

COVID-19 Property Law Considerations

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This guidance note focuses primarily on the effect of COVID-19 on Sale and Purchase Agreements; Leases; and Mortgages, and also sets out the tax relief measures applicable to property owners.

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Sale and Purchase Agreements

Completion: issues at settlement

The Ministry of Business, Innovation and Employment (MBIE)'s advice regarding property sale and purchases during Alert Levels 1 – 4 is as follows:

Alert Level 4

At Alert Level 4, people cannot inspect homes in-person prior to settlement, physically hand over documents or keys, or meet their lawyer in person. This should be done remotely instead.

At Alert Level 4, people cannot move houses except in limited cases, such as involving family violence. Moving companies are not considered an essential service and therefore cannot operate at Alert Level 4.

Alert Level 3

People can move homes at Alert Level 3. They can travel between regions, including using domestic air services for the purposes of moving house. All freight can be moved around the country at Alert Level 3 and moving companies can operate as long as they do so safely.

Where possible, the physical interactions involved in house sale, purchase and settlement should be done remotely at Alert Level 3. It may be possible to do a final pre-settlement inspection in person or have a real estate agent come into the home, as long as all physical distancing and public health measures are taken.

Alert Levels 1 and 2

The physical interactions involved in house sale, purchase and settlement (e.g. open homes and inspections) are possible at Alert Levels 1 and 2, subject to any conditions at those alert levels. For example, open homes will need to comply with contact tracing and distancing requirements.

Guidance for Alert Level 2

Sale and Purchase Agreements can be negotiated and executed in person, provided this can be done safely (e.g. physical distancing (2m minimum) can be maintained at all times, hygiene etiquette is adhered to, hands sanitised when entering and exiting property), Consider whether to insert a clause to address how settlement will occur if the Alert Level increases to Level 4 before the settlement date (see information regarding Law Society suggested clause during lockdown period as outlined at 'Guidance for Alert Levels 3 and 4' below).

At Alert Level 2, travel between regions is permitted, so settlement for inter-region house sales can occur. Official advice regarding hygiene practices, social distancing, and other Level 2 measures must be adhered to.

Guidance for Alert Levels 3 and 4

The Law Society issued interim guidance (see [Property Law Section recommends Level 4 property settlement clause](#)) to help lawyers and clients in the COVID-19 lockdown context. An option recommended by the Property Law Section of the New Zealand Law Society is a suggested clause to be inserted into new agreements that are drafted during the lockdown period:

The parties agree that settlement is hereby deferred to the 10th working day after the Government reduces the COVID-19 Level to Level 2 or below, or to such other date as may be mutually agreed. For the sake of clarity neither party shall have any claim against the other in relation to this deferral.

The Property Law Section's rationale for including the wording "10th working day" is because it is arguable that 'days' for the duration of the lockdown period are not 'working days' for the purposes of an Agreement for Sale and Purchase.

In a [Ministry of Justice guidance communication](#) on property sales and settlements during COVID-19, the Ministry suggests that, in addition to the clause suggested by the Law Society, there are other options that may suit the parties' particular circumstances, including:

- deferring settlement to a different time (noting that not everyone can move on the 10th working day after a reduction to COVID-19 Alert Level 2);
- a price adjustment;
- lowering the interest rate for late settlement; or
- the buyer renting the property back to the seller after settlement.

Parties may otherwise mutually agree to adopt alternative clauses to suit their circumstances. An example that the Property Law Section gives is where a purchaser may wish to settle to avoid a change in circumstances in the future that may result in a lender reassessing availability of funds (this would require the vendor's agreement).

During Alert Levels 3 and 4, negotiating and executing sale and purchase agreements is required to be contactless. Agreements cannot be negotiated or executed in person and must be explained via phone or virtual methods; they can be drawn up and executed via online methods or courier.

Guidance on settlements between regions at different Alert Levels

The Property Law Section of the New Zealand Law Society has stated there is a strong argument that moving between regions at different Alert Levels is permitted in the absence of any definitive government statement to the contrary. See [Covid-19 property update: settlements at levels 3 and below](#).

In the case of the 12 August 2020 move to Alert Level 3 for the Auckland region and Alert Level 2 for the rest of New Zealand, the Director-General of Health's [Exemption of Persons From Requirements of the COVID-19 Public Health Response \(Alert Levels 3 and 2\) Order 2020](#), gazetted on 15 August, provided clarity that people could move into or out of Auckland for the purpose of permanently relocating their business, home or place of residence.

The Property Law Section recommended it may be helpful to provide a letter on law firm letterhead to clients moving into or out of the Alert Level 3 region to assist when passing through Police checkpoints. See [Covid-19 property update: shifting into, out of and through Auckland](#).

Guidance on remote signing:

Land Information New Zealand (LINZ) issued [interim guidance](#) for authority and identity requirements and electronic signing of documents. This will have effect until further notice. The Interim Guideline includes changes in the use of audio-visual technology, delegating witnessing and electronic signatures.

LINZ have also published [guidance](#) on their website on signing A&I forms when printing is unavailable; paper instruments for manual dealings; relying on scanned copies; and statutory declarations.

From 17 April, LINZ will accept statutory declarations made via audiovisual link or audio link completed in accordance with the [Epidemic Preparedness \(Oaths and Declarations Act 1957\) Immediate Modification Order 2020](#).

See also:

[Unite against COVID-19: COVID-19 Alert System](#)

[Ministry of Justice: Property sales and settlements guidance for lawyers during COVID-19](#)

[Land Information New Zealand: Signing documents remotely](#)

[Real Estate Institute of New Zealand – Sales: Guidelines for operating under COVID-19 Alert Level 3](#)

[New Zealand Law Society: MBIE advice on moving house under Level 3 welcomed](#)

[Auckland District Law Society: COVID-19 Level 4 - Settlements](#)

[New Zealand Law Society: Property Law Section recommends Level 4 property settlement clause](#)

Default under a contract for sale and purchase: general commentary

Although the circumstances surrounding default under a contract for the sale and purchase of land will be different in each instance, the contract should nevertheless identify what processes are to be followed and what remedies will be triggered by certain events of default.

For further general commentary on default under a contract for sale and purchase, see [Default and Remedies](#).

Commercial leases

The COVID-19 lockdown had significant effects on landlords and tenants and their respective rights under their lease.

“No access in an emergency” and rent abatement

Under cl 27.5 of the ADLS Deed of Lease 6th Edition 2012 (5), a tenant can claim an abatement of a “fair proportion” of the rent and outgoings for as long as the tenant cannot access the premises to fully conduct its business due to an emergency (which likely includes the forced closure on non-essential business premises due to the COVID-19 pandemic and consequent State of National Emergency).

The Property Law Section of the New Zealand Law Society has issued information to assist in advising on what would be considered a “fair proportion” of rent and outgoings under cl 27.5. While acknowledging that the assessment of what would be a “fair proportion” of rent is a subjective one, dependent on a range of considerations and individual circumstances, the Property Law Section lists factors that may be considered, including:

- What is fair will depend on the individual circumstances
- A ‘fair proportion’ should be fair having regard to the circumstances of both landlord and tenant
- Nature of the premises and, accordingly, the proportionate change in use and enjoyment of them while the inaccessibility to fully conduct the tenant’s business lasts
- Tenant’s ability to conduct business remotely/ability to continue business
- Rights of termination if the non-access continues
- Impact on the tenant’s ongoing viability if required to pay the rent
- The landlord’s costs in holding and managing the property
- A ‘fair proportion’ may differ as between the rent and outgoings

Additionally, the Property Law Section provides examples of rent reductions which have been negotiated in the market, as follows:

- Retail – Range of 50% to 80% abatement
- Office – Range of 50% to 75% abatement
- Warehousing – 50% (the rationale being that goods were being stored and remain stored during lockdown)
- Tourism - varied

Leases without a “no access in an emergency” clause

For tenants not on a form of lease with the “no access in an emergency” clause, the position is more complex.

These businesses may not have a legal ability to claim a rent and outgoings abatement. It is unlikely that the lease will have a force majeure clause and the doctrine of frustration will be unlikely to apply because the period of the lockdown is (currently) limited. For leases without contractual right to a rent abatement, any rent reduction would likely amount to a variation of the lease and so should be recorded in a short Deed or a formal exchange of letters or emails recording the variation.

Measures to protect commercial landlords and tenants: extension of enforcement timeframes

The COVID-19 Response (Further Management Measures) Legislation Act 2020 has amended the Property Law Act 2007 to extend the periods before enforcement action can be taken for non-payment of rent under commercial leases and default on mortgages. The extensions only apply during the COVID-19 period, defined as starting on 1 April 2020 and ending six months after the Epidemic Preparedness (COVID-19) Notice 2020 expires or is revoked.

Commercial leases

Normally a commercial landlord can cancel a lease where the rent has gone unpaid for not less than 10 working days, the landlord has issued a notice to remedy the breach within not less than 10 working days and the tenant fails to do so by the end of that period. The amendments extend these timeframes from 10 to 30 working days during the COVID-19 period. See ss 245A-245E of the Property Law Act 2007.

Landlords' mortgage payments

Normally if a mortgagor is in default, a mortgagee must give 20 working days' notice to remedy this before it can exercise its powers to take possession of, or sell, the mortgaged property. The amendments extend this period to 40 working days during the COVID-19 period. See ss 120A-120E of the Property Law Act 2007.

New commercial lease support announced

The Government has announced it plans to amend the Property Law Act 2007 to imply a clause into commercial leases requiring a fair reduction in rent where a business has suffered a material loss in revenue due to COVID-19. This clause will apply if the business is New Zealand based, has 20 or fewer full-time equivalent staff (per lease) and has not already come to an agreement with their landlord to temporarily reduce rent.

The Government has also announced that, where agreement cannot be reached, a subsidy will be provided for streamlined arbitrations at a rate of \$6,000 per arbitration.

However, no further details have been released since the initial announcement in June.

See [Arbitrating commercial lease disputes, Ministry of Justice](#).

See also:

[ADLS Deed of Lease — Sample \(Sixth Edition 2012\(5\)\), Auckland District Law Society New Zealand Law Society Property Law Section Bulletin, 20 April 2020](#)
[Commercial property guidance for lawyers during COVID-19](#)
[Guidance for commercial leases and mortgages during COVID-19](#)

Residential tenancies

The Government has indicated that tenants' rights are paramount during the COVID-19 pandemic. Tenancies should be sustained to avoid tenants facing potential homelessness during a pandemic; and from a public health perspective, it is critical that people can remain in their rental properties for the duration of this crisis to enable self-isolation in their own homes.

COVID-19 Response Measures

Effective 26 March, the Government passed emergency legislation to enforce a freeze to residential rent increases, and increased protections for tenants against having their tenancies terminated.

These measures are contained within the [COVID-19 Response \(Urgent Management Measures\) Legislation Act 2020](#), which inserted a new Sch 5 into the [Residential Tenancies Act 1986](#) ("the Act").

Period of application

Schedule 5 of the Residential Tenancies Act 1986 sets out that the rent freeze applies for an initial period of six months, ending 25 September 2020; and that protections against terminations applied for a period of three months, which ended on 25 June 2020.

Rent freeze

Under cl 12 of the new Sch 5, rent cannot be increased in respect of any tenancy until 25 September 2020. If a notice to increase rent was given before the 26 March and had not yet come into effect by that date, that notice is of no effect.

Boarding houses are also subject to the rent freeze.

Fine for increasing rent

A landlord commits an unlawful act by undertaking a rent increase during the rent freeze period and is liable to a maximum fine of \$6,500.

Restriction on termination of tenancy by landlord

Restrictions on tenancy terminations ended on 25 June 2020. From 26 June 2020 landlords can give notice to terminate a tenancy under the standard provisions of the Residential Tenancies Act 1986.

See [Ending a tenancy](#), Tenancy Services.

Role of the Tenancy Tribunal

Sch 5 of the Act provides that until 25 March 2021 the Tenancy Tribunal has the power to have hearings as it sees fit – including on the papers, without attendance from parties, if necessary. The Tribunal may also have hearings by telephone or videoconference.

References:

[COVID-19 Response \(Urgent Management Measures\) Legislation Act 2020](#)

[Residential Tenancies Act 1986, Sch 5](#)

See also:

[Tenancy Services](#)

[Ministry for Housing and Urban Development](#)

[Landlord and Tenants' Q&A \(from the Ministry for Housing and Urban Development\)](#)

For general commentary on Residential tenancies see [Residential tenancies](#). For commentary on exemptions to the Residential Tenancies Act see Leases – [When the residential tenancy legislation applies](#).

Effect of receivers, administrators and liquidators on leases

The economic impacts of the COVID-19 restrictions on trade are likely to result in some companies facing insolvency.

The performance of contractual obligations and the enforcement of contractual rights can be put in jeopardy when a party to the contract becomes insolvent — and that danger is generally no different for leases.

For general commentary relating to the effect of insolvency on leases, see:

[Landlord's remedies](#)

[Effect of receivers, administrators and liquidators on leases](#)

Mortgages

COVID-19 mortgage holiday

New Zealand's retail banks are offering to defer repayments for all residential mortgages for up to six months for mortgage holders financially affected by COVID-19.

Mortgage repayment deferrals mean that affected customers may apply to their bank to suspend payment of principal and interest payments on their loans for up to six months. This package is in addition to any support banks are offering to individual affected customers.

Interest on these loans will still accrue, and deferred interest will be added to the principal amount of the loan.

Banks will assess the suitability for each customer who is asking for a deferral, and each bank will have a different approach to how they manage the process for customers to opt into a mortgage deferral.

See:

[Reserve Bank of New Zealand statement on mortgage freezes](#)

[ANZ: Support during coronavirus](#)

[ASB: COVID-19 support](#)

[Kiwibank: COVID-19 information](#)

[TSB: COVID-19 virus support](#)

[Westpac: We're here to help: COVID-19](#)

For general commentary relating to mortgage default, see [Mortgage default](#)

Tax Relief

The Government has put tax relief measures into place to lessen the impact of the COVID-19 restrictions, including measures applying to building owners. These are contained within the [COVID-19 Response \(Taxation and Social Assistance Urgent Measures\) Act 2020](#), which makes changes to the [Income Tax Act 2007](#) among other Acts.

Depreciation

From the 2020-2021 income year onwards, the Inland Revenue Department have changed depreciation for commercial and industrial building. Tax depreciation on all buildings was previously set at 0%. Now, eligible businesses will be able to claim depreciation deductions in tax returns for commercial and industrial buildings.

These changes are designed to assist businesses with cash flow in the short term, and to enable long term economic recovery by encouraging property investors to invest in new and existing buildings.

Residential buildings are not part of these depreciation changes.

Depreciation for short-stay accommodation and residential buildings

Whether or not a property owner is able to claim depreciation on property used for short-stay accommodation depends on whether it is seen as residential or commercial. The changes to the Income Tax Act 2007 include a change to the definition section to insert a definition of “residential building” as “a dwelling”, including “a building intended to ordinarily provide accommodation for periods of less than 28 days at a time, if the building, together with other buildings on the same land, has less than 4 units for separate accommodation.”

Waiving interest for late tax payments

Interest for late tax payments will be relieved to provide relief for businesses who are directly affected by COVID-19. This will apply for all tax payments due on or after 14 February 2020 and will be at the discretion of Inland Revenue.

References

[Income Tax Act 2007, s DB 65](#)

[Income Tax Act, ss EE 35 - 38](#)

[Income Tax Act ss EZ 13 - 14](#)

[COVID-19 Response \(Taxation and Social Assistance Urgent Measures\) Act 2020, Pt 1](#)

See also:

[Taxation and revenue: Goods and Services Tax](#)

[Inland Revenue Department: COVID-19](#)

[COVID-19: business cash flow and tax measures](#)