

# GOVERNMENT TENANCY MEASURES REGARDING COMMERCIAL LEASES FOR COVID-19 IMPACTED TENANTS

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The Government announced surprising changes to all leases by an enforceable implied term for commercial property. The law will be effective from 28 September 2021 once it is legislated and receives Royal assent.

In a joint statement issued by the Hon Potu Williams [Associate Minister of Housing] and the Hon Chris Faafoi [Minister of Justice] on 28 September 2021 the intention is to ease impacts of COVID-19 restrictions on commercial tenancies.

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An amendment to the Property Law Act is proposed to insert an implied 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.

Therefore, the immediate issues will be:

- (a) What is a fair proportion?; and
- (b) What is fully conduct?

"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," Kris Faafoi said. We can assume therefore parties can contract out of this obligation in future leases.

**"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." – Kris Faafoi**

The provisions of the current Auckland District Law Society [ADLS] Deed of Lease cl 27.5 [No access in emergency] state that if a tenant is unable to gain access to rental premises as a result of restrictions



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imposed by a competent authority to fully conduct its business then a fair proportion of rent and outgoings shall cease to be payable for the period of the tenants inability to fully operate its business. Cl 27.5 doesn't provide any mechanism for resolution of any dispute between landlord and tenant to determine what is fair. If no agreement can be reached, then the parties would rely upon the Arbitration provisions of cl 43.

Under the new amendment to the Property Law Act, arbitration will be required where landlords and tenants are unable to come to agreement about a fair rent proportion, unless they agree to an alternative dispute resolution process such as mediation. On face value there is little difference to the current ADLS provisions.

There remains no clear answer as to what a fair proportion reduction of the rent is. There is likely to be further litigation on this issue as the proposed changes are not offering any guidance at all. Nor does it seem there will be any mechanism under the new implied clause for determining this or when a tenant is 'fully conducting' their business. Is a tenant fully conducting their business if they can still conduct business online even though they are unable to do so in person? Each lease is different and facts such as a tenant simply refusing to pay any rent, or refusing to negotiate, or refusing to attend arbitration with a landlord will impact on any dispute resolution. The new implied clause should not give tenants a 'get out of jail free card' so they can avoid their part of the lease bargain.

Minister Faafoi noted that 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.

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