

Industry Operational Guidelines for Determining a Fair Proportion of Rent

Relating to the COVID-19 Response (Management Measures) Legislation Act 2021

8 December 2021 | V2.0



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Version

The Draft Property Council Industry Operational Guidelines was released on 18 November 2021. This version has now been updated to reflect the change to the Traffic Light Framework, and additional feedback received from landlords, tenants and industry associations.

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Disclaimer

Persons availing themselves of these Industry Operational Guidelines do so in reliance on their own interpretation and Property Council New Zealand (including their officers, representatives and/or agents) does not accept any liability to any persons so acting.

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Introduction

The COVID-19 Response (Management Measures) Legislation Act 2021 (**Act**) received Royal Assent on 2 November 2021 and is now in force. This Act amends the Property Law Act 2007 (**PLA**) to imply a rent and outgoings abatement term (similar to clause 27.5 of the ADLS lease) into leases that currently do not contain that clause.

These Guidelines have been compiled by Property Council New Zealand with extensive consultation with landlords, tenants and a variety of business association groups. The first DRAFT was published on 18 November 2021 with this final version released on 8 December 2021 after the new Orders for the Traffic Light Covid-19 Protection Framework were released

Purpose

The Act provides that a “fair proportion” of rent and outgoings will cease to be payable when there is an “epidemic”, and the tenant is “unable to gain access to all or any part of the leased premises but provides limited guidance on how the reduction will be determined. There is no guidance from the Courts as to how to assess what is fair, as any disputes about clause 27.5 have required the parties to submit the dispute to arbitration, which is a private dispute resolution process.

The purpose of these Guidelines is to assist tenants, landlords, mediators and arbitrators in resolving disputes regarding “fair proportion” rent reductions applicable to periods of lockdown.

Structure of the Guidelines

These Guidelines are structured as follows:

- Part 1 – Limits on the Effect of the Guidelines
- Part 2 – Principles
- Part 3 – Implied No Access in Emergency
- Part 4 – Considerations for the determination of a fair proportion of rent
- Part 5 – Considerations of determining a fair proportion of rent
- Part 6 – Information to be provided by tenants
- Part 7 – Reviewing Arrangements
- Part 8 – Property Council of New Zealand
- Part 9 – Initial Rent Relief Information Request Form

Part 1 – Limits on the Effect of the Guidelines

We note that the guidelines:

- Are advisory only and not, of course, legally binding in the case of a dispute
- Do not deal with any other negotiated outcomes that landlords and tenants may agree, which extend beyond the terms of the new implied term (or clause 27.5)
- Are not intended to replace the need for the parties to seek their own legal advice, as the final determination of what is “fair” will very much depend on the particular circumstances.
- Does not seek to change the underlying legal relationship or lease contract between landlord and tenant and any guarantor.

- Do not address how a fair proportion reduction of outgoings might be calculated, as there are different considerations for this calculation.
- Will not necessarily be suitable to apply (without amendment) in the case of a ground lease or a triple net lease.

Part 2 – Principles

We believe any discussions and decisions should be guided by the following basic principles:

- As many commercial landlords, tenants, have already done, the best approach is to work together constructively to find a solution which is sustainable and will meet all parties' needs and interests and ensure business continuity;
- Landlords and tenants are expected to negotiate in good faith and act in an open, honest and transparent manner;
- Each party is to provide accurate information within the context of negotiations; and work towards achieving a mutually satisfactory outcome
- Decisions should appropriately balance the respective interests of tenants and landlords.

Part 3 - Implied no access in emergency clause

The Act provides for the 'no access clause' to be implied in leases that do not currently contain that clause.

The implied term applies from begins on 18 August 2021 and ends on the date on which the Epidemic Preparedness (COVID-19) Notice 2020 expires or is revoked. The notice currently expires mid-December but is subject to three (3) monthly renewals.

The right to a rent reduction does not apply where a reduction in a business's ability to generate income, or its profitability, is not a direct result of the inability to access the premises. For example, a tenant may be able to access their premises but have no customers due to border closures or other COVID-19 restrictions or reduced foot traffic. Conversely, a tenant may be unable to access their premises, but may still be able to operate remotely and suffer no loss of income.

The period for rent relief ends when the tenant's inability to access the premises to fully conduct their operations ceases. The new Traffic Light system which has come into effect on 3 December 2021 means an end to rent relief for most tenants. However some tenants (such as those in the hospitality business) may still be unable to "fully conduct" their business during the red and amber traffic lights, because of distancing requirements and the cap on the number of people in the premises. For those tenants there may be some very limited rent relief due still, but it will very much depend on the particular circumstances.

Part 4 – Considerations for the determination of a fair proportion of rent

In considering what is a "fair proportion" of rent and outgoings for an abatement, the matters that the parties consider must include any loss of income experienced by the tenant (during the particular Alert Level) because of the epidemic and the tenant's inability to gain access to all or part of the premises to conduct its business. This is different to clause 27.5 of the ADLS lease, which does not include any guidance on how the fair proportion is to be determined.

It is unclear whether the impact of the loss of income is the only factor to be taken in account. The wording in the Act would suggest it is not.

To be eligible for rent relief under this legislation the parties must not have already concluded a rent relief agreement.

There are a range of factors that could be considered when determining a "fair proportion" rent reduction. These include:

Business Factors

- The type of business being operated by the tenant
- The size of the business
- Whether the lease is a gross or net lease
- The ability of the tenant to operate its business remotely
- The tenant's reliance on the business premises in order to operate its business remotely, for instance location of servers and/or storage of stock in premises
- Rights of termination for the tenant if the inaccessibility continues
- The ability of the tenant to mitigate losses (and sustain future operations) through measures such as extending credit terms with suppliers, offering on-line sales and "click and collect"
- It is the view of Property Council New Zealand that the intent of the rent relief provisions under this legislation is not applicable to public sector entities at central or local government levels.

Financial Factors

- The general financial position, revenue, and business expenses of both parties,
- The impact of COVID restrictions on the tenant's business generally and its ability to generate revenue through-out New Zealand
- The financial resilience of the business to withstand loss of income during the relevant period and the extent of loss.
- The third party financial support available to both parties, such as government, franchisor and bank support
- Any likely increase in revenue after the tenant can again operate from the premises.
- The impact on revenue (even once the premises can be accessed) of social distancing requirements and the ability to serve customers
- Any loans (and other financial commitments generally) which the tenant has in respect of its business
- Any mortgages which the landlord has in respect of this property [and any other property which is part of the landlord's business]
- For large organisations the lessee's consolidated Corporate Group revenue may be considered where appropriate
- Any capital incentives or rent-free periods forming part of the lease
- Does not include fitout loans or any other loans due to the landlord over and above rent and outgoings which the tenant has in respect of its business

Sub-lessees are to undertake any rent relief discussions with their sub-lessor, as opposed to the head lessor.

For franchise organisations, rent relief discussions are to be undertaken with respect to the franchisees individual (or collective) business only, not across the wider franchise organisation.

Part 5 –Considerations for Loss of Income

Business income may include income received from the sale of products or services. It does not include GST. Depending on the size and type of business different levels of financial information can be provided.

Considerations could include the following:

- Audited sales/revenue for the previous 12/24 month period
- Audited sales/revenue for the same month(s) (as lockdown) in 2019 and 2020
- If the business has commenced operations in the last 12-24 months or had significant restructuring, growth or decline in that period then alternative comparison periods may need to be considered.
- If a tenant's business revenue is irregular and not cyclical then alternative comparisons may also need to be considered.
- For small businesses who do not have audited accounts the businesses' financial statements

Part 6 – Information to be provided by tenants

Tenants should provide reasonably comprehensive documentation – appropriate to the size of their business - for discussions with landlords to demonstrate loss of income. This could include one or more of the following:

- Extracts from the tenant's accounting records showing profit and loss statements or
- The tenant's business activity statement(s) that relate to the relevant turnover test period, including government stimulus received
- Audited statements of revenue and sales prepared by an independent practising accountant
- Audited accounts if and when normally available
- Loss of income information provided to Government to prove required loss to receive Wage subsidy
- Tenants to provide consistent information on either a cash or accruals basis.

Further considerations depending on the type and scale of the business. If there is multiple premises, then information can be considered on the total business operations.

Part 7 – Reviewing arrangements

Circumstances for landlords and tenants can change. Rent relief considerations can be reviewed at a change in alert levels or introduction (or change in level of) the traffic light system or on a monthly basis as agreed between the two parties.

Part 8 - Property Council of New Zealand

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 – across industrial, retail, office, hospitality and residential sectors. Our members represent many landlords and tenants across all sectors of the property industry.

There are a number of commercial leases that are used in the marketplace, but the Property Council has industry standard leases for retail, industrial and office premises.


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.

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.

The value of New Zealand's residential property stock is \$1,305 bn and the value of commercial property stock is \$243 bn.

Part 9 – Sample Rent Relief Information Request Form

The following form is provided as a starting point for gathering information. Note that not all parts will be relevant for every business but use as required depending on the size and type of business.

 Property Council New Zealand	Sample Rent Relief Information Request Form	Date:						
Tenant Information								
Address	_____							
Building Name	_____							
Tenant Name	_____							
Type of Business - Retail, Hospitality, Industrial, Office, Other	_____							
Support Request Type:								
	Period	Amount						
Rent Relief	_____	_____						
Other - provide details	_____	_____						
Background for Request								
		Comments						
What is the reason for your rent abatement request?								

Have you been operating your business from the premises at any time during the current lockdown (and if so, specify when, e.g. only in Level 3 or otherwise)								

Are you able to operate your business remotely (for example, with employees working from home)								

How reliant are you on tourism, travel, entertainment, hospitality?								

Specific measures you have taken or in process to sustain operations: (Please advise initial measures you have taken specific to the individual tenancy/business - supplier credit terms, click and collect, online etc)								

Specific measures you will take to sustain future operations: (Please advise what further measures you intend taking specific to the individual tenancy/business - supplier credit terms, click and collect, online etc)								

What are the key areas that generate revenue for your business?								

*Audited accounts if available. For smaller businesses where audited accounts aren't available, financial statements can be used								
Sales Performance/Revenue								
	Jun-21	Jul-21	Aug-21	Sep-21	Oct-21	Nov-21		
Sales/Revenue for month	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -		
Sales/Revenue for same month last year (Audited Sales)	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -		
Sales/Revenue performance variance	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -		
(Note - if the business revenue is cyclical, or for larger businesses - it may be appropriate to provide extended financials to show "income loss")								
Business Expenses			Jun-21	Jul-21	Aug-21	Sep-21	Oct-21	Nov-21
Occupancy Costs	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	
- Rent	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	
- Others	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	
Business Insurance:								
Do you have insurance to cover in the event of a pandemic?			_____					
Have you approached your insurer about the Covid-19 virus?			_____					
Have you made a claim? If not why not?			_____					
Has the claim been accepted/declined?			_____					
Government Support:								
Have you assessed for your business what support is available? (e.g. Wage Subsidy, Resurgence Support Payment)			_____					
Have you received or are you eligible to receive any Government support, and if so, what is the amount?			_____					
If you are not entitled to government support, what are the reasons?			_____					
Have you approached your Bank?								
What support have you sought from your bank?			_____					
What has the banks response been to your request?			_____					
Which Bank or Banks do you deal with?			_____					
Declaration								
- I certify that the information/statements given in the request are true and complete to the best of my knowledge and belief								
- I understand that this is not a contract and does not bind either party								
- The information provided will remain confidential								
			Tenant				Date	