



# Cabinet Economic Development Committee

## Minute of Decision

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### Arbitrating Commercial Leases Disputes

Portfolio Justice

On 3 June 2020, the Cabinet Economic Development Committee, having been authorised by Cabinet to have Power to Act [CAB-20-MIN-0255]:

#### Background

- 1 **noted** that many small businesses are struggling to meet fixed costs due to the loss of revenue caused by COVID-19, and that there is no general contractual right to a decreased rent at this time;
- 2 **noted** that businesses are at a greater risk of insolvency when they cannot come to a reasonable agreement about a temporary change to their lease;

#### Proposed changes

- 3 **agreed** that the Property Law Act 2007 be amended to:
  - 3.1 imply a clause into leases of businesses that meet eligibility criteria that requires that a fair proportion of rent and outgoings cease to be paid when a tenant's business has suffered a material loss of revenue because of the restrictions put in place to combat COVID-19;
  - 3.2 establish the following criteria for businesses who would be eligible to have the clause referred to in paragraph 3.1 above implied into their commercial lease:
    - 3.2.1 the business has 20 or fewer full-time equivalent staff per lease site;
    - 3.2.2 the business is New Zealand based;
    - 3.2.3 the business has not already come to an agreement for a rent abatement with their landlord;
  - 3.3 provide clear rules that must be followed when determining what factors must be considered in determining a fair proportion, based on the principles that the interests of the landlord and the tenant should both be taken into account, and the financial burden of COVID-19 fairly proportioned;

- 3.4 provide clear guidance on what other measures parties may agree to as a temporary change to support them both through the pressures caused by COVID-19;
- 3.5 require any disputes under the implied clause to be settled in arbitration;
- 4 **noted** that any appeals of an arbitral decision would be allowed under the grounds established in the Arbitration Act 1996;
- 5 **agreed** that the government will support parties to access arbitration in a timely and cost-effective manner through a government subsidy provided for streamlined arbitrations at a rate of \$6,000 per arbitration;
- 6 **agreed** that the amendments will have retrospective effect and apply from the date of this policy announcement and extend for six months after enactment of the Bill;

**Financial implications**

- 7 **agreed** to establish the following new appropriation:

Vote	Appropriation Minister	Title	Type	Scope
Justice	Minister of Justice	COVID-19: arbitrating commercial lease disputes	Non-departmental output expense	This appropriation is limited to procuring arbitration services for commercial lease disputes arising due to the impacts of COVID-19.

- 8 **approved** the following changes to appropriations to give effect to the above policy decisions, with a corresponding impact on the operating balance and net core Crown debt:

Vote Justice Minister of Justice	\$m – increase/(decrease)				
	2019/20	2020/21	2021/22	2022/23	2023/24 & Outyears
Non-Departmental Output Expense: COVID-19: arbitrating commercial lease disputes	-	20.000	-	-	-

- 9 **agreed** that the changes to appropriations for 2020/21 above be included in the 2020/21 Supplementary Estimates and that, in the interim, the increase be met from Imprest Supply;

- 10 **agreed** to establish a tagged operating contingency of up to the amounts as follows in Vote Justice to provide for a subsidy for COVID-19 commercial lease disputes:

	\$m – increase/(decrease)				
	2019/20	2020/21	2021/22	2022/23	2023/24 & Outyears
COVID-19: arbitrating commercial lease disputes: Tagged Operating Contingency	-	20.000	-	-	-

- 11 **authorised** the Minister of Justice and the Minister of Finance jointly to drawdown the tagged operating contingency in paragraph 10 above, subject to their satisfaction of the estimated demand for the service;

- 12 **agreed** that the expenses incurred under paragraph 8 above and the tagged operating contingency in paragraph 10 above be charged against the COVID-19 Response and Recovery Fund;

### Legislative implications

- 13 **invited** the Minister of Justice to issue drafting instructions to the Parliamentary Counsel Office to give effect to the above paragraphs;
- 14 **authorised** the Minister of Justice to make additional minor policy decisions, in discussion with the Minister of Finance or the Minister of Small Business, as appropriate;
- 15 **authorised** the Minister of Justice to approve the drafting and introduction of an amendment Bill.

Janine Harvey  
Committee Secretary

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#### Present:

Rt Hon Winston Peters  
Hon Kelvin Davis  
Hon Grant Robertson (Chair)  
Hon Phil Twyford  
Hon Andrew Little  
Hon David Parker  
Hon Nanaia Mahuta  
Hon Stuart Nash  
Hon Jenny Salesa  
Hon Damien O'Connor  
Hon Kris Faafoi  
Hon Shane Jones  
Hon James Shaw  
Hon Eugenie Sage

#### Officials present from:

Office of the Prime Minister  
Officials Committee for DEV

**In Confidence**

Office of the Minister of Justice

Cabinet Economic Development Committee

**COVID-19: ARBITRATING COMMERCIAL LEASE DISPUTES**

**Proposal**

- 1 I seek agreement to a package of measures to support commercial tenants and landlords to come to agreements to adjust the terms of their leases. This will enable more businesses to remain solvent through the COVID-19 epidemic.

**Executive Summary**

- 2 The COVID-19 crisis has had a significant impact across the economy, especially on the revenue of small and medium enterprises (SMEs). This loss of revenue can make it difficult to meet fixed costs such as rent.
- 3 While many commercial leases contain a provision to reduce rent in emergencies, many do not. Tenants to leases without this provision are in a weaker position, as there is no general right in law that would allow for a rent reduction. The Government has encouraged commercial tenants and landlords to work together to reach a fair agreement on the payment of rent in response to COVID-19. However, some parties appear to be unwilling to renegotiate fair payment terms. This could lead to more businesses becoming insolvent, worsening the impact of COVID-19 on the New Zealand economy.
- 4 To address this, I have developed a package of measures, consisting of:
  - 4.1 implying a clause into commercial leases of businesses that meet certain criteria, that would require that a fair proportion of rent and outgoings cease to be paid.
  - 4.2 providing statutory direction on how the implied clause is to be interpreted, including the factors that would need to be considered in setting the reduced rent.
  - 4.3 requiring that disputes about the implied clause be settled through a compulsory arbitration process.
  - 4.4 supporting parties to access arbitration in a timely and cost-effective manner through a Government subsidy for streamlined arbitration services.
- 5 I seek agreement to a Bill to amend the Property Law Act 2007. I propose that these legislative changes have retrospective effect. They will take into effect from the date that this policy announcement is made.
- 6 I also propose the Government allocate funding of \$40.000 million to deliver improved access to arbitration in a timely and cost-effective way. This would

be delivered via contracted providers, who would receive a subsidy of \$6,000 including GST per dispute for a fixed-rate, streamlined arbitration service. To be eligible for the subsidised service at least one party would need to be a small or medium enterprise receiving the Wage Subsidy.

## Background

- 7 The COVID-19 crisis has had a significant impact across the economy, especially on small and medium enterprises (SMEs). SMEs are defined as a small or medium business that has 50 or fewer full-time equivalent employees. Many are facing a severe loss of revenue as a result of the restrictions on business activity that are necessary to fight the epidemic. These businesses are also affected by the high degree of uncertainty about when normal levels of business activity can resume. This loss of revenue can make it difficult to meet fixed costs, such as rent.
- 8 I am concerned that some landlords and tenants are not coming together to make agreements that reflect the seriousness and uniqueness of this event. I am aware of large commercial tenants declaring that they will refuse to pay any rent for several months. I am also aware of landlords demanding full rent from small retailers that were unable to trade at all under the Alert Level 4 restrictions and were very limited under the Alert Level 3 restrictions. This sort of behaviour will lead to more businesses becoming insolvent and will worsen the economic impact of COVID-19 across New Zealand. I want to provide landlords and tenants more tools to assist in their negotiations.
- 9 The proposals in this paper are intended to complement other proposals being put forward by other Ministers to support businesses.

*Many leases contain a provision to reduce rent in emergencies, but many do not*

- 10 Many commercial leases use the Auckland District Law Society (ADLS) 2012 template. Learning from the experience of the Canterbury earthquakes, this template was updated to contain a default “No Access in Emergency” clause (clause 27.5). The clause states that:
- 10.1 If there is an emergency and the Tenant is unable to gain access to the premises to fully conduct the Tenant’s business from the premises because of reasons of safety, including restriction on occupation of the premises by any competent authority.
- 10.2 Then a proportion of the rent and outgoings shall cease to be payable for the period commencing on the date when the Tenant became unable to gain access to the premises to fully conduct the tenant’s business from the premises until the inability ceases.
- 11 This contractual clause has been the basis of many commercial negotiations since the Alert Level 4 restrictions were announced. I understand that a key point of negotiation has been what a “fair proportion” is in the circumstances and what factors should be considered, such as whether the landlord’s ability to make mortgage repayments is relevant. I note that the extent to which a

tenant can fully conduct their business will vary depending on the restrictions that apply to them under the different alert levels. This will impact what a “fair proportion” of rent they would cease paying would be.

- 12 Many businesses, however, have leases that do not contain this clause. Those tenants are in a weaker negotiating position and must rely on the goodwill of their landlord, or the landlord taking a longer-term economic view in order to agree on a rent abatement or some other relief. There is no general right in law that would allow for a rent reduction.

*The Government has encouraged parties to make agreements, but some parties remain unwilling*

- 13 The Government has encouraged commercial tenants and landlords to work together to reach a fair agreement on the payment of rent. It is generally in both parties’ best interest to make an agreement, even when the lease does not contain a rent abatement clause, because it will support the tenant to stay solvent, and the landlord may not be able to easily find a new tenant if the current tenant’s business fails. Agreements could focus on measures other than a rent abatement, including a rent waiver, a payment plan, or other adjustments to the lease such as a variation of the lease which assists the tenants (e.g. deferring rent review).
- 14 As mentioned at paragraph 8, I know that there are landlords and tenants who are unable to reach an agreement about whether to amend their leases, and on what terms. I am deeply concerned about this and consider that there are actions that can be taken to assist a fair resolution through amending the Property Law Act 2007.

*The scale of this issue is not clear but there is evidence of the problem*

- 15 Business representative organisations such as Business NZ, EMA Northern and the Property Council have strongly advocated since the start of the alert level 4 lockdown for more effective intervention to ensure a more equitable sharing between landlords and tenants of the cost of the non-trading period.
- 16 There is some data that shows businesses are not paying rent. Re-leased, a cloud based commercial property software firm that manages invoicing and payments for more than 10,000 commercial properties including 35,000 leases around the country, has released data based on 800 properties indicating that one-third of commercial tenants did not pay rent in April. Rent from the retail sector was down 53 per cent and office and industrial rents down by around a third. It is not clear from this data how much of this unpaid rent is the result of rent reduction agreements between landlords and tenants, though Re-leased notes that there was a 430 per cent increase in the number of credit allocations by 1 April 2020 (these notes are commonly used to waive part or all of a rent payment).
- 17 I am aware through correspondence, media reports, and submissions to the Epidemic Response Committee that many businesses are struggling to pay rent, and that some landlords and tenants have not been able to agree on a

variation to their lease. New Zealand Council of Retail Property (NZCoRP) concluded from a survey of its membership of commercial premises owners that 75 per cent had offered concessionary arrangements (the nature and extent of which were not quantified) to their tenants with agreement being reached with only 50 per cent to whom they had been offered. It is possible to conclude from this that there is a need for assistance through appropriate statutory signalling and resort to a mechanism that encourages agreement to be reached or to which resort can be taken for an arbitrated decision.

*This is not a problem with a one size fits all solution*

- 18 I am conscious that tenants' businesses have been and continue to be affected by the epidemic to different extents, and some commercial tenants are better placed than their landlords to withstand the financial pressure. Many landlords may be facing significant financial pressure, have mortgage obligations, and could be classed as SMEs themselves. There is also a variety of complex commercial arrangements across the market, such as cascading sub-letting and the use of guarantors.

**Overview of package**

- 19 To address this issue, I have developed a package of measures for Cabinet's agreement. This package consists of:
- 19.1 implying a clause into the commercial leases of businesses that meet eligibility criteria, similar to the "No Access in Emergency" clause, which would require that a fair proportion of rent and outgoings cease to be paid.
  - 19.2 providing statutory direction on how the implied clause is to be interpreted, including the factors that would need to be considered in setting the reduced rent. This would avoid the disputes that are happening now when applying the "No Access in Emergency" clause.
  - 19.3 requiring that disputes about the implied clause be settled through a compulsory arbitration process.
  - 19.4 supporting parties to access arbitration in a timely and cost-effective manner through a Government subsidy provided for streamlined arbitrations.
- 20 A new clause would be implied into the leases of businesses that meet eligibility criteria. The rent payable under a lease is determined in accordance with the particular lease, so an implied clause is an effective way of modifying the settings for a large number of leases. This will ensure that leases are varied in response to COVID-19, in a way that strengthens the position of SMEs, and makes clear that the financial impacts of COVID-19 should be shared between tenants and landlords.
- 21 I note that implied terms are not uncommon, particularly in property law. Schedule 3 of the Property Law Act already implies a number of covenants in

leases, such as the covenant of quiet enjoyment (although these default covenants can be excluded or modified).

*The key aspects of the new clause*

- 22 The exact wording of the implied clause would be finalised during the drafting of the Bill. The clause should be similar to the “No Access in Emergency” clause but also clearly require that:
- 22.1 there is, or has been a material negative impact on the tenant’s business due to COVID-19, whether or not the lessee is able to access the premises
  - 22.2 the parties negotiate a fair proportion of rent and outgoings that would cease to be paid. Parties could consider whether, in the circumstances, it was most appropriate for this to take the form of:
    - 22.2.1 no rent being payable for a period; or
    - 22.2.2 reduced rent being payable for a period, including reductions of varying levels over successive periods; or
    - 22.2.3 a scheduled rent increase being deferred; or
    - 22.2.4 rent continues to be paid unabated; or
    - 22.2.5 a mix of any of these options.
  - 22.3 the clause should also include a list of other types of measures that could be negotiated, such as a rent deferment, if that is fair in the circumstances. The clause would therefore enable the parties to negotiate about these matters if they wish to, but this negotiation would not be mandatory.

*There will be clear statutory rules for interpreting the implied clause*

- 23 The legislation would also provide guidance for what factors should be considered in interpreting and applying the implied clause. An issue with the “No Access in Emergency” clause is that it is not clear what factors should be considered when determining a fair proportion – for example, whether the proportion is determined by looking solely at the tenants’ position or whether it should also include the landlords’.
- 24 To address this, the legislation would clarify how the parties should determine a fair proportion. This guidance would be based on the principles that the interests of the lessor and the lessee should both be taken into account, and the financial burden of COVID-19 fairly proportioned. My view is that the following factors could be useful to determine a fair proportion:
- 24.1 the financial position of the lessor, the lessee, and any other relevant party, including:



- 24.1.1 the impact of the COVID-19 restrictions on the business, including the impact of restrictions that are no longer in place
  - 24.1.2 any mortgage obligations relevant to the leased premises
  - 24.1.3 any financial support available to them
  - 24.1.4 their revenue and profit levels in recent years
  - 24.1.5 their ability to survive financially the effects of official requirements to counter an outbreak of COVID-19
  - 24.1.6 any difference in size and resources between the lessor, the lessee, and any other relevant party
  - 24.1.7 any other factor that is reasonably relevant
- 24.2 a relevant party is any sublessee, any lessor under a superior lease, any parent company for the lessor or lessee, and any other party who is reasonably relevant.
- 25 I am conscious that although this clause grants a right to tenants, it also requires fairness for landlords. I note that in some situations it might be fair for there to only be a very small rent reduction. This will depend on the relative circumstances of each party.
- The clause will be implied into the leases of businesses that meet eligibility criteria*
- 26 I propose criteria to target rent relief to the businesses that need it most. The implied term would only apply to the leases of businesses that:
- 26.1 have 50 or fewer full-time equivalent staff;
  - 26.2 are New Zealand based. Businesses that have an overseas head office or are part of an overseas based multi-national would not have the term implied into their leases.
- 27 The number of employees of the business would be based on, not only the business's employees, but the employees of other entities closely associated with the business. This would include the employees of any parent company or other company that is a subsidiary of the parent company. It is necessary to explore through drafting whether other associated entities should be included in this definition, for example, where the business, or the associated entity, is not a company. I seek authority to settle on the final wording of this element during the drafting process.
- 28 I also seek authority to approve the final definition of a "New Zealand based" business in consultation with relevant Ministers.

*No impact on parties who have already agreed*

- 29 There could be confusion for parties whose leases already include the “No Access in Emergency” clause or a similar rent abatement clause. It may be necessary to add into the implied term language to the effect of “any commercial lease agreement containing clause 27.5 of the standard ADLS commercial lease agreement is modified to be consistent with this implied term”.
- 30 However, the clause would not apply where parties had agreed before the announcement of the proposals about the proportion of rent that should continue to be paid in light of the COVID-19 restrictions. This would include situations where the lease required an adjustment of the rent, as well those where the lease was silent on this point, but the parties still reached an agreement. It may include where parties have agreed that rent should continue without abatement (for example, where the tenant has been able to continue operating), but it would not include situations where the landlord has insisted on strictly enforcing the terms of the lease in response to the tenant’s request for a rent reduction.

*The policy intention of tenants and landlords sharing the financial burden is clearly signalled*

- 31 The development of the proposal has been guided by the principle that the financial burden of COVID-19 should be proportioned in a way that is fair to both the landlord and the tenant, taking into account their respective bargaining power, financial position (pre- and post-COVID-19 measures) and the need to support both parties to remain solvent.
- 32 These ideas would be clearly reflected in the proposed statutory factors to determine what is a fair proportion under the clause.

**Where parties cannot agree on how to implement the implied term they will have to seek arbitration**

- 33 Arbitration tends to be the preferred dispute mechanism of choice in commercial leases and by parties in a contract. I propose requiring parties to seek arbitration to resolve disputes about the implied clause. Requiring arbitration in all cases would provide efficiency in terms of time and cost for parties as well as certainty and consistency. In order to support parties to access timely and affordable arbitration, I propose a Government subsidy for streamlined arbitrations. Further detail on this subsidy is provided below.
- 34 Arbitration is a private dispute resolution mechanism by an independent third party that can be chosen by the parties. The Arbitration Act 1996 was set up to encourage arbitration to resolve commercial and other disputes, to promote consistency in arbitration and to align New Zealand with international practices.
- 35 Arbitration is generally a quicker, cheaper alternative to a court process. However, the process can sometimes still be very time consuming. It allows

parties to tailor the process to their particular dispute and does not necessarily require legal representation.

- 36 Generally, arbitral decisions cannot be appealed or reviewed in full and are final and binding. This avoids the costly and time-consuming appeals process that may occur in normal civil litigation. The scope of the grounds for an appeal are very limited unless the parties agree otherwise.

*The arbitration process*

- 37 The statutory arbitration framework under the Arbitration Act 1996 would apply to any disputes under the implied clause. This means that the rules in Schedules 1 and 2 of the Arbitration Act will determine the arbitration process.
- 38 A key feature of arbitration under the Arbitration Act is that the parties control how the arbitration will be run but the Act contains default rules if the parties do not agree otherwise. For example, there will usually be one arbitrator in domestic proceedings, but the parties can agree on a panel of arbitrators.
- 39 As a result, there is not a standard timeframe for arbitration, as it is up to the parties to agree on the process. Arbitration processes can take as long as court processes, depending on the dispute. Costs also vary from provider to provider, and from case to case and can potentially be high for some businesses.

*Government support for arbitration*

- 40 In order to support parties to access timely and affordable arbitration, I propose the Government allocate funding of \$40 million to provide a subsidy for streamlined arbitrations. It is my intention that this will be a fixed pool of funding, available until it is exhausted.
- 41 This would be delivered via contracted providers, who would receive a subsidy of \$6,000 including GST per dispute to deliver a fixed-rate, streamlined arbitration service. To be eligible for the subsidised service at least one party would need to be a small or medium enterprise receiving the Wage Subsidy. Parties to the dispute would be expected to fund the remaining costs of the service.
- 42 The Ministry of Justice will deliver the subsidy by contracting for cost and time-efficient services. While parties will continue to be able to choose their arbitrator, only parties using the contracted provider(s) will have access to the subsidy. I expect that a streamlined arbitration process could include features such as a default decision on the papers, and tight timeframes for submissions and decisions.
- 43 There is uncertainty about the potential demand for subsidised arbitration, and a number of factors may influence uptake. Access to an efficient and affordable arbitration process might encourage parties to agree in advance to avoid the uncertainty of a decision not being in their favour. However, parties

who are currently participating in mediation might be encouraged instead to consider arbitration.

**In limited situations arbitral decisions can be appealed to the High Court**

44 I propose that the right to appeal an arbitrator's decision of a dispute about the implied clause follow the standard process for appealing arbitral decisions. Decisions made by an arbitrator can be appealed to the High Court in limited circumstances, as per the Arbitration Act 1996. The High Court has powers to suspend or postpone the setting aside application for a period of time in order to enable the arbitral tribunal to take steps to eliminate the grounds for setting aside. The High Court may also make an order directing payment into court or otherwise securing any money order in the award to be paid.

45 Parties may agree to appeal to the High Court on a question of law or the High Court may grant leave to appeal on a question of law. The Arbitration Act states that the High Court shall not grant leave to appeal unless the court considers, having regard to all the circumstances, that the determination of the question could substantially affect the rights of one or more parties. On determination of the appeal, the High Court may confirm, vary or set aside the award, or remit the award back to the arbitral tribunal for reconsideration.

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### Timing of the proposed measures

#### *When should the implied clause take effect from?*

- 51 I propose that the changes apply from the date that this policy announcement is made. For parties that have not already agreed to a rent reduction, the clause should oblige parties to agree to a fair proportion of rent that can cease to be paid, for a period before the law is passed.
- 52 The time between the announcement of proposed law changes and the enactment of validating legislation means that people would be required to act in accordance with the law as announced by the Government, rather than the law itself. This creates uncertainty about what the law is or will be in the future.
- 53 This is similar to the situation in *Fitzgerald v Muldoon* [1976] 2 NZLR 615 when the then Prime Minister announced that the Government would abolish the superannuation scheme in the New Zealand Superannuation Act 1974. The Government planned to repeal the Act when Parliament reconvened and apply it retrospectively to the date of the announcement.
- 54 Wild CJ held that the Government had violated article 1 of the Bill of Rights 1688, which states: "That the pretended power of suspending of laws or the execution of laws by regal authority without consent of Parliament is illegal."
- 55 The Chief Justice declared that the Prime Minister had suspended Parliament's law without its consent in breach of the Bill of Rights 1688.

#### *How long should the implied clause be in effect?*

- 56 I wish for there to be some flexibility about when exactly the implied clause ceases. I propose that the implied clause applies for six months after enactment of the Bill. I see some benefits to the ability for parties to agree to a slight rent reduction for a period following the end of formal restrictions on business to acknowledge that things will take time to get back to normal levels of business.

### Financial Implications

- 57 Implementation of the proposal to subsidise arbitration will result in the Ministry of Justice incurring financial implications for the current and future

years, which is being sought through the COVID-19 Response and Recovery Fund.

- 58 To support arbitration providers to scale-up quickly, additional costs of approximately \$200,000 will be required to cover additional management and administration costs. The Ministry is able to fund this internally by reallocation of funding within its existing baseline.
- 59 The Ministry is expecting to start the implementation of the arbitration subsidy as soon as possible for the 2020/21 fiscal year. While the volumes for the process are uncertain, the Ministry expects that a significant proportion of disputes will arise in the coming months, particularly as alert levels change. On this basis, the Ministry has conservatively estimated \$20.000 million may be required for this initial period.
- 60 However, as the volumes of cases are uncertain, I am also seeking a tagged contingency of an additional \$20.000 million to be set up for the 2020/21 fiscal year.
- 61 Funding for out years will be sought as part of Budget 2021. However, most cases are expected to be resolved by 30 June 2021.
- 62 For the administration of the subsidy, the Ministry is seeking to set up a new time limited non-departmental output expense appropriation.
- 63 The financial impact of current and 2020/21 will be sought through the COVID-19 Response and Recovery Fund.

### **Legislative Implications**

- 64 The proposals in this paper require legislation to implement. I seek agreement to issue drafting instructions to the Parliamentary Counsel Office. I intend to do this immediately.
- 65 I propose making these changes through a Bill to amend the Property Law Act 2007.
- 66 I will determine the dates for introducing a new Bill into the House and other steps in the legislative process following consultation with the Leader of the House.

### **Impact Analysis**

#### *Regulatory Impact Statement*

- 67 The Treasury has determined that this is a direct Covid-19 response and has suspended the RIA requirements in accordance with (CAB-20-MIN-0138). The paper refers to impacts and mitigations for the proposals.

*Risks*

- 68 The proposals in this paper are not measures that I would consider taking in normal circumstances. It is a reflection of the seriousness of the impact of the COVID-19 epidemic on New Zealand businesses that I consider these to be necessary. I wish to be clear with Cabinet about the risks and potential criticisms of these proposals.
- 68.1 *Sanctity of contract:* These proposals go against the legal principle of sanctity of contract because they would add contractual terms and obligations to leases that the parties did not mutually agree. There is a general principle in contract law that parties should adhere to what they have agreed, and third parties should not interfere. Although there are some exceptions in law, the general principle of the sanctity of contract provides certainty for businesses and supports confidence in New Zealand's legal system. These factors contribute to the attractiveness of New Zealand as a destination for global trade and investment in that parties can rely on their agreements being enforceable on the agreed terms.
- 68.2 *The rule of law:* These and many other proposals responding to COVID-19 are happening under fast tracked processes without the full amount of usual scrutiny. As Minister of Justice, I am a firmly committed to foundational legal principles like the rule of law. I consider that the law should be clear and consistent, and as much as possible the usual legislative processes should be followed to allow proper scrutiny of proposals. These proposals are time dependent; they need to happen quickly and they need to apply retrospectively. If they are not made in this way, they will not achieve their intended purpose to support businesses through this time.

**Human Rights**

- 69 The proposals in this paper do not engage significant issues of consistency with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993. While there is no general protection for property under the Bill of Rights Act, the proposals in this paper do change obligations under leases which impacts on landlord's exercise of their property rights. The restrictions are considered necessary to protect the property rights of tenants and assist businesses in surviving COVID-19. The restrictions will only apply temporarily. The proposals require any changes to be fair and appropriately consider the position of landlords.
- 70 Providing relief only to tenants who are based in New Zealand could be seen as drawing a distinction indirectly on basis of nationality or citizenship. However, even if it is the case that there is an indirect distinction, I consider that it is justified because of the need to target this relief to small and medium New Zealand businesses that are affected by COVID-19. A final view on these proposals' consistency with New Zealand Bill of Rights Act will be possible once the Bill is drafted.

## Consultation

- 71 The following agencies have been consulted in developing the proposals in this paper: Ministry of Business, Innovation and Employment, the Treasury, Ministry of Foreign Affairs and Trade, the Parliamentary Counsel Office, and the Department of the Prime Minister and Cabinet.

## Proactive Release

- 72 I will consider proactive release of this paper pursuant to Cabinet Office circular CO (18) 4.

## Recommendations

The Minister of Justice recommends that the Committee:

- 1 **note** that many small businesses are struggling to meet fixed costs due to the loss of revenue caused by COVID-19, and there is no general contractual right to a decreased rent at this time;
- 2 **note** that businesses are at a greater risk of insolvency when they cannot come to a reasonable agreement about a temporary change to their lease;
- 3 **agree** that the Property Law Act 2007 be amended to:
  - 3.1 imply a clause into leases of businesses that meet eligibility criteria that requires that a fair proportion of rent and outgoings cease to be paid when a tenant's business has suffered a material loss of revenue because of the restrictions put in place to combat COVID-19;
  - 3.2 establish the following criteria for businesses who would be eligible to have the clause mentioned at recommendation 3.1 implied into their commercial lease:
    - 3.2.1 the business has 50 or fewer full-time equivalent staff;
    - 3.2.2 the business is New Zealand based;
    - 3.2.3 the business has not already come to an agreement for a rent abatement with their landlord.
  - 3.3 provide clear rules that must be followed when determining what factors must be considered in determining a fair proportion, based on the principles that the interests of the landlord and the tenant should both be taken into account, and the financial burden of COVID-19 fairly proportioned;
  - 3.4 provide clear guidance on what other measures parties may agree to as a temporary change to support them both through the pressures caused by COVID-19;



3.5 require any disputes under the implied clause to be settled in arbitration.

4 **note** that any appeals of an arbitral decision would be allowed under the grounds established in the Arbitration Act 1996;

5 **agree** that government will support parties to access arbitration in a timely and cost-effective manner through a Government subsidy provided for streamlined arbitrations at a rate of \$6,000 per arbitration;

6 **agree** that the amendments will have retrospective effect and apply from the date of this policy announcement and extend for six months after enactment of the Bill;

7 **agree** to establish the following new appropriation:

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8 **approve** the following changes to appropriations to give effect to the policy decisions in recommendations above with a corresponding impact on the operating balance and net core Crown debt:

Vote Justice Minister of Justice	\$m – increase/(decrease)				
	2019/20	2020/21	2021/22	2022/23	2023/24 & Outyears
Non-Departmental Output Expense: COVID-19: arbitrating commercial lease disputes	-	20.000	-	-	-

9 **agree** that the proposed changes to appropriations for 2020/21 above be included in the 2020/21 Supplementary Estimates and that, in the interim, the increase be met from Imprest Supply;

10 **agree** to establish a tagged operating contingency of up to the amounts as follows in Vote Justice to provide for a subsidy for COVID-19 commercial lease disputes:

	\$m – increase/(decrease)				
	2019/20	2020/21	2021/22	2022/23	2023/24 & Outyears
COVID-19: arbitrating commercial lease disputes – Tagged Operating Contingency	-	20.000	-	-	-

- 11 **authorise** the Minister of Justice and the Minister of Finance jointly drawdown the tagged operating contingency in recommendation 10 above, subject to their satisfaction of the estimated demand for the service;
- 12 **agree** that the expenses incurred under recommendation 8 above and the tagged operating contingency in recommendation 10 above be charged against the COVID-19 Response and Recovery Fund;
- 13 **invite** the Minister of Justice to issue drafting instructions to give effect to the above proposals;
- 14 **agree** that the Minister of Justice be authorised to make additional minor policy decisions, in discussion with the Minister of Finance or the Minister of Small Business, as appropriate;
- 15 **agree** that the Minister of Justice can approve the drafting and introduction of an amendment Bill.

Authorised for lodgement

Hon Andrew Little

Minister for Justice