

## Property Council New Zealand

---

# Submission on the COVID-19 Response (Management Measures) Legislation Bill

4 October 2021

**For more information and further queries, please contact**

Liam Kernaghan

[liam@propertynz.co.nz](mailto:liam@propertynz.co.nz)

021715108

## Submission on the COVID-19 Response (Management Measures) Legislation Bill

### 1. Recommendation summary

- 1.1 Property Council New Zealand (Property Council) does not support the proposed changes to the Property Law Act 2007 (“the Act”) as set out in Schedule 6 Part 4 of the COVID-19 Response (Management Measures) Legislation Bill (“the Bill”). Without consultation with the industry, and without comprehensive select committee analysis, we fear this poorly drafted amendment will make things harder for landlords and tenants to negotiate in good faith and get equitable outcomes.

### Property Council New Zealand recommends:

1. The rent relief clause, as currently drafted, does not progress.
2. If the rent relief clause is progressed, that it be amended to clear up drafting ambiguities with a simple two-step process:
  - a. Eligibility for Rent Relief
    - i. A limit to its application to only include Alert Levels 4 and 3 to provide consistency with current Government support initiatives;
    - ii. Eligibility criteria to ensure tenants are assessed against need and vulnerability. This would include being a New Zealand owned business; an SME – (e.g. of fewer than 20 employees or a turnover of say less than \$25m); and eligibility for the wage subsidy showing economic loss;
  - b. Considerations for a “fair proportion of rent”
    - i. A set of considerations that should be taken into account when assessing rent relief – including economic loss, consideration of online and click and collect sales, ability for a business to operate remotely and consideration of the potential bounce back in sales once the physical premises reopens over a defined period of time.
3. That in addition, the Government should consider targeted business payment support for vulnerable businesses to deal immediately with cashflow issues; and
4. That the Government reconsider other direct interventions and policy options, including:
  - a. Mandatory communication timeframes;
  - b. Rent deferral for tenants through the tax;
  - c. Rent subsidy for tenants;
  - d. Landlord Hardship Fund.
5. That the Finance and Expenditure Committee request an extension of time to adequately assess the implications of the draft clause until 14 November 2021.

## **2. Introduction**

- 2.1 Property Council welcomes the opportunity to submit on the COVID-19 Response (Management Measures) Legislation Bill.
- 2.2 Property Council's purpose is "Together, shaping cities where communities thrive". We believe in the creation and retention of well-designed, functional and sustainable built environments which contribute to New Zealand's overall prosperity. We support legislation that provides a framework to enhance economic growth, development, liveability and growing communities.
- 2.3 Property is currently New Zealand's largest industry with a direct contribution to GDP of \$41.2 billion (15 per cent). The property sector is a foundation of New Zealand's economy and caters for growth by developing, building and owning all types of property.
- 2.4 Property Council is the leading not-for-profit advocate for New Zealand's largest industry - property. Connecting people from throughout the country and across all property disciplines is what makes our organisation unique. We connect over 10,000 property professionals, championing the interests of over 550 member companies. The value of New Zealand's residential property stock is \$1,305 bn and the value of commercial property stock is \$243 bn.
- 2.5 Attached at the end of this submission is an appendix with stories from our membership. These highlight not only some of the extraordinary work landlords and tenants have done together, but the risks the approach taken by the Government will have on the property industry.

## **3. Overview**

- 3.1 COVID-19 has been tough for everyone. Business suffers particularly because through no fault of their own, they are left to – in most circumstances – shut up shop or work from home where they can. When it comes to the retail and service industry, it's much tougher – the uncertainty around returning back to work and the inability to trade puts a lot of stress on business owners and staff. The same can be said for landlords as fixed costs and mortgages still need to be paid during a lockdown.
- 3.2 We all want the same outcome. Landlords want their tenants to keep trading post lockdown and tenants want to know they can still open when they're allowed to. In that spirit, working collaboratively to work through problems as they arise is mutually beneficial and avoids any unnecessary tension and stress in the relationship.
- 3.3 We must acknowledge some tenants are more vulnerable than others. Particularly those in the hospitality and tourism sectors, their ability to bounce back is not the same for general and large-scale retail outfits. Equally, we should acknowledge there are more vulnerable landlords than others – particularly in regional New Zealand and where the premises are owned by small investors.
- 3.4 Rents are part of the cost of doing business, but equally so are utilities, insurance or mortgage payments. Landlords understand that the property ecosystem is a delicate balance and that neither party can exist in isolation. This issue merely addresses a symptom of the wider disease; a lack of cashflow. These are uncertain times and people are understandably afraid of losing their livelihoods. This is true for retailers, business owners and property owners alike.

- 3.5 In that spirit, the vast majority of landlords and tenants have worked constructively and co-operatively to negotiate solutions that work in their individual relationships. This situation protects against frustrating their contracts as well as ensures landlords and tenants maintain good relationships.
- 3.6 On this basis, there should be no requirement for the Government to intervene in commercial arrangements as proposed.

#### **4. Property Council's efforts to date**

- 4.1 Property Council and its members have been proud partners with Government on many issues relating to property and the wider commercial sector as we all work through the complexities of the COVID-19 pandemic.

##### *Engagement with the previous government*

- 4.2 We played an active role with the previous government on commercial rent issues. In the first ten days of the initial lockdown in March 2020, Property Council provided the previous government with several policy options for them to consider as part of trying to navigate through the pandemic. These included options for rent deferral and abatement as well as options regarding GST and other tax treatments. This was to encourage a broader and more meaningful conversation about the actual effects on the business landscape due to COVID-19.
- 4.3 Property Council also provided industry-led feedback on the initial Property Law (Leases Affected by COVID-19 Outbreak) Amendment Bill. We were pleased to have had the opportunity to provide feedback and expert industry advice to the government. This included playing a crucial role in helping officials and ministers understand the intricacies of commercial leases and how particular drafting decisions could have severe consequences on the workability and effectiveness of those leases.
- 4.4 While we didn't not necessarily agree with the direction the previous government took initially in regards to legislating over commercial contracts, we nevertheless appreciated and respected their attempts to work with the industry and to engage with us on the complexities of the commercial lease environment.

##### *Active steps our industry has taken*

- 4.5 In reality, landlords and tenants have strong commercial as well as social incentives to come to arrangements without legislative interference. During the first lockdown, this collaboration worked very well. The Government should be very encouraged by the outcomes of the previous lockdowns where the vast majority of landlords and tenants were able to negotiate and agree a fair and equitable adjustment to rent in instances where it was necessary and prudent.
- 4.6 To date, a survey of 200 member companies indicated they have given \$650m in rent relief to Kiwi businesses across the country over the past 18 months. There are a wide range of agreements that have been made between landlords and tenants to share the pain, and ensure we get through this together. This has typically included one or a combination of the following initiatives:

- Rent abatements for lockdown periods of anywhere up to 100% depending on need.
- Rent deferral options helping improve cashflow for tenants by allowing payments to be paid over typically the following 12 - 24 month periods.
- Lease restructuring in combination with the above options to provide security of tenure for tenants

### *Review of the industrial standard leases*

- 4.7 There are a number of commercial leases that are used in the marketplace. Tenants and landlords mutually can agree to modify existing leases or add additional clauses. The Auckland District Law Society provides one of the industry standard leases, but the Property Council has industry standard leases for retail, industrial and office premises.
- 4.8 Property Council had already begun a review of the industrial standard leases before the Government had announced its intentions to mandate a no-access clause. As part of this review, we have already undertaken to work through options that take into account the complexities of the COVID-19 environment including when tenants cannot access and fully operate their businesses.
- 4.9 We will continue to work with tenants and landlords across the retail and industry sectors to come to decisions which work in the best interest of both parties.

## **5. Complexity of commercial leases**

- 5.1 The proposed changes to the Property Law Act 2007, as in Schedule 6 Part 4 of the Bill, take a sledgehammer to a very nuanced and complex commercial lease environment. Treating all leases and all commercial relationships the same will have very serious unintended consequences that will leave many tenants and landlords worse off. Many leases have modified the industry-standard, creating many different positions for landlords and tenants alike. This can result in creating confusion, uncertainty and inconsistency across the market for tenants and landlords.
- 5.2 Some leases are more vulnerable to cash flow and therefore the ability to pay rent than others. For instance, businesses who can still largely work from home outside of their premises and are not seeing a decline in revenue wouldn't be as vulnerable as hospitality, tourism and some retail businesses who cannot open under some alert levels and even when they can still see a substantial reduction of revenue.
- 5.3 There are hundreds of examples of businesses in between those two above. The proposed deemed clause does not deal with those particular nuances, nor the ones listed below when it comes to specific types of lease arrangements.

### *Ground leases*

- 5.4 A ground lease – or a *Glasgow lease* – is a lease for the site to carry a permanent structure/building. They are usually for a term of 21 years and renewable in perpetuity for successive periods the same as the original term. Ground rent – the rent owed due to a ground lease - is reviewed either on the renewal or on more regular dates such as every five or seven years. The rent will only be payable in respect of the value of the land (excluding the buildings on it).

- 5.5 Typically, it would be unusual for a ground lease to have a no-access clause because the purpose of a ground lease is long term land use for the improvements to the land and more often than not that purpose hasn't been interrupted by the epidemic. It is unclear why rent relief would be required for a ground lease given these circumstances and rent relief should not apply to ground or land leases.

### *Outgoings*

- 5.6 The proposed amendments make it clear rent includes any contribution to the outgoings on the leased premises payable by the lessee for that rental period. As noted earlier, every business will have different fixed and non-fixed outgoings that require servicing.
- 5.7 The Government has supported businesses with costs through lockdowns and higher COVID-19 alert levels. The wage subsidy and the business resurgence payment both provide businesses some support to pay for fixed costs like wages and help support viable and ongoing businesses or organisations which have experienced a decline in revenue due to a COVID-19 alert level increase to level 2 or higher.
- 5.8 On the other hand, no support for commercial landlords has been provided in terms of building fixed costs. In addition, no relief has been provided in terms of mortgage payments, rate payments, or insurance payments for commercial landlords. These fixed costs are necessarily paid to ensure the premises can be functional and have access to public services when businesses return. Costs such as insurance and utilities (as examples) have to be paid even during lockdown.
- 5.9 The proposed deemed clause allows for a tenant to legitimately claim these support payments as well as seek rent relief from their landlords without having to disclose any support payment they may have received in the process. There is a systemic unfairness to this given the ability for tenants to claim support and seek rent relief from landlords who cannot seek relief for their own fixed costs.
- 5.10 Our view is that any deemed clause relating to rent relief should only consider relieving rent and not capture all potential fixed outgoings.

## **6. Fair proportion of rent**

- 6.1 The requirement for tenants and landlords to come to an agreement about what fair proportion of rent presents many challenges. There is no guidance from the Courts about how we assess what a fair proportion of rent is. The current ADLS lease requires a dispute to be referred to arbitration. Arbitration is of course a private process, so there is no information publicly available as to how fair proportion might be interpreted in this context. This differs substantially from the Government's draft Property Law (Leases Affected by COVID-19 Outbreak) Amendment Bill which provided for factors such as impact of the tenant's business and the both the landlord and tenants respective profits in recent years taken into account.
- 6.2 What is deemed fair will be vastly different depending on whether you are a landlord or a tenant. Tenants are likely to argue that the rent reduction should be determined based on a literal reading of the clause – which is the extent to which the tenant was unable to access the premises to fully conduct its business. On this interpretation it is irrelevant whether remote working has actually impacted on the tenant's business, or whether there is a significant increase in the tenant's revenue in Level 3 or Level 2

(depending on the particular business) which would compensate for the lockdown period.

- 6.3 Equally, landlords would argue that the rent reduction needs to take into account those wider factors, as well as matters such as the ongoing financial viability of each party. They would assume economic loss would be the basis for any rent relief discussion similar to the principle required to receive the wage subsidy where a business must show economic loss over a period of 40 percent. A further question exists for those businesses who experience a significant bounce back in sales once the lockdown ends. Landlords would argue that any rent relief would reflect sales over a longer period of time – not just the lockdown. However, it is not at all certain that that is how the implied clause would be interpreted.
- 6.4 There are countless examples of both sides having difficult, complex and challenging fairness arguments which are hard to create clear solutions for.
- 6.5 Overall, our very strong preference is that parties should be able to determine their own agreement - whether that be rent relief or abatement, or rent deferral, lease restructuring or some other mechanism which the parties agree to – or if the implied clause does come into effect, there are set criteria for what constitutes a fair proportion of rent given the individual circumstances of the landlord and the tenant.

## **7. Affected period**

- 7.1 Property Council thinks the reference to the implied term apply for the “rental period” is confusing and does not make it clear when the rent abatement period commences.
- 7.2 We are also concerned that the rent abatement is not limited to COVID-19 Alert Level Four or Three, and is in force until the repeal of new section 245F of the Act (which is on the date on which the Epidemic Preparedness (COVID-19) Notice 2020 expires or is revoked).
- 7.3 We recommend the affected period should be limited to Alert Levels 4 and 3. We believe this is consistent with statements from the Government and other COVID-related support provided by the Government in regard to economic loss.

## **8. The cost of arbitration**

- 8.1 Binding arbitration is a costly exercise which will not add to any clarity around what “fair proportion” means. Defaulting straight to arbitration without using other dispute resolution vehicles such as mediation could see a number of unintended consequences arise from landlord/tenant negotiations for rent relief.
- 8.2 Depending on many factors, including the quantum of rent relief sought, the cost of arbitration could be anywhere in the tens to hundreds of thousands of dollars. If parties are seeking rent relief because their cash flow is so low and they are struggling to pay fixed costs, it is highly unlikely that parties will be able to pay for arbitration.
- 8.3 In essence, the reason for some dispute resolution is to try and resolve tension between two parties. If anything, jumping immediately to costly arbitration will do one of two things – exacerbate tensions between the parties to the point where

relationships break down, or the cost of arbitration will become so prohibitive that parties avoid even discussing things with their landlords.

## 9. Sanctity of contract

- 9.1 A cornerstone of our legal system is the sanctity of contract. It should be absolute that any variation to the employment agreement must require the consent of both parties, whether the variation take the form of an alteration to existing terms or conditions, or the imposition of a new contractual term. Any move from this principle threatens the fabric of private contracting and raises important questions.
- 9.2 Our very real concern is the precedent this sets. Is it going to be that every time New Zealand faces a crisis – be it a pandemic, a civil defence national emergency, a financial shock or something else equally significant – that the Government will ride over private contracts and legislate deemed clauses? It surely cannot be that issues around commercial rent relief can only be resolved by breaching centuries old jurisprudence around the sanctity of contract.
- 9.3 The very basis of requiring parties to agree to changes in private contracts is to avoid frustrating the contract and to bind parties by trust and confidence. Legislating over the top of that relationship risks the sanctity of contract. Many contracts allow parties to agree on matters as they arise as a matter of course. This rightly allows for each of the parties to negotiate and to act in good faith. If there is an expectation that any time there is a significant event or crisis that the Government will intervene, it risks many parties being confident that their private contracts are as sacred as they intended.
- 9.4 It equally cannot be said that our members feel protection against the use of this kind of legislation to mandate other requirements. Mandating mortgage, insurance and rates relief without consultation with banks, insurance companies and local councils would equally be poor interventions into private contracts.
- 9.5 Government intervention into contractual arrangements will also undermine confidence in investment in New Zealand from the international investment community. This means its less likely international investors are willing or will want to do business in New Zealand if they see this important principle diminished.

## 10. Solutions

- 10.1 We are acutely aware of the need for support for small businesses - particularly hospitality, tourism and some vulnerable businesses in the personal services sector. Our goal is to ensure those businesses who need assistance can access it in the most effective way possible, at the same time as ensuring continuity of business for both landlords and tenants.
- 10.2 We are aware that many landlords and tenants already have rent relief agreements in place. In that regard, Property Council recommends several different policy options for the Committee to consider.
- 10.3 Our alternative options align with the draft legislation insofar as the solutions relate to those businesses who do not:
- have a no access clause in their lease, or



- have not already had an agreement in place for rent relief.

### *Guiding principles*

- 10.4 We believe any decision should be guided by the following basic principles:
- Landlords and tenants share a common interest in working together, to ensure business continuity;
  - Landlords and tenants to negotiate in good faith and act in an open, honest and transparent manner;
  - Each party to provide sufficient and accurate information within the context of negotiations; and
  - The primary focus of rent relief is actual economic loss.

### *A more nuanced rent relief regime*

- 10.5 Currently the legislation as proposed is ambiguous and unclear. It has no eligibility criteria apart from the requirement to not already have an agreement or a no-access clause in the lease. We believe there should be a very clear two-step process:

- 1. Are you eligible for rent relief?**
- 2. If you are, what considerations should be put around a 'fair proportion' of rent?**

- 10.6 In our view, without some criteria around both eligibility and fair proportion, the Government's intended outcomes will not be met. It will leave lawyers to game out how these clauses work in practice and gives no certainty to both landlords and tenants from the outset about how it applies.
- 10.7 At least in the short term, the uncertainty means that a range of businesses are potentially eligible which is unlikely to be the original intent. We believe this could include:
- Businesses who have suffered no financial loss, or in fact have done better during Covid;
  - Large multi-national and international retailers who are reporting record profits;
  - Government and council departments and other public entities.
- 10.8 Whilst it is currently not specified, we believe this is not the intent of the legislation. We believe that a much more targeted criteria – similar to the proposed legislation from last year – would be more appropriate. This could be something like the following eligibility criteria:

### Eligibility Criteria

- Step One: Are you a New Zealand-owned business?
- Step Two: Are you a private sector or not for profit business – that is you are not a local or central government department or agency?<sup>1</sup>
- Step Three: Are you a SME business – for example - that is fewer than 20 employees in the group or is your turnover less than say \$25m?
- Step Four: Have you received the wage subsidy?

10.9 If you meet the above four levels of criteria - the next step is to negotiate what is considered a fair proportion of rent. What is deemed fair could be different between whether you are a landlord, tenant or lawyer. There is no “one size fits all” lease that is appropriate for all different types of businesses, sizes and sector. However, there are a range of considerations that may help guide both landlords and tenants negotiate what a fair proportion might look like in their individual circumstances:

1. Economic loss must be the basis for any rent relief discussion and the determination of the ‘fair proportion’ amount;
2. Rent relief may be one or a combination of rent abatement, rent deferral and/or lease restructure;
3. For retail premises, a fair proportion should be considered over a long period than the immediate lockdown and a review should occur to assess how much – if any - could be recoverable after a period (maximum 12 months). This should be sufficient to have established the overall impact on sales of the covid interruption. It seems eminently “fair” that if a genuine sales impact has been sustained the rental deferment is proportionately abated and if the sales performance has recovered that the deferment is repaid. This approach will deliver the equitable sharing of the impact of the covid interruption and avoid the unintended consequences of a windfall position to those tenants that do not require it;
4. More generally, fair proportion may include consideration of online sales, click and collect sales, the ability for a business to operate remotely and any bounce-back in sales once the physical premises re-opens.

10.10 Fundamentally, we believe economic loss should be the basis for any rent relief discussion. The deemed clause makes no mention of economic loss being a trigger for rent relief, whereas to receive the wage subsidy a business must show economic loss over a period of 40 per cent. It should not be merely a test of whether you can

---

<sup>1</sup> The New Zealand government is one of this country’s most significant tenants. Recent estimates suggest the public sector inhabits over 45 per cent of office space in Wellington CBD alone. As at 2020, the Government pays \$6,764 per office person in rent. There are 57,149 public servants as at 2020. Payable rent by the Crown alone is more than \$386,555,836. Given these considerations, it seems only reasonable that an amendment exempting the Crown and its agents from being able to claim rent relief.

fully access all areas of your premise in line with epidemic health and safety guidelines as discussed earlier. Given parliament intends to legislate over private contracts, their intention should be as explicit as it possibly can be.

#### *Targeted business payment support for vulnerable businesses*

- 10.11 Property Council supports further payment for businesses in vulnerable industries who irrespective of rent relief, would struggle because of a significant reduction in cash flow. Retail New Zealand and Hospitality New Zealand have rightly pointed out that “most retail and hospitality businesses have had almost no revenue coming in” and that “the Government has provided no specific support for businesses to manage rent situations, and no incentive for parties to negotiate.” We would support their recommendation to provide additional support to landlords and tenants to resolve issues that have arisen since the latest lockdowns began in mid-August.
- 10.12 We support this for two main reasons. The first is the practical reason – most landlords and tenants do not struggle to come to agreements as we have outlined earlier. The biggest barrier to agreement is cashflow for both parties – to ensure tenants can actually pay rent, and for landlords to be able to sustain a loss for a period of time. The second is our view that little support has been provided to the business community while much has been given to other sectors. Most will be able to negotiate some agreement to abate rent or to defer but equally it does not solve the root problem.

#### *Consider other options other than immediate relief*

- 10.13 In our view, there are other opportunities for the Government to recommend and support additional measures which would prevent the serious unintended consequences for which the deemed clause will provide.
- **Communication Timeframes** – To ensure timely responses between landlord and tenant, we recommend there be a mandated time period of up to 14 days which requires either party to respond of receipt of correspondence.
  - **Rent deferral for tenants through the tax system** - A recommendation we strongly support to deliver immediate cash-flow relief for tenants through the tax system is to allow tenants to claim relief for the tax effect of their rental payments, if they are significantly adversely financially affected by COVID-19 during a rent period. We believe this measure can be implemented without the need for application by the tenant to Inland Revenue, by allowing affected businesses to only pay the after-tax effective rental amount to the landlord. This would need to be communicated to the landlord at the time, to ensure both parties are aware of the tax status of the payment.
  - **Rent subsidy for tenants** - We believe that allowing businesses to claim an immediate rent tax credit (rather than a tax deduction when the tax return is filed) should assist some businesses to mitigate the cash-flow impacts of COVID-19. This has the benefit of utilising a model that is now well known to both business and the Government and its key responsible agencies – Ministry for Business, Innovation and Employment (MBIE), Ministry of Social Development (MSD) and Inland Revenue. Like the wage subsidy, we believe this will help those businesses directly (and indirectly) impacted by operating restrictions to manage

an immediate and large cash-flow cost.

- **Landlord Hardship Fund** – In Australia, there is a Landlord Hardship fund which provides additional support to smaller property owners whose main source of income is impacted because they provide rent relief to the tenant. This is based on a portfolio size of less than \$5m and is up to \$3,000 per month subject to a range of criteria.

## 11. Process

### *Engagement with Property Council and wider sector*

- 11.1 We want to express our deep disappointment at the process by which the Government has followed to mandate rent relief across all commercial leases. At the end of August we wrote to the Minister of Justice expressing a desire to work with him and his Justice officials, to provide support and expertise and help the Government through this challenge. We are yet to receive a response from Kris Faafoi.
- 11.2 As the Department of Prime Minister and Cabinet have noted, "the size and scale of this problem is not clear." From our perspective, the Government has missed an opportunity to work with us to determine this important factor and – following this – work with our industry to identify those who need some specific assistance.

### *Construction Sector Accord*

- 11.3 Property Council is a proud member of the Construction Sector Accord. We have appreciated the constructive nature in which Ministers have engaged with members of the Accord on matters of importance to the construction industry. We feel like both Government and the sector have benefited greatly from the Accord.
- 11.4 The Construction Sector Accord is a joint commitment from government and industry to work together to create a high performing construction sector for a better New Zealand. Achieving the shared goals of – increased productivity, raising capability, improving resilience and restoring confidence – will deliver benefits across the sector and for all New Zealanders.
- 11.5 The construction sector is an ecosystem that depends on the high performance of all its many parts and the Accord brings everyone together to support the collective cause.
- 11.6 One of the critical parts of the ecosystem are the property owners/developers – i.e the client - who contract professional services, construction companies and many others to maintain, renovate or undertake development projects on their properties – across all parts of the sector – residential, commercial, industrial and retail. There are two broad groups of clients – the Government who account for approximately 20% of the construction work and the private sector clients who account for the remaining 80% of the work.
- 11.7 One important foundation of the Accord is that industry and government agree to be guided by four key principles including build trusting relationships and to hold themselves and each other to account against them.

- 11.8 We believe the approach by the Government on this particular issue is in breach of the principles of the Construction Sector Accord – particularly the first principle of Build Trusting Relationships.
- 11.9 The actions illustrate a severe breach of trust and has the potential to significantly undermine the Construction Sector Accord. This issue will be followed up with the Construction Sector Accord to remedy.

*Select committee procedure.*

- 11.10 Finally, we are concerned that the Finance and Expenditure Committee will only have two weeks to receive this Bill, open then hear and consider submissions, amend the Bill so it is workable and produce a report so the House can consider the most relevant advice from experts in their respective fields. Amending sixteen other pieces of legislation along with the Property Law Act 2007 in such a truncated fashion risks creating multiple significant errors which could be mitigated against by running a proper, full process.
- 11.11 To ensure the amendments do not create unintended consequences, we recommend the Finance and Expenditure Committee request an extension of time so that it can properly consider the effects of the proposed changes in the Bill until 14 November 2021.

## **12. Conclusion**

- 12.1 Property Council thanks the Finance and Expenditure Committee for the opportunity to submit on the COVID-19 Response (Management Measures) Legislation Bill.
- 12.2 We do not recommend the amendment to the Property Law Act 2007 mandating a no-access clause across commercial lease arrangements. If the Committee chooses to progress the amendment, we recommend the following:

1. If the rent relief clause is progressed, that it be amended to clear up drafting ambiguities with a simple two-step process:
  - a. Eligibility for Rent Relief
    - i. A limit to its application to only include Alert Levels 4 and 3 to provide consistency with current Government support initiatives;
    - ii. Eligibility criteria to ensure tenants are assessed against need and vulnerability. This would include being a New Zealand owned business; an SME – (eg of fewer than 20 employees or a turnover of less than say \$25 m); and eligibility for the wage subsidy showing economic loss;
  - b. Considerations for a “fair proportion of rent”
    - i. A set of considerations that should be taken into account when assessing rent relief – including economic loss, consideration of online and click and collect sales, ability for a business to operate remotely and consideration of the potential bounce back in sales once the physical premises reopens over a defined period of time.

2. That in addition, the Government should consider targeted business payment support for vulnerable businesses to deal immediately with cashflow issues; and
3. That the Government reconsider other direct interventions and policy options, including:
  - a. Mandatory communication timeframes;
  - b. Rent deferral for tenants through the tax;
  - c. Rent subsidy for tenants;
  - d. Landlord Hardship Fund.
4. That the Finance and Expenditure Committee request an extension of time to adequately assess the implications of the draft clause until 14 November 2021.

12.3 For any further queries contact Liam Kernaghan via email: [liam@propertynz.co.nz](mailto:liam@propertynz.co.nz) or cell: 021715108.



Leonie Freeman  
**Chief Executive, Property Council New Zealand**

## Appendix I: Member Stories

Over the past week, our inboxes have been flooded with member stories. We have anonymized these and a summary of these messages is shared with the Committee to outline the concerns and issues related to the proposed changes.

\*\*\*\*\*

*“Of concern is the seeming belief by this Government that all landlords are wealthy high living individuals that just drain their tenant’s pockets to further their own extravagant lifestyle. This latest law change continues this ‘landlord bashing’ narrative. The latest law does not take into account that many commercial landlords have undertaken substantial borrowings to purchase their property. Unfortunately, the stick being taken to landlords to force them to provide relief to their tenants, although noble in its intent, fails to also place an onus on the bank or other interested party to provide relief to the landlord should it be required.”*

Over the last year we have seen many businesses struggle to survive, particularly in certain sectors. I do not have the statistics however would believe that the vast majority of landlords have been patient and accommodating of their tenant’s cashflow to their own detriment. Contrast that with the reports of the Banks making record profits seemingly without Government intervention or meddling. Something doesn’t seem quite balanced here.”

\*\*\*\*\*

*“As a shareholder (in a property investment company), I am very happy to support tenants, but that support is soon going to come against the inflexibility of the Banking Industry. The banks still require their monthly interest and amortisation and we cannot put these payments at risk.*

*It is my personal view that the Banking Industry have done nothing to assist businesses during the Covid-19 lockdown periods least of all the property industry. At the same time, the Banking Industry is making record profits.*

*I believe that Kris Faafoi and his friends should be taking a more holistic approach and not just hammering one sector. If the Property Industry is required to offer rebates to tenants during times of hardship, the banking industry needs to allow deferral of amortisation payments at least and at best allow some space for the property industry to get other markers such as LVR in order.”*

\*\*\*\*\*

*“My husband and I own a commercial unit In Howick. We are 76 and 82 years old.*

*Last night we had an email that our tenants who are lawyers are asking for a 50% rent and outgoing reduction. The rent is \$46906 including gst. The only income that we have is our state pension and the income from the unit. We have recently had to pay \$7153.00 on roof repairs. Which you can see do not leave us with a very big income.*

*We know they have 11 people who work there who are working from home. We cannot afford a rent reduction so what can we do?*

*Also the October rent was due yesterday and he notified last night that he could not pay this was with no discussion with us.”*

\*\*\*\*\*

“I represent a private commercial property development, construction, investment and management company. We manage approximately 190 commercial tenancies, across the retail, hospitality, commercial, medical and industrial sectors. We employ approx. 20 full time staff, and work/contract with a large number of companies in the industry, and across other industries to undertake work on our construction sites, ongoing maintenance and compliance work for our properties, design and consultation with professional services for new developments, and building material supply companies. These are a few examples of the eco system in which we operate in the broader economy.

It is disappointing that our industry hasn't been consulted on the proposed changes which have significant and complex effects on many tens of thousands of New Zealanders. Expediting this process for completion in a fortnight means the Government runs a real risk of unintended consequences.

The relationship we have with our tenants is important to us, and we have worked closely with in them last 18 months to navigate through this difficult time. We have provided over \$1.3m in rent abatement for our tenants and additionally we have worked with other structures to help the various businesses through (rent deferrals etc).

In this time, our business has paid our suppliers, banks, employees in full.

What has become very clear in this time, is that each business and sector is affected in different ways. Some businesses are really struggling, not able to trade at all due to the restrictions imposed and need the most help. Other businesses have had record profits through this time. Neither business may have had physical access to their premises in a level 4 restriction, and therefore a blanket approach to these businesses cannot work. Our focus has been and will continue to be helping those most in need of the support. We have not treated tenants differently, whether they have had the No Access Clause 27.5 in their lease or not. It is all about those who need the help, and targeting the support we can provide to these businesses.

This story is not unique to us. We are aware of the great lengths many landlords and tenants have worked together to negotiate an outcome that works for them. This proposal puts at jeopardy that goodwill into the future.

It is my understanding that the Government values partnerships and working together to create a better New Zealand. To rush through changes without consulting with our industry, who have been more than happy to work with the Government to find solutions to this very complex problem, seems at odds with this position.”

\*\*\*\*\*

*“I'm writing to you today to express my disbelief at your decision to mandate a no-access clause across all commercial leases. I represent a landlord with significant retail assets in Auckland and Wellington which serve as hubs for their communities.*

*It is disappointing that our industry hasn't been consulted on the proposed changes which have significant and complex effects on many tens of thousands of New Zealanders. Expediting this*



*process for completion in a fortnight means the Government runs a real risk of unintended consequences, which is all too common under Labour policy.*

*Many businesses took the wage subsidy and then paid it back having realised it wasn't necessary or fair to benefit from taxpayer funds when they were able to continue working remotely, or realised record sales from a H2, 2020 upswing in sales, which carried on into 2021. Many didn't as they lacked public pressure from being outside of the public eye.*

*Landlord's across the board provided cashflow assistance primarily in the form of abatement. Most of the tenants I dealt with, providing abatement and other forms of assistance, then went onto have very healthy financial years. Who is the victim of covid lockdown assistance to tenants in this situation? The landlord. What assistance is provided to a landlord in this instance, virtually none as it is a low wage business. Then going forward they have no recourse for balancing the scales after the assistance is provided, as no tenant is coming back to the landlord to say, "thanks you helped out, we didn't need it in retrospect, here's the rent we owe".*

*This financial impact remains felt for months and years to come and reinvestment into these community hubs becomes more difficult.*

\*\*\*\*\*

We have a small number of commercial tenancies. "We have a really proud story to tell when it comes to working with our tenants. For example, we have negotiated and worked with our tenants by providing \$85,000 of rent relief, most of which is still ongoing, plus we have provided mental relief with our discussions and assurances of financial support.

This story is not unique to us. We are aware of the great lengths many landlords and tenants have worked together to negotiate an outcome that works for them. This proposal puts at jeopardy that goodwill into the future.

It is my understanding that the Government values partnerships and working together to create a better New Zealand. To rush through changes without consulting with our industry, who have been more than happy to work with the Government to find solutions to this very complex problem, seems at odds with this position.

Please reconsider your decision to forge ahead with this change to commercial leases. My companies and I are available to work with you to find a way forward which works for landlords and tenants."

\*\*\*\*\*

*"I found it staggering to learn of your decision to mandate a no access clause across all commercial leases.*

*There appears to have been a total lack of consultation and it is disappointing to see government running roughshod over our freedom to negotiate contracts. Your actions do not appear to reflect the Prime Minister's catch phrase "be kind" said so frequently on Prime Television*

*In the level 4 lockdown last year we treated tenants in a manner which we felt was fair. We had letters of thanks from our tenants and some declined our offer as they did not require it. We actually found that liquidity during the lockdown and shortly after was more important than actual costs and*

*part of our offer was to agree to deferred rental payable over 3 months starting some months after lockdown. This was well received.*

*We have around 100 tenants mostly small businesses and we only had one tenant who expressed concern with our offer and asked for a complete cancellation of rental. They happen to be in the building industry which was bursting at the seams prior lockdown and will no doubt be busy after lockdown. They are a very capital intensive part of the industry and rent would not be there major overhead*

*None of our leases have the law society clause in them. We endeavour to operate our business so that we are considered as “good landlords” by our tenants.”*

\*\*\*\*\*

“A bit ironical that government took all of the business off my butcher and fruit shop tenants and gave it all to the supermarkets and now they are suggesting they have the right to demand I give a rental abatement to the butcher and fruit shop.

I did in fact offer a discount and rental deferment but that was out of my generosity and should not be by government dictate.”

\*\*\*\*\*

*“I'm writing to you today to express my displeasure and amazement at your decision to mandate a no-access clause across all commercial leases.*

*I represent an organisation which between them have ten commercial and industrial tenants. We have an excellent relationship with our tenants most of whom have been with us for many years.*

*During last year's lockdown and this year's we have willingly provided our tenants with 50% Covid rental relief. This relief has been given voluntarily to tenants party to both pre and post the 2012 edition lease which provides clause 27 relief. We did not need the interference of Government to make us volunteer this relief. As professional Landlords we realise that the well-being and viability of our tenants are vital to our business's success.*

\*\*\*\*\*

“I'm writing to you today to express my frustration at your decision to mandate a no-access clause across all commercial leases.

I would be considered a mum and dad investor with a small portfolio of commercial properties. We have 8 tenants this change impacts, with whom for the large part we have negotiated fair terms. Your legislated change does nothing to improve the situation, if nothing the ambiguous wording simply confuses the matter further.

You were elected on promises of transparency, and so I find it against everything you supposedly stood for that our industry hasn't been consulted on the proposed changes which have significant and complex effects on many tens of thousands of New Zealanders. Expediting this process for completion in a fortnight means the Government runs a real risk of unintended consequences.”

\*\*\*\*\*

*“I’m writing to you today to express my frustration at your decision to mandate a no-access clause across all commercial leases. We are a property and fund manager with NZ\$2.1 billion in assets under management. Our portfolio of 37 assets is geographically spread throughout New Zealand, with 566 tenant customers across the office, industrial, large format retail, and retail (shopping centres) asset sectors.*

*We are well aware of the pressures faced by all businesses in New Zealand when lockdowns are imposed, and have worked with our tenants, wherever possible, to find solutions to enable us to get through this together. The rental abatements and rental deferrals that we have provided across our managed portfolio over the past 18 months equate to approximately \$9.5 million.*

*We have tenants for which we know our assistance, together with that of other landlords, has made the difference to their business survival. In many of these cases such assistance has been*

- a) necessary to be beyond that of a ‘one-size-fits-all’ approach; and*
- b) possible because we haven’t had to give as much assistance to every tenant – in particular those that haven’t needed it.*

*We also have tenants that we have assisted, that have gone on to achieve performance far superior to the past and in numerous examples that resulting in record profits, yet they haven’t repaid our abatements and the proposed change in legislation would mean those tenants would be entitled to more assistance – ultimately at the expense of the tenants that really need it and our property owners that have achieved less profit.*

*Many of our properties are proportionately owned by individuals and families that have far smaller balance sheets than those of many tenant occupiers. The legislative change as it stands would cause seriously inequitable results.*

\*\*\*\*\*

“I represent a company which owns and manages a portfolio of commercial properties consisting of over 80 tenants who consist mainly of small to medium sized businesses operating in a wide range of industries. We were left absolutely flabbergasted by your recent decision to mandate a no-access clause across all commercial leases.

Almost none of our leases contain the standard ADLS no-access clause (and therefore there has been no legal obligation on us to provide any type of rent relief) but despite this we were still willing to negotiate bespoke solutions for all of our tenants that sought assistance throughout the various COVID alert levels (through appropriate abatements and deferments), and we can proudly say that all of our tenants were able to continue trading, and still are to this day. We do note that the various abatements and deferments were in relation to rent only which we felt was appropriate noting that we as landlords most certainly did not benefit from any kind of abatement relief for our overheads (e.g. rates, insurance). We highlight that your proposal intends to also include outgoings – we appreciate this mirrors the way the current no-access clause is worded however again we struggle to understand how this can work in practice when we don’t receive any relief in this regard. “

\*\*\*\*\*

*“I am writing to you today to express my surprise and disappointment at your decision to mandate a “no-access in an emergency clause” across all commercial leases, particularly without consultation with the property industry. I represent an entity which owns and manages over \$3 billion of assets, in*

*the office, retail and industrial sectors. We manage over 70 properties throughout New Zealand, with over 850 tenants.*

*The introduction of a mandatory implied “no access in an emergency” provision across all commercial leases has a material and complex effect on many New Zealanders. We are also concerned with the speed with which it is proposed to introduce this legislation, which we consider may not enable Parliament to fully consider the implications of this legislation.*

*We have negotiated no access in emergency clauses which provide rent and opex relief to tenants where we are able to claim on its business interruption insurance. This is a negotiated arrangement which responds fairly to the situation that this clause was introduced into the standard form lease to deal with – namely the situation where a tenant is unable to access premises due to earthquake or other natural disaster. Implying a clause which cuts across our negotiated position with tenants indicates that the Government does not respect the ability of private persons to negotiate a contracted position. This sets a worrying precedent, one that the Government should be very reluctant to undertake.*

*We are very proud of our history in managing lockdown situations, and considers that it works proactively with tenants to achieve a reasonable outcome. Our approach across all of its owned and managed properties was to take a tenant-by-tenant approach and to provide rent and cost relief where it was needed in order to support the tenant. In these cases, we often sought a benefit in return, through a longer lease term. However, we did not always provide rent abatement to tenants where it considered that abatement was not required, for example because the tenant’s business had not been impacted by the lockdown period, or where the tenant was of a sufficient size or scale to pay rent. This enabled us to direct its support to smaller tenants which required it, in order to continue to have a sustainable business.*

*The proposed implied provision does not provide any indication of what a “fair proportion” of rent and costs may be that is required to be abated. As has been made clear by other commentators, we expect this new legislation will result in a significant amount of dispute, and will generate income only for lawyers, particularly as disputes will go to arbitration, a private and confidential dispute resolution mechanism which will mean the outcome is not known and therefore there is no precedent.*

*If a fair proportion is determined by reference to the period that the tenant was not able to fully occupy its premises, this does not take into account the fact that some tenants are able to continue to operate their business during lockdown with workers working from home – professional services firms and banks for example, may not have suffered any financial detriment as a result of the lockdown, but could seek abatement of a fair proportion of rent.*

*In addition, we saw over the past year that a number of retail tenants recouped any lost sales following the lockdown period, particularly as New Zealanders cannot travel overseas so are spending more money at home. Only this week The Warehouse Group announced record profit for FY21 – is it then reasonable for landlords to provide rent abatement for The Warehouse Group or similar tenants?*

*We are proud of our approach to tenants and rent negotiations during the period impacted by COVID-19. During the March – May 2020 lockdown period, we negotiated and provided rent abatement and deferrals of over \$30 million across all of its managed funds, and this support was provided on a targeted basis, as noted above. Out of this, \$10 million was provided as straight abatement, and a further \$20 million was deferred rent which was subsequently repaid as the tenants’ businesses were able to pay the deferred rent due to their improved trading position after the lockdown period. This provides an example of how we consider that the market has operated in practice, targeting support where it is needed, rather than a blunt legislated instrument across all tenant categories and situations.*

*Like most landlords, we recognise that supporting tenants benefits us over the long term, as there may not be replacement tenants to take the space should the tenant cease to have a viable business. Commercial pressures provide sufficient incentive for landlords to work with tenants in a responsible way – this legislation is a stick to address a problem for a small minority and we submit it is not required.*

*The proposed implied clause would require landlords to provide rent and costs abatement but does not acknowledge that landlords have costs that it cannot avoid – including rates (many of which are increasing at alarming rates around the country), insurance and interest costs on mortgages. The legislation mandates that landlord bear the costs of lockdown without necessarily requiring that it be spread in any fair manner (particularly as we have no idea what a “fair proportion” is). The Government has not imposed legislative obligations on any other industry to support their customers financially - it is simply unfair and arbitrary to require through legislation that only commercial landlords to provide financial support to their customers.*

*As a entity, we are over 90% owned by New Zealanders, including a large proportion of KiwiSaver investors. However, many tenants are owned by international entities, and accordingly by mandating that we provide rent abatements to tenants, this is a straight transfer of wealth from New Zealanders to overseas entities.”*

\*\*\*\*\*

*“I’m writing to you today to express my deep displeasure at your decision to mandate a no-access clause across all commercial leases. I represent an Investment group which is in the business of residential and commercial development and property investment.*

*It is disappointing that our industry hasn't been consulted on the proposed changes which have significant and complex effects on many tens of thousands of New Zealanders. Expediting this process for completion in a fortnight means the Government runs a real risk of unintended consequences. We are very conscious of the need to complete quality residential and commercial developments and preserve strong long-lasting relationships with our tenants. To this end we have / will take a responsible approach to providing a fair abatement of rent in situations where our tenants are not able to trade from their premises due to covid lockdowns. Without our tenants we would own empty buildings, which is NOT our business.”*

\*\*\*\*\*

*“I’m writing to you today to express my frustration at your decision to mandate a no-access clause across all commercial leases. I represent a company which manages approximately \$16 million rent roll across 12 commercial assets including approximately 60 tenants.*

*We have provided the vast majority of our independent and small occupiers with 100% rent relief in Levels 3 & 4 lockdown. This applies to our hairdressers, children’s softplay venues and dance studios which cannot open for business until Level 2. If a restaurant or café provides a takeaway service in Level 3, we have agreed either 50% or 100% rent relief depending on the specific circumstances of that tenant. Similarly, if a tenant can provide a click and collect service in Level 3, they pay either 50% or 100% rent depending on their circumstances.”*