for 14 days. This particular provision will prove problematic in the case of smaller tenants, with limited business experience.
  
23. By the time rent has owed for 15 working days the tenant may have a number of other debts, such as operating expenses, utilities and rates. It is not in the interest of the landlord, the tenant or other tenants, to leave the tenant in the premises in those circumstances.
  
24. It will also make a landlord less likely to lease to smaller tenants and is certainly likely to mean that the landlord will require additional security from ingoing tenants, such as personal guarantees, a rent deposit or a bank guarantee.

### **Clause 267 (Subrogation rights)**

25. Clause 267 provides that if the landlord has insurance against a particular circumstance, and that circumstance then causes damage, the tenant is not required to make good the damage caused even if the damage was caused or contributed to by the tenant's negligence.
  
26. This is different to the position under many leases in New Zealand where damage caused to the property by the tenant is damage that the tenant is responsible for. In some cases the landlord will recover the costs of the work required from its insurer but, should that happen, the insurer can choose to exercise its subrogation rights and recover the money it has paid out from the tenant.
  
27. The effect of this clause will be that an insurer will, in many cases, no longer have rights of subrogation against a tenant. This will lead to significantly higher costs for insurance. Those insurance costs will form part of the operating expenses for the building and, therefore, tenants will pay increased operating expenses on a day to day basis.

**Conclusion**

28. The Property Council wishes to be heard on this submission.

29. The Property Council reserves the right to be heard on such matters as may arise from other submissions or such further information as may be obtained.

**DATED** this **28th** day of February 2007.



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**Connal Townsend, Chief Executive**

On behalf of The Property Council of NZ incorporated

**ADDRESS FOR SERVICE:** PO Box 1033  
Auckland 1010