

# Government unveils action plan on small business rent disputes



**Michelle Hill**  
Partner



**Amy Johns**  
Senior Associate

Lockdown put an undoubted strain on many businesses trying to meet their rent commitments, and that strain will have been felt all the more acutely by those with no abatement provision in their lease agreement. The government has now announced it will take steps to help them. Although, as ever, there are announcements and then there is legislation.

It is proposed that, as from 4 June 2020, commercial leases which did not previously contain a rent abatement provision will have a rent abatement term implied so that a fair proportion of rent and outgoings will abate when a tenant's business has suffered a material loss of revenue, if the tenant and site meet eligibility criteria being:

- Not having previously agreed any rent arrangement with the landlord;
- having 20 or fewer full time equivalent employees at the site; and
- being a New Zealand based business.

The legislation—which has yet to be publicised or passed—will include guidance for assessing a fair proportion to which the rent and outgoings should abate. The legislation is in the process of being drafted. However, there are now reports that New Zealand First has pulled support; at least of the Bill at least in its current form.

The proposal which was intended to be the base for the Bill intended to look at the COVID-19 burden on the parties so that the interests of the landlord and the tenant are both taken into account. Criteria for considering those interests may include:

- a. The financial position of the landlord, the tenant, and any other relevant party, including:
  - the impact of the COVID-19 restrictions on the business, including the impact of restrictions that are no longer in place;
  - any mortgage obligations relevant to the leased premises;
  - any financial support available to them;
  - their revenue and profit levels in recent years;
  - their ability to survive financially the effects of official requirements to counter an outbreak of COVID-19;
  - any difference in size and resources between the landlord, the tenant, and any other relevant party;
  - any other factor that is reasonably relevant;
- b. whether a relevant party is any subtenant, any landlord under a superior lease, any parent company for the landlord or tenant, and any other party who is reasonably relevant.

And what kind of arrangement could be made?

Several possibilities are proposed:

- no rent being payable for a period; or
- reduced rent being payable for a period, including reductions of varying levels over successive periods; or
- a scheduled rent increase being deferred; or
- rent continues to be paid unabated; or
- a mix of any of these options.

If the landlord and tenant cannot agree, then a Government subsidy of \$6,000 is proposed to be available for the parties to go to arbitration, so long as one of the parties has claimed the wage subsidy.

The Legislation is yet to be finalised but it is proposed that it will be retrospective to 4 June 2020 and will apply for six months following the enactment of the Bill. It will take effect as an amendment to the Property Law Act 2007 (which already sets out implied terms in leases).

It's not clear precisely which aspect of the Bill is unpalatable to NZ First. However what is clear is that issues have been raised and, for now, the Bill is yet to have its first reading.

Even with before the process was delayed, there were a number of matters which remained to be clarified from the proposal, in particular:

- Are those who already have an abatement term in their lease, but otherwise meet the eligibility criteria, able to access the arbitration subsidy?
- How is a "full-time" employee determined – how many hours are required? Will it include entities closely associated with the business as was the original proposal when a threshold of 50 employees was mooted. It is also worth noting that a threshold of 20 full time equivalent employees could provide a wrong incentive to slash staff in order to make an organisation eligible (depending on whether the number of staff is as at 4 June 2020 or the date of application).
- What will define a "New Zealand" business? Initial guidance excludes those with an overseas head office and multinationals, but this has not been finalised. Could there be a question of fairness to be resolved in terms of being applicable to only New Zealand businesses? Many iconic NZ businesses operate internationally and have an overseas parent company. Until criteria are expressly set, which is yet to happen, these businesses will be in limbo awaiting further guidance.
- There are many leases in the institutional sector that did not have a provision for rent abatement on the basis of inaccessibility due to the pandemic. While some of these are private companies, many are listed. It could be argued therefore that the policy unfairly singles out a particular class of landlord. For the listed property companies—as rental income goes to their bottom lines and the ability to pay dividends to shareholders – many of

us will unknowingly hold shares in these companies through our Kiwisaver so any rent abatements may impact beyond the immediate business.

- In relation to shopping malls (which typically did not have abatement provisions) rent is often split into a fixed rental and a component payable based upon turnover. The tenants in those cases would have already received the abatement via not paying turnover rent. As turnover rent is designed to share the risk and reward of a business in shopping centres is it right that the tenant can seek further abatement from the landlord?
- It's not clear if the government subsidy towards arbitration costs will only be available to those with the new implied right to rent abatement, or if those tenants that have a right to a rent abatement already in their lease (but have not yet reached agreement with the landlord as to the level of abatement to apply) will be able to benefit from it also.
- Finally, there could an injustice here for businesses who have already taken action. As the contribution to arbitration is only for those where no arrangements had been made, it may be unfair that, through agreeing a rent position prior to the government announcement, some tenants will not have the opportunity of a subsidised arbitration process that may (or may not) have produced a better outcome for them.

The intention of the initiative is clear, but it may take some time to ensure all ramifications are fully addressed. Meanwhile the path for resolution for some landlords and tenants remains ongoing and unclear.

## KEY CONTACTS



**Michelle Hill**  
Partner  
D +64 9 916 6374  
M +64 27 4582 828  
E [michelle.hill@dentons.com](mailto:michelle.hill@dentons.com)



**Amy Johns**  
Senior Associate  
D +64 9 375 1148  
M +64 21 489 794  
E [amy.johns@dentons.com](mailto:amy.johns@dentons.com)

