COVID-19 Response (Management Measures) Legislation Bill

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Report of the Finance and Expenditure Committee

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Contents

Dr Duncan Webb
Chairperson

COVID-19 Response (Management Measures) Legislation Bill

Recommendation

The Finance and Expenditure Committee has examined the COVID-19 Response (Management Measures) Legislation Bill. We recommend by majority that the bill be passed, and that the House take note of our recommendations in this report.

Because of the tight timing for our report back to the House, we have not included our recommendations in a revision-tracked version of the bill. We would expect the House to have the opportunity to consider our recommendations through a Supplementary Order Paper at the Committee of the whole House stage.

About the bill

This omnibus bill would amend 16 Acts and one set of regulations. Its overarching purpose is to help the Government, and all New Zealand, to manage and recover from the effects of the COVID-19 pandemic. The changes proposed in the bill are considered necessary in light of the outbreak of the Delta variant of COVID-19 in August 2021, which prompted renewed restrictions.

Many of the amendments proposed in the bill are minor and administrative in nature. They are designed to overcome problems that have arisen because of COVID-19 restrictions. For example, some would extend statutory deadlines, or allow certain actions to be carried out remotely, so people can more easily comply with regulatory requirements. In several cases the bill would simply extend provisions that were introduced in earlier COVID-19 legislation.[1] Examples of such changes include allowing coroners to hold hearings remotely, allowing online sales of raffle tickets, and extending the deadline for country-of-origin food labelling.

We focused our scrutiny on the bill's more substantial amendments, which attracted the most comment from submitters. They include the following measures:

- Changes to the Property Law Act would insert an implied term into commercial leases to require tenants and landlords to agree to a fair proportion of rent ceasing to be paid as a way of sharing the financial burden of COVID-19's disruption. It would require arbitration where agreement cannot be reached.
- Changes to the Residential Tenancies Act would enable the Minister responsible for the RTA to make a "COVID-19 tenancies order" to "switch on" restrictions on tenancy terminations in response to a COVID-19 public health order that generally restricts people from moving house, and to allow the Tenancy Tribunal to operate more flexibly.

1 The COVID-19 Response (Urgent Management Measures) Legislation Act 2020 was enacted in March 2020. The COVID-19 Response (Further Management Measures) Legislation Act 2020 was considered by the Epidemic Response Committee and received Royal assent in May 2020; a second bill of the same name was enacted in August 2020.

- Changes to the Local Electoral Act would allow for local body elections to be postponed for multiple six-week periods if COVID-19 restrictions were in force.
- Changes to environmental legislation would include amending the Climate Change Response Act to extend the statutory deadlines for setting the first three emissions budgets and the first emissions reduction plan. The COVID-19 Response (Fast-track Consenting) Act would also be amended to extend its sunset provision.

More detail about the changes the bill would make is available in the bill's explanatory note, and briefing papers from our departmental advisers.[2]

Structure of the bill

The bill is structured into eight schedules according to the department administering the relevant legislation. Each schedule, or Part within a schedule, would amend a separate piece of legislation, as shown in the table below:

Schedule 1	Part 1: Gambling Act 2003 Part 2: Local Electoral Act 2001	Department of Internal Affairs
Schedule 2	Rating Valuations Act 1998	Land Information New Zealand
Schedule 3	Part 1: Climate Change Response Act 2002 Part 2: COVID-19 Recovery (Fast-track Consenting) Act 2020 Part 3: Resource Management Act 1991	Ministry for the Environment
Schedule 4	Part 1: Contract and Commercial Law Act 2017 Part 2: COVID-19 Response (Requirements For Entities—Modifications and Exemptions) Act 2020 Part 3: Credit Contracts and Consumer Finance Act 2003 Part 4: Consumer Information Standards (Origin of Food) Regulations 2021	Ministry of Business, Innovation and Employment
Schedule 5	Residential Tenancies Act 1986	Ministry of Housing and Urban Development
Schedule 6	Part 1: Coroners Act 2006 Part 2: Criminal Procedure Act 2011 Part 3: Epidemic Preparedness Act 2006 Part 4: Property Law Act 2007	Ministry of Justice
Schedule 7	Land Transport Act 1998	Ministry of Transport
Schedule 8	COVID-19 Response (Requirements For Entities—Modifications and Exemptions) Act 2020	Ministry of Business, Innovation, and Employment

About this report and our process

This report focuses on what we consider to be the more significant changes proposed in the bill, and sets out our suggestions for further work and amendments if the bill proceeds.

Because of the tight timing for our report back to the House, we have not included our recommendations in a revision-tracked version of the bill. We would expect the House to

[2] These documents are available on Parliament's website.

have the opportunity to consider our proposed amendments through a Supplementary Order Paper at the Committee of the whole House stage.

We should note for the record some challenges entailed in our consideration of this bill. The first was its timing, with just over two weeks allocated for the select committee process. The bill was introduced on 28 September 2021. It was referred to us the following day, with instructions to report back to the House on 14 October. We invited submissions with a closing date of 5 October 2021, and received more than 200. We heard from 41 submitters by videoconference in meetings over the next three days, before receiving advice from officials, consolidating our views, and preparing this report.

We would like to express our appreciation to all submitters for their efforts in providing us with their considered and well-expressed views in the time available. We acknowledge that such tight timing is particularly challenging for small organisations, especially those run by volunteers. We note that several submitters expressed concern about the short time frame, stating that it is not conducive to quality legislation. Some questioned whether the urgency was strictly necessary. Most of us agreed that urgency was necessary, due to the hardship caused by COVID-19, and to provide certainty for those impacted by the proposed changes.

A second challenge for us was in coordinating the necessary information to examine such a wide-ranging bill. We received input separately from seven government departments. We express our thanks for the intensive work of officials and our own secretariat in this process; we are grateful for their mahi.

Legislative scrutiny

As part of our process we examined the bill's consistency with principles of legislative quality. We identified a number of issues regarding the legislation's design, which we raised with officials. The Regulations Review Committee also wrote to us expressing concern about some aspects of the bill.

In some cases we wanted more information. In others we wanted officials to provide written justifications to clarify the issues. We discuss later in this report issues that have been addressed, and ones which we recommend that the House continue to examine as the bill progresses.

Issues and proposed amendments

Property Law Act: Commercial leases (Schedule 6, Part 4)

The bill's proposed amendments to the Property Law Act 2007 aim to provide a way for commercial tenants to negotiate rent relief when they have been affected by COVID-19 restrictions but the lease does not cover an epidemic situation.[3] It would also provide a way to resolve disputes if no agreement can be reached.

We heard of many instances where landlords have been doing the right thing by their tenants and sharing the burden of COVID-19. However, we also heard of the financial and

[3] Many commercial leases use a template developed by the Auckland District Law Society (ADLS). Since the Canterbury earthquakes it includes a clause covering emergencies that would apply to an epidemic situation.

mental toll on tenants where the landlord would not cooperate. The bill is designed as a back-stop for those cases.

Clause 11 in Schedule 6 would insert an implied clause in certain commercial leases to require negotiation of a rent adjustment where, because of an epidemic, a tenant cannot gain access to the premises to fully conduct their business. The required adjustment would be for a “fair proportion” of rent (as agreed by the parties) to cease to be payable. This implied clause would only apply if there was no existing agreement to vary the rent, and no clause in the lease to cover such a situation. That is, it would exclude leases that include clause 27.5 of the Auckland District Law Society (ADLS) Deed of Lease, or any explicit clauses relating to rent arrangements during a pandemic.

Any dispute arising under the implied clause would need to be referred to arbitration under the Arbitration Act 1996 unless the parties contracted out of the clause or agreed to mediation rather than arbitration for any disputes.

Concerns about the sanctity of contract, and potential unintended consequences

Submitters generally supported the intent of the provisions, namely to support businesses that have suffered a loss of income due to COVID-19 restrictions. However, they were divided over whether it was justifiable for the bill to alter retrospectively the terms of a private contract. A number of submitters expressed strong concern that the implied clause would violate the sanctity of private contracts, which is a principle that they see as fundamental to contract law. National Party and ACT Party members of the committee share this concern.

Some other submitters maintained that the proposals are justified by the extraordinary circumstances of the COVID-19 pandemic, which could never have been envisaged in current leases. Labour Party and Green Party members agree with this view.

Several submitters questioned whether the bill would achieve its aims, believing it could lead to unfairness and unintended consequences. Although the bill is designed to adjust for power imbalances that favour landlords—of which we heard various examples—submitters also pointed to situations where the opposite applies. We heard examples of tenants not facing financial hardship who nevertheless sought relief at the expense of the landlord. Such a situation could involve a large multinational tenant and a much smaller New Zealand landlord, or a tenant whose profits had bounced back significantly following a lockdown. Such examples all helped to inform our consideration of the issues discussed below.

Leases that already include a “no access” clause

Under the bill, the implied clause about rent adjustments would not apply to leases with the standard ADLS clause 27.5. This is because such leases are assumed to already cover the situation of “no access in an emergency” and provide expressly for a fair proportion of rent to be paid in these circumstances (see clause 9 of Schedule 6, proposed new section 245F(2)). However, some submitters suggested that this is not always the case. We heard that there is considerable room for ambiguity, especially where a landlord is uncooperative.

We heard from submitters who said that despite the inclusion of ADLS clause 27.5 in their commercial property contracts, their landlords have refused to negotiate a rent reduction with them. Our consideration of this bill, which largely mirrors that clause, is that landlords are required to negotiate a fair rent reduction with their tenants in situations of limited access or operation ("no access") where that clause already exists in contracts.

Our intention is that this legislation should emulate the protection provided by clause 27.5 of the ADLS lease template. We recommend that officials review the wording of clause 9, new section 245F, to ensure that tenants get the benefit of the implied clause where there is any ambiguity in their lease about the prospect of rent relief.

Whether "access to premises" is the right trigger for rent relief

The implied clause would apply where the tenant was unable to gain access to the leased premises.[4] Submitters pointed out, however, that the lack of access to premises in some instances bears no relationship to a business's ability to generate revenue, or their profitability. For example, a tenant may be able to access their premises, yet have no customers because of border closures or other COVID-19 restrictions. (Conversely, many tenants have proved able to make other arrangements under lockdown conditions, such as operating from home, and suffered minimal loss of income.) It was suggested that the trigger should be clarified, and that access to customers could be a better guide.

We note that the bill's proposed amendments are focused on landlords helping with the costs of leasing the physical premises. They do not attempt to address the wider economic effects of the epidemic, such as closed borders or reduced downtown foot traffic.

We understand that the courts have interpreted "access" under clause 27.5 to include access for staff, contractors, suppliers, and customers. We consider that the wider issue of access to customers could be part of the "fair proportion" negotiation.

Suggested eligibility criteria for rent relief, and determining a "fair proportion"

Many submitters commented that the proposal in the bill was too broad-brush, and would not target support to the tenants or landlords who need assistance the most as a result of COVID-19 restrictions. They suggested the inclusion of criteria for the types of businesses that should be eligible to include the implied clause. Submitters who favoured having specific criteria also noted that this was all the more important since dispute resolution decisions would be private and hence unavailable as guidance.

Various criteria or "filters" for eligibility were suggested, including that the business should be:

- New Zealand owned
- a small to medium-sized (SME) business, measured by number of employees (say, fewer than 20), or income (say, under $25 million)
- eligible for the wage subsidy (thereby demonstrating economic loss).

Conversely, it was suggested that a landlord who qualified for the wage subsidy should not be required to provide rent support.

[4] The full wording is "unable to gain access to all or any part of the leased premises to conduct fully their operations in all or any part of the leased premises, because of reasons of health or safety related to the epidemic".

We struggled with these proposals for criteria to determine eligibility for relief. While we have some sympathy for the thinking behind them, we note that the issue is far from straightforward, and cuts both ways. We are aware of businesses that would not qualify for rent relief under the above criteria, even though they were struggling. Business ownership structures vary widely, and it would be extremely complex to determine what constituted a New Zealand business, and what size of business would qualify.

Several submitters also favoured criteria for the parties to determine what a "fair proportion" of rent reduction would be. Suggestions included:

- the financial effects of alert level restrictions on the tenant, including revenue, expenses and profitability
- the effect any rent concession could have on the landlord, such as failure to meet mortgage, insurance, rates, or other fixed payments
- whether rent relief should be provided through deferral or abatement, or a combination
- the degree to which premises could be used under higher alert levels
- whether there is a bounce-back in sales after restrictions ease.

We considered that many of the factors suggested would be relevant in determining what a fair proportion of rent to be reduced would be. We would expect any decision maker to balance these and other factors in reaching a decision. We were persuaded by advice from officials that there are advantages in not prescribing criteria in legislation as this could allow more flexibility to accommodate people's varying situations. We heard that officials are developing guidance for tenants and landlords regarding what would constitute a fair proportion of rent. We note that official guidance will not have any legal force; however, we were ultimately persuaded that listing considerations (even on a non-exhaustive basis) would run the risk of unduly restricting what might be taken into account in determining what amounts to a fair rent reduction. We stressed the importance of ensuring that any guidance was clear and easy to read for all tenants and landlords.

We have not been able to explore this issue fully enough in the time available, but we suggest these proposals be given careful consideration. We believe the intention should be to have the terms of the implied clause mirror clause 27.5 as closely as possible. We note that clause 27.5 does not include criteria for assessing a "fair proportion".

Possible clawback of rent relief or deferral of rent payments

We heard from several submitters who recommended that the bill include a provision to claw back rent relief if it was established later that the tenant's business was not in fact adversely affected by COVID-19 restrictions (or benefited from a bounce-back after restrictions were lifted). In practice, this would amount to a deferral of rent payments: tenants who had benefited from a rent abatement during restrictions might have to pay back the rent that would otherwise have been payable.

We do not recommend amending the bill to include such a provision. It is our view that doing so could create unfair situations. Leases that already have a clause dealing with no access, or a prior agreement as to rent payable during lockdown, would not be subject to the clawback of rent relief, while those reliant on the implied clause would be able to use it.

Retrospective timing and the "affected period"

The proposed amendment inserting an implied clause into the Property Law Act would apply retrospectively, to any rent paid under leases since 28 September 2021. This was the date of the bill's introduction, when the proposal was announced.

Many submitters expressed concern about this timing. They argued that it did not cover the majority of the current alert level 3 and 4 restrictions, which have had the most impact on businesses. Submitters proposed that, at a minimum, the provision should be made retrospective to the date of the latest COVID-19 outbreak: 18 August 2021. Some suggested it should be backdated even further, and also apply for lockdowns in 2020 and 2021.

Labour Party and Green Party members accept the general rule that legislation should not be retrospective, and should only take effect from the date it receives Royal assent. However, these members believe the current pandemic circumstances justify a departure from the rule. They would like to see serious consideration given to having this provision date from 18 August 2021, the date of the renewed COVID-19 restrictions. This is because many small businesses, or those with thin margins, may need the 18 August 2021 effective date to remain viable. We considered that landlords who had already reduced rent in a way that met the requirements of this legislation would not be affected by this provision. However, landlords who had not done so would be.

National Party and ACT Party members consider that legislation should be prospective only, and do not support the proposed retrospective application of the implied lease provision.

We recommend that this issue be considered further at the Committee of the whole House stage. We note that, whether or not the date is changed, landlords and tenants deciding on a "fair proportion" of rent relief would be required to consider any rent paid since 18 August 2021.

Definitions of "lessee" and "sublessee"

The bill includes in clause 9 a new section, 245F(2), which refers to both "lessees" and "sublessees" who have been affected by the epidemic restrictions. Through these references both would potentially get the benefit of the implied clause.

Several submitters proposed that specific types of leases be excluded from the amendments, including ground leases and triple-net leases. For these types of leases, they generally constitute ownership and do not need to include a "no access" clause.

We recommend that officials review the types of leases covered by the amendments to understand whether a distinction is needed in the kinds of leases that should be covered, and how subleases should be treated.

Alternatives to arbitration

The bill would require disputes under the implied clause to be referred to arbitration. Several submitters, both lessors and lessees, pointed out that arbitration can be painfully time-consuming, and the cost prohibitively high. They stressed a need for some faster and lower-cost form of dispute resolution. We are sympathetic to this point, and would like to see consideration given to an amendment that would require professional mediation in the first instance, with arbitration as a backstop.

We note that the Disputes Tribunal is available for disputes under the implied clause up to $30,000. We gave thought to whether the Tenancy Tribunal's functions could be extended, as it cannot currently deal with commercial lease issues. However, we were advised that such a change would not be appropriate.

We recommend amending clause 9, new clause 4A, so that the parties could agree to mediate any dispute about the implied clause (or use another agreed method), prior to arbitration being required.

As an alternative to the bill's proposal, we also see merit in a suggestion by the Auckland District Law Society that a procedure could be used where the parties were directed to seek an expert adjudication (similar to that set out in Part 3 of the Construction Contracts Act 2002) on the issue of what was a "fair proportion", for a fixed fee. We would like to see this avenue considered further.

Enforcement action and personal guarantees

A number of submitters noted that landlords frequently require personal guarantees from small business owners, and could use them to enforce lease obligations for rent. This was cited as a cause of significant personal stress for leaseholders and their families. We understand that a lessor can enforce the guarantee only once the lessee has breached the covenant to pay rent. We believe this could not occur until after the fair proportion of rent relief had been agreed, so we consider that the implied clause could help in this respect.

For example, we heard from a submitter who explained that, while they had the ADLS clause 27.5 within their contract, their landlord was refusing to negotiate on a rent reduction. The submitter considered themselves stuck between paying full rent or breaching their contract, which would trigger the personal guarantee and put their life savings on the line. We note that either party could trigger the dispute resolution provisions to ascertain the applicability and extent of the rent reduction provisions.

We note that personal guarantees fall outside the Property Law Act, and so are beyond the provisions of the bill. We are satisfied that the passage of this legislation should provide clarity in circumstances like the above, requiring landlords to negotiate a "fair proportion" of rent reduction where access and operation is impaired. The Green Party member encourages Ministers to review the intended purposes, applications, and efficacy of "personal guarantee" clauses in commercial tenancies as the law at present appears to be producing unjust outcomes.

Residential Tenancies Act (Schedule 5)

Schedule 5 would amend the Residential Tenancies Act 1986 (RTA). It aims to support tenants to stay in their rental homes during outbreaks of COVID-19 when a COVID-19 public health order restricts people from moving house. It would do this by allowing for Ministerial "COVID-19 tenancies orders" (CTOs) which would activate restrictions in a specified area from a specified date that would limit the grounds on which tenancies could be terminated.

The provisions in Schedule 5 would also enable the Tenancy Tribunal to conduct its proceedings as it sees fit, including on the papers, for a period of 12 months from the commencement of the bill.

The provisions in the bill are similar to amendments made to the RTA in March 2020 (now expired), but the restrictions could be switched on and off by ministerial order, as needed. Another significant difference is that, for most tenancies, existing termination notices would not have to be re-issued after the restrictions end. For most tenancies, the notice period would continue to run while restrictions are in place, but after the restrictions lift, tenants would have a minimum of 28 days' notice until the tenancy terminates.

The bulk of submitters supported the proposal, while requesting additional protections for tenants. Several commented that the bill left a lot to ministerial discretion, and was unclear as to when a COVID-19 tenancy order would end.

We agree with submitters who said that the provisions in Schedule 5 are quite complex, and recommend that they be simplified and clarified as much as possible.

Tenants should have prior notice of a CTO's end date

The bill as introduced has no requirement for a CTO to last for a set period of time. This is because CTOs would be aligned with COVID-19 health response orders. This caused concern for some submitters, who said that tenants and landlords need more certainty to arrange moving and new tenants. They suggested that CTOs should last for a set minimum period, and there should be a minimum notice period as to whether a CTO would expire or be extended.

We believe a minimum period for a CTO risks misalignment with COVID-19 public health measures, which at lower levels allow for people to move house. However, we agree it would be helpful to have a minimum notice period of a CTO's end to avoid uncertainty. We recommend that the Minister be required to give 7 days' notice when switching off a CTO.

Repeal date should be aligned with that of COVID-19 Public Health Response Act

We also recommend that the repeal date for the provisions in Schedule 5 as a whole be linked to the repeal of the COVID-19 Public Health Response Act. A bill currently before Parliament proposes to extend the Act's term from May 2022 to May 2023.

Notices of tenancy termination

Under Schedule 5, most termination notices or discontinuations of fixed-term tenancies cannot take effect while a CTO is in place.

One exception to this under Schedule 5 is that, while a CTO is in place, boarding house landlords would be able to give a 28-day termination notice on grounds involving serious breach of the tenancy agreement, such as endangering people. We accept the point made by a submitter that 28 days' notice could be too long for boarding house tenancies, where other tenants would be at risk in the event of bad behaviour by a tenant. We recommend that the notice period be shortened to 7 days for boarding houses, with the exception of abandonment and rent arrears.

We also recommend that the bill make it clear that purporting to give a termination notice or make an application terminating the tenancy would be unlawful under Schedule 5.

We accept the view of our advisers that some minor changes could be made to cover potential circumstances where alert levels "bounce around", with CTOs made in quick succession. The changes are necessary to ensure that tenants can remain in a tenancy in circumstances where a termination notice period for that tenancy has not fully elapsed following a CTO's revocation, when a further CTO is reinstated for the same area. Under such circumstances the termination restrictions and notice periods under Schedule 5 would reapply afresh. However, we propose that landlords would only have one consecutive 28-day period to serve a termination notice under clause 10(2), and tenants would only have one consecutive 14-day period to serve a termination notice under clause 6(3).

Where tenants cannot move into a rental property due to COVID-19 restrictions

Several submitters expressed concern about tenants being liable for rent for a rental property which they are unable to move into due to movement restrictions under a COVID-19 public health order. As introduced, clause 11 of Schedule 5 would cancel the obligations that landlords and incoming tenants have towards each other where the landlord is unable to provide vacant possession due to the existing tenants remaining as a result of Schedule 5. However, the clause would not provide similar protections for incoming tenants due to move into a vacant property but who cannot due to movement restrictions.

In such a situation we consider that it would be reasonable for a tenant to have the option of cancelling or terminating the new tenancy, with 2 days' notice. We recommend that the bill be amended accordingly.

Tenancy Tribunal should take into account family violence when considering termination on the ground of anti-social behaviour

Several tenancy advocacy groups raised concerns that the Tenancy Tribunal may treat family violence as anti-social behaviour for the purposes of the anti-social behaviour termination ground, resulting in victims of family violence losing their tenancies.

We recommend amending the bill to include family violence as an example of the circumstances that should be considered under clause 5(3)(a). We note that this is intended as clarification and for the avoidance of doubt, not to change the meaning of section 55A (Termination for anti-social behaviour) in the Act.

Several submitters expressed disappointment that section 56B of the RTA is not yet in force, which would allow tenants to withdraw from a tenancy with only 2 days' notice if they are experiencing family violence.

Several issues were outside the policy intent of the bill

Many submissions raised issues that fall outside the focus of this bill, which is aimed at helping tenants during COVID-19 response measures. Nevertheless, we consider it worth covering the issues below.

Freezes and controls on rent increases

Many submitters, including tenant advocacy groups, argued that there should be a freeze on rent increases while a CTO is in force, or during alert levels 3 and 4. They noted that the Government had established a 6-month freeze on rent increases in response to the March 2020 outbreak of COVID-19. The Green Party member of our committee supports the calls for a freeze on rent increases.

We were informed that it was a policy decision not to include provision in the bill for a rent freeze during any future periods at alert level 4. This is because, since August 2020, landlords can only increase rent once every 12 months. Landlords must give at least 60 days' notice to tenants of a rent increase.

The Green Party member also endorses recommendations by several submitters for various forms of rent controls as a general measure to respond to rising rental costs. We were advised that rent controls which limit prices generally are out of the policy scope for this bill, which is focused on COVID-19 response measures.

Flatmates, boarders, and others not covered by the Residential Tenancies Act

Many submitters urged that Schedule 5 should apply to people whose living arrangements are not covered by the RTA. In particular, they focused on providing more protections for people in flatmate and private boarding arrangements. One submitter also mentioned those in student accommodation. We recognise that these groups experience insecurity of tenure, which is particularly problematic during periods of COVID-19 restrictions.

We understand that extensive legislative change to the RTA would be needed to cover such groups, which is beyond the policy intent of this bill.

Local Electoral Act (Schedule 1, Part 2)

Clause 4 of Schedule 1 would amend section 73A of the Local Electoral Act 2001 to allow local electoral processes to be deferred by up to six weeks by Order in Council. The power would apply while the Epidemic Preparedness (COVID-19) Notice was in force, and multiple deferrals would be allowed.

The view was expressed that this provision is unnecessary as the powers in section 73AB of the Act would allow repeated deferrals. We looked into this point, and found that at present this was only the case for council by-elections, whereas a regular 3-yearly election could only be delayed once. The proposed amendment would align sections 73A and 73AB, establishing a repeatable adjournment power for both triennial elections and by-elections.

We agree with the Regulations Review Committee that there should be a requirement to give reasons in any order authorising a deferral. This would better enable Parliament to scrutinise the orders and determine whether they unduly trespassed on personal rights and liberties. Therefore, we recommend amending the bill to achieve this.

We recommend amending clause 4 of Schedule 1 to require the Minister of Local Government to consult the Chief Electoral Officer before making a recommendation to the Governor-General to shift any council election dates.

We note that both Local Government New Zealand and Taituarā – Local Government Professionals Aotearoa supported the proposal. Several submitters expressed concern that the amendments would be made permanent. They questioned the appropriateness of this given the bill's overall focus on COVID-19 response.

Voting rights of New Zealanders overseas

Some submitters pointed out that New Zealanders overseas who have been unable to return home over the past 18 months because of border restrictions risk being disenfranchised in forthcoming elections. Currently, section 80(1)(a) of the Electoral Act disqualifies any New Zealand citizen who has not been in the country within the last 3 years. It was suggested that an amendment be included in the bill to change the disqualification period from 3 years to 6 years, on a temporary basis to cover the next local body and general elections.

We have considerable sympathy with the position that these people are in. The Green Party member believes this matter deserves due consideration and legislative change. They agree that it is an injustice for citizens to be prevented from voting when they would have come home but have been physically prohibited from doing so by Government policy decisions. Labour Party members recognise that this suggestion is outside the policy proposal of the bill and do not agree that this is an appropriate vehicle with which to address this issue.

We observe that on 5 October 2021 the Minister of Justice announced an independent review of electoral laws which will include an examination of overseas voting.

Environment-related legislation (Schedule 3)

Climate Change Response Act

Part 1 of Schedule 3 would amend the Climate Change Response Act 2002 to extend the statutory deadlines by which the Minister for Climate Change must set the first three emissions budgets and the first emissions reduction plan. Recognising the delays to consultation caused by the current COVID-19 outbreak, the deadlines would be extended by five months, from 31 December 2021 to 31 May 2022. The bill would not change the commencement date for the first emissions budget period, which remains 1 January 2022.

Almost all the submitters who commented on this amendment were opposed to extending the deadlines. Many of them emphasised that although COVID-19 is also an emergency it does not provide an excuse for inaction on climate change. They said New Zealand should not go to COP26 without further action on climate change.[5]

Based on the advice we received from officials, we do not propose any changes to this provision. Officials note that the proposed extension to statutory time frames is not expected to significantly delay action to address climate change over the time frame of the first three emissions budgets. It also would not preclude the Government from taking updated or additional commitments under the Paris Agreement in advance of COP26.

The Green Party member agrees with those submitters that highlighted the urgency with which we must act to tackle the climate crisis, and notes that delay to the Emissions Reduction Plan is not ideal, nor something we wanted to see happen. They argue that now Cabinet has made that decision, it needs to note there is a clear expectation that the Emissions Reduction Plan, when it is finally published in May, is equal to what the science says we must do. The Green member noted the Government has given itself time to get its plan right and it must use that time to work with submitters and others to make sure the Emissions Reduction Plan is the best it can be, noting that delay gives the Government the opportunity to align the Emissions Reduction Plan with Budget 2022. They suggest anything

5 COP26 is the 26th United Nations Climate Change conference. It is scheduled to be held in Glasgow, Scotland, between 31 October and 12 November 2021.

less than a Budget that delivers on the necessary investment to implement the Emissions Reduction Plan will not be enough.

COVID-19 Recovery (Fast-track Consenting) Act

Part 2 of Schedule 3 would extend the repeal date for the COVID-19 Recovery (Fast-track Consenting) Act 2020 (FTCA) for an additional year, to 8 July 2023. The rationale is that continuing the FTCA would promote employment and contribute to the economic recovery from COVID-19. It would also continue to facilitate consents for projects such as housing and public and active transport that offer significant public benefit.

Almost all the submitters who commented on this amendment opposed extending the repeal date. Based on the advice we received from officials, we do not propose any changes to this provision. Officials noted that there are environmental safeguards in the FTCA: in its purpose, in the incorporation of consideration of the effects of climate change and greenhouse gas emissions, and in mechanisms to decline an application if a project is inconsistent with a relevant national policy statement.

The Green Party does not support the extension of fast-tracking consents. They believe the Government has the opportunity to instead fix consenting while ensuring environmental protections, climate impact measurements, and community consultation within the Resource Management Act reform.

Resource Management Act

Part 3 of Schedule 3 would amend the Resource Management Act 1991 to defer local authorities’ existing review obligations, and allow the Minister for the Environment a more streamlined process for extending one deadline. The changes aim to recognise the additional demands COVID-19 is placing on councils to respond to the pandemic while operating with constrained resources.

This amendment received little comment from submitters.

Courts-related amendments (Schedule 6)

Coroners Act

Part 1 of Schedule 6 would amend the Coroners Act 2006 to make it clear that coroners can hold hearings remotely if this is in the interests of justice.

Criminal Procedure Act

Part 2 of Schedule 6 would amend the Criminal Procedure Act 2011 to enable more cases to be heard in the High Court. This would help reduce mounting backlogs in the District Court caused by COVID-19 restrictions. By inserting new section 68A in the Act, the bill would allow a High Court judge, on their own motion, to reconsider earlier decisions under the Court of Trial Protocol about which court would hold a trial.

From our legislative scrutiny of the proposal we raised several issues with advisers. We are satisfied that our concerns have been addressed, but recommend that consideration be given to clarifying the wording of the amendments at the Committee of the whole House stage.

Epidemic Preparedness Act

Part 3 of Schedule 6 would amend section 24 of the Epidemic Preparedness Act 2006 to remove uncertainty about the ability of the heads of the bench to modify court rules for all matters in their court during an epidemic.

Some matters were raised by the Regulations Review Committee regarding this amendment. They recommended making it clear that this would be a separate power for heads of bench to make modifications to rules of court and that it would have the effect of modifying secondary legislation. They also recommended ensuring that any modification to a rule of court should be time-limited and clearly linked to the epidemic notice.

We agree with the committee's first point and recommend that this be clarified in the bill. On the second matter, we think the bill as introduced is sufficiently clear that any modification, whether by an individual judge or by a head of bench, can only be made and will only apply while an epidemic notice is in force.

Gambling Act (Schedule 1, Part 1)

The 2020 COVID-19 response legislation temporarily modified the Gambling Act to allow three class 3 lottery operators[6] to sell raffle tickets remotely since their usual street appeals were hampered by COVID-19 restrictions. This permission is due to expire on 31 October 2021. Schedule 1 would extend the provision by another two years and extend it to other class 3 lottery operators.

We support the provision as it would remove an obstacle for community organisations wishing to fundraise under COVID-19 restrictions. We are satisfied that the bill would not increase the risk of gambling harm, as winnings could not be rapidly reinvested.

The proposal in the bill was widely supported by submitters. However, based on some of the submissions it is clear that the current wording of section 4A of the Gambling Act is overly complex, and has created confusion about what is and is not allowed for class 3 lottery operators. For example, lottery operators are able to offer tickets online, but some submitters, based on the current wording of section 4A, thought this was not allowed.

We recommend amending clause 2 to streamline and simplify the description of the exemption in section 4A(3) of the Act. This would not change its effect but would make it easier for people to understand.

We note that, to conduct lotteries remotely, operators will need to invest in upgrading their technology. So that they can recover their investment, they have suggested making the bill's change permanent. We are open to this idea but do not believe it is an appropriate change to make in this bill. We suggest that the proposal could be more fully considered as part of the online gambling review that is currently under way. To allow for this, we recommend extending the proposed expiry date of this provision by an additional year, so that section 4A of the Gambling Act would expire at the close of 31 October 2024.

[6] Class 3 lotteries are used to raise funds for charitable or non-commercial purposes. The three operators were Countdown Kids Charitable Trust, the National Heart Foundation of New Zealand and Royal New Zealand Coastguard Incorporated.

It was suggested to us that class 2 raffles be included in the bill's amendment. Class 2 raffles are low-risk forms of gambling, with prizes that do not exceed $5,000. We believe this issue merits further consideration, separately from this bill. We note that Class 2 operators do not require a licence, so it could be difficult to monitor these operators and impose any conditions. We therefore believe the idea should be explored further without the constraint of this bill's timing.

Commerce and Consumer Affairs legislation (Schedules 4 and 8)

Schedules 4 and 8 of the bill propose several temporary changes in commerce and consumer affairs legislation administered by the Ministry of Business, Innovation and Employment. The changes would affect forthcoming credit reforms and country of origin disclosure requirements for food. They would also reinstate certain temporary relief provided by Parliament in 2020 in respect of corporate governance legislation and contract and commercial law. The following Acts would be amended:

- Contract and Commercial Law Act 2017 (Schedule 4, Part 1)
- COVID-19 Response (Requirements For Entities—Modifications and Exemptions) Act 2020 (Schedule 4, Part 2 and Schedule 8)
- Credit Contracts and Consumer Finance Act 2003 (Schedule 4, Part 3)
- Consumer Information Standards (Origin of Food) Regulations 2021 (Schedule 4, Part 4).

We consider the changes to be justified and appropriate. Based on the submissions we have read and heard, we note that a number of the changes will be warmly welcomed as sensible responses to the disruption and uncertainty caused by COVID-19.

After considering the Regulations Review Committee's views, we recommend a change to clause 26 in Schedule 4, relating to section 42A of the COVID-19 Response (Requirements for Entities—Modifications and Exemptions) Act. The clause would allow regulations to be made amending the lists of modifications and exemptions. We agree with the committee that Ministers should be required to give and publish reasons for recommending the regulations.

We heard a request from one submitter regarding the ability for incorporated societies to permanently change their rules using the relief provided in the COVID-19 Response (Requirements For Entities—Modifications and Exemptions) Act. We received advice from officials that organisations will be able to modify their rules, for example to facilitate electronic voting in reliance on this relief. However, those modifications would only be able to last for 6 months, or 12 months if extended by regulation. We consider that this strikes the appropriate balance. It would provide relief to organisations to allow them to run themselves in the current circumstances, while also ensuring that members of societies who cannot do things like vote electronically are not permanently deprived of their right to vote.

Land Transport Act (Schedule 7)

Schedule 7 would amend the Land Transport Act 1998 so that infringement notices, infringement reminder notices, and regulatory notices could be served by fax or email while the Epidemic Preparedness (COVID-19) Notice 2020 is in force.

We recommend removing the reference to fax, as this technology is now outmoded and rarely used. We note that the proposal for use of email would be in addition to the existing postal and personal methods of serving notice.

In response to points that came out of our legislative scrutiny, we asked about the implications of accessing personal information in order to serve notice by email. We were told by officials that the proposal is consistent with the Privacy Act 2020 and that the New Zealand Bill of Rights Act 1990 (BORA) vetting process found the bill as a whole, including Schedule 7, to be consistent with the BORA. We note that due to time constraints Waka Kotahi was unable to consult with the Privacy Commissioner.

Service of notice

We recommend amending this provision to make it clear that notice would be treated as being served on a person “unless the contrary is shown”. Officials suggested the deeming element of the exception becomes effective “at the time the email leaves the enforcement officer’s system”. We were told that this is based on the electronic transaction provisions of the Contract and Commercial Law Act 2007.

We are not confident that provisions designed for determining when a contract is formed are appropriate for determining when service of documents in criminal matters is effective. We are very uneasy about using electronic methods by which service is deemed to occur in cases that are related to more serious offences. There are significant criminal penalties for people driving on revoked or suspended licences.

We consider that thought should be given to service being deemed to be effective at the time the email leaves the enforcement officer’s system unless it can be shown that the message never entered the information system of the person intended to be served.

Rating Valuations Act (Schedule 2)

Schedule 2 would provide an option for territorial authorities (councils) that meet certain criteria to apply to delay their three-year property revaluation cycle by up to a year. This would apply to the 22 councils that are scheduled to undertake their general revaluation for rating purposes between July 2021 and February 2022.

We questioned Land Information New Zealand as to whether the amendment was truly needed as a specific response to COVID-19. We were told that any application to the Valuer-General for a delay would need to be supported by compelling evidence and strongly supported by both the council and their contracted valuation service provider. Experience from the 2020 revaluation round was that councils were reluctant to defer and only two applied due to extreme circumstances.

We recommend amending clause 2 of Schedule 2 to clarify that the Valuer-General may only make such a determination if satisfied that a delay is appropriate as result of the COVID-19 pandemic.

ACT New Zealand differing view

The ACT Party opposes this bill.

The primary reason for our opposition relates to the amendments to the Property Law Act which undermine freely entered contracts, exercise retrospective law making, and will not ultimately make things better for the business they intend to help. We also wish to make it absolutely clear that, as with the wage subsidy for businesses that are not able to operate under alert level restrictions, the Government bears ultimate responsibility to bear the cost of the public health response, and to not impose costs on particular businesses where the benefits from the public health response flow to the wider public.

It is worth noting that there are a range of initiatives in this bill that ACT does not have an issue with. Indeed, many make pragmatic and sensible changes that properly amend legislation considering the COVID-19 pandemic.

It would have been a preferable situation if the Government had decided to make those pragmatic and uncontroversial changes without including a rushed and divisive amendment to the Property Law Act to make a political point.

This minority opinion will therefore focus on the reasoning of opposing the Property Law Act changes rather than dwelling on the positive changes being made that will, no doubt, be covered by the majority.

Amendments to the Property Law Act

Nestled in the heart of this bill is a hastily put together amendment to the Property Law Act 2007 that outweighs all the pragmatism of this bill and challenges core principles of our parliamentary democracy.

These changes, despite having a wide scope, have no quantified benefits or costs to them. In parliamentary written questions the Minister stated that this was due to the urgency surrounding COVID-19.

But without knowing the impacts of the law, it is difficult to see how a decision could be made to advance it. It is an example of a slipping standard in law making using COVID-19 as the excuse.

In a similar vein, we heard from submitters that many landlords were working with tenants to provide rent relief where the contract was not otherwise negotiated to provide for such. In some cases, we did hear that some landlords were unwilling to provide relief and to instead uphold the agreed contract.

Again, we do not have any real information from the Government on the scale of the problem they are trying to solve. Instead, the approach has been to assert a problem exists and to move responsibility for that onto commercial landlords.

This is quite a departure from previous approaches taken by the Government considering the pandemic. Options such as extending the resurgence payment to a weekly payment could have been explored. It wasn't.

Submitters also questioned the breadth of application. It was pointed out that, unlike measures such as the wage subsidy, proving detriment due to COVID-19 is not necessary and access was very broad and could include large multinationals or companies who simply do not require the measures but would be advantaged if they did take up the opportunity.

The Ministry of Justice commented that the kind of businesses captured by the clause is deliberately broad to ensure general coverage and it would be complex to design a more nuanced scheme.

It would, however, have been simple to simply not progress these amendments or to look at Government side support instead of blustering into unilaterally changing commercial leases.

A final point to consider is the issue of retrospectivity. It is important to raise this because, as a general rule, legislation should not be retrospective. The standard for any retrospectivity should be high—correcting an error that, for example, would result in significant and realistic harm. The amendments proposed in this bill do not come anywhere close to that standard.

In this case, the two elements of challenging contracts and doing so retrospectively make the changes particularly odious.

By the Government changing the terms of contracts that people may have signed years ago, it signals that the certainty New Zealanders place in the contracts they sign should not be so. But not only do these changes move to challenge the terms of a contract, they move to do so to contracts signed prior to the law.

The reason retrospective legislation is opposed is because it strikes against the trust New Zealanders have in the state. If you cannot predict what the Government will do or how you can act consistent with the rules set by Parliament, it becomes more difficult to engage with the state.

These amendments are the product of a rushed piece of work with no meaningful attempt to scope the problem or provide an evaluation of benefits or costs, pushed through Parliament with little notice. It challenges the freely made contracts of parties, and does so with retrospective effect. It should be opposed.

New Zealand National Party differing view

Amendments to Local Electoral Act 2001

National opposes the bill's amendments to the Local Electoral Act in Schedule 1, Part 2. We do not believe the power to repeatedly delay local body elections, under the guise of the COVID-19 response, is appropriate or has been adequately justified. We share the concerns raised by several submitters that amendments of this nature should not be made through an urgent, truncated process.

National agrees that central government should have practical tools and a degree of flexibility available to manage the changing impacts of COVID-19. However, we believe the existing power enabling local electoral processes to be adjourned by up to six weeks by Order in Council is sufficient at this time.

Our strong view is that making this amendment now is pre-emptive and unnecessary. We agree with the comments of some submitters that a permanent amendment not limited to responding to COVID-19 has been included in an urgent COVID-19 response bill. The Government's own stated commitment to ending lockdowns also leads us to believe that these permanent powers are unnecessary and an overreach.

We are extremely troubled that amendments of this nature have not been subject to a full, proper scrutiny process. We strongly believe that this bill having its first reading under urgency, having a truncated select committee process, and likely having latter stages proceed under urgency is not conducive to the level of scrutiny that local electoral changes of this nature deserve.

We support the recommended improvements to require consultation with councils' electoral officers and require that any Order in Council include the reason for shifting local body election dates. However, these changes do not go far enough to allay our broader concerns with this schedule of the bill.

Amendments to Property Law Act 2007

National opposes the bill's amendments to the Property Law Act in Schedule 6, Part 4 inserting a 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.

We are concerned that the clause cuts across the sanctity of contract law. We also do not support the retrospective nature of the bill (to 28 September 2021).

The proposals apply to all commercial tenancy arrangements. Many submitters raised the need to confine eligibility to small-to-medium businesses, linking to eligibility for the wage subsidy scheme, or to income or capital.

The definition of the "lack of access" is unclear. The bill proposes adopting the ADLS 27.5 definition. The issue is that the lack of access to premises in some instances bears no relationship to the profitability of business's operations nor their ability to generate revenue or access to customers. It transfers the cost of the Government-imposed lockdown from the Crown to the landlord.

National fundamentally believes our Rental Support Package is a superior policy response.

Appendix

Committee procedure

The COVID-19 Response (Management Measures) Legislation Bill was referred to us on 29 September 2021. We called for submissions with a closing date of 5 October 2021. We received and considered 204 submissions from interested groups and individuals. We heard oral evidence from 41 submitters by videoconference.

We received advice on the bill from the Department of Internal Affairs, the Ministry of Business, Innovation and Employment, the Ministry for the Environment, the Ministry of Housing and Urban Development, the Ministry of Justice, Land Information New Zealand, and the Ministry of Transport. The Office of the Clerk provided advice on the bill's legislative quality. The Parliamentary Counsel Office advised on legal drafting matters. The Regulations Review Committee reported to the committee on the powers contained in the bill.

Committee members

Dr Duncan Webb (Chairperson)
Andrew Bayly
Barbara Edmonds
Ingrid Leary
Anna Lorck
Christopher Luxon
Greg O'Connor
Damien Smith
Stuart Smith
Chlöe Swarbrick
Helen White

Advice and evidence received

The documents that we received as advice and evidence are available on the Parliament website, www.parliament.nz.