
COVID-19 related changes to the Property Law Act 2007 are now effective

The COVID-19 Response (Management Measures) Legislation Act 2021 became effective on 3 November 2021. In this article we focus on the amendments to the Property Law Act 2007 (PLA) made by that Act. These amendments may result in significant alterations to contractual bargains struck between landlords and tenants, particularly in relation to rent abatement during periods when epidemic related premises access restrictions are in force.

Key changes to the PLA

Whilst the Epidemic Preparedness (COVID-19) Notice 2020 (*Epidemic Notice*) is in force, a “no access in an emergency” clause will apply to leases and licences that do not include a similar clause that covers an epidemic.

The PLA now implies a “no access in an emergency” clause into any lease or licence that does not contain a similar clause, and which is in operation during the period from 18 August 2021 until the Epidemic Notice expires (currently mid-December 2021, subject to ongoing three-monthly renewals). If a “no access in an emergency” clause is implied, it will be triggered if:

- the tenant at any time “is unable to gain access to all or any part of the leased premises to conduct fully their operations from all or any part of the leased premises, because of reasons of health or safety related to the epidemic” (*No Access Period*); and
- the parties have not already agreed a rent and outgoings abatement prior to 18 August 2021. However, to the extent that any agreed abatement does not apply for the full No Access Period, the Act will apply in respect of the period not covered by the abatement.

New leases (but not existing leases) can contract out of the “no access in an emergency” clause – but this is contingent on appropriate wording being included in the lease.

If the “no access in an emergency” clause applies and is triggered, the tenant will be entitled to an abatement of a “fair proportion” of rent and outgoings.

The abatement will apply to a “fair proportion” of rent and outgoings during any No Access Period that occurs following 18 August 2021. Whilst “fair proportion” is not defined in the PLA (and must be agreed by the parties), the PLA requires the parties to

consider any loss of income experienced by the tenant during the No Access Period when determining a “fair proportion”.

We note that:

- there is likely to be dispute as to which factors should to be taken into account by the parties when agreeing the fair proportion (apart from the mandatory requirement to consider the loss of the tenant’s income during the No Access Period);
- by referring only to the loss of the tenant’s income during the No Access Period, there is an argument that the PLA is directing the parties to disregard any subsequent increase in income (which may have the effect of off-setting the tenant’s loss) following the end of the No Access Period; and
- generally speaking, when determining a “fair proportion”, it is currently understood (but by no means settled by the Courts) that the parties should consider a range of factors including the remaining term of the lease and rights of termination, COVID-19 related financial assistance, the relative resources of the parties and the actual impact of COVID-19 related restrictions on the tenant’s ability to generate income. The Property Council has recently introduced guidelines in relation to assessing a “fair proportion” which may be of assistance.

Disputes about a “fair proportion” are to be referred to arbitration under the Arbitration Act 1996.

The PLA requires disputes to be referred to arbitration but does not preclude the parties from agreeing other methods of dispute resolution (for example, mediation or determination by an agreed expert).

Importantly, the PLA includes an obligation on both parties to take all reasonable steps to respond to abatement-related communications within 10 working days. Both landlords and tenants need to abide by these timeframes.

Until the landlord and tenant agree the “fair proportion”, a landlord cannot terminate the lease for non-payment of rent and outgoings.

This is a critical point from a landlord’s perspective. Although this is onerous, we note that section 246 of the PLA has not been amended. This means that a landlord can still cancel a lease for breach of other, non-rent related lease covenants.

Is a tenant entitled to an abatement?

Does the lease already contain a similar “no access in an emergency” clause?

ADLS leases from 2012 onwards generally include a “no access in an emergency” clause, and are therefore unlikely to be affected by these provisions. The wording of the “no access in an emergency” provision in the PLA is close to, but not the same as, the wording used in clause 27.5 of the ADLS lease. However, we understand the legislative intention to be that if there is a clause in a lease that operates akin to clause 27.5 of the ADLS lease, the PLA provisions will not apply.

The implied clause could apply to Property Council leases. The equivalent clause (clause 7.5(c)) of the Property Council office lease differs from clause 27.5 of the ADLS lease, as the concept of “no access in an emergency” has different triggers. The landlord must also be able to collect loss of rent insurance in order for the tenant to be entitled to an abatement.

Bespoke leases (or modified forms of the ADLS/Property Council leases) will require assessment on a case by case basis. Regardless of the form of lease, we recommend

that you take legal advice in relation to any specific lease provisions that may be under consideration.

Has an abatement already been agreed?

As noted above, the “no access in an emergency” clause will not be triggered where the parties have already agreed to an abatement prior to 18 August 2021 (provided that the abatement covers the entire “no access” period).

Can the Tenant “conduct fully” its operations?

What “conduct fully” means is not specified in the Act, but we think it will generally be interpreted to mean that business is able to be conducted at least very substantially, if not fully. It may cover situations where the tenant is operating from the premises sub-optimally, for example as a result of restrictions on capacity or customer access, or due to social distancing requirements. Much will depend on the specific circumstances, the nature of the tenant’s business, the premises and the terms of the lease.

Seek legal advice

Given these changes, we strongly recommend that landlords do not agree any abatement, rely on any form of security to recover unpaid rent and outgoings, or act to terminate leases for non-payment of rent and outgoings, without first seeking expert advice.

If you would like any further information about the effect of the changes to the PLA or how to deal with them, please contact any of our experienced [property](#) lawyers.

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