
COVID19 – Commercial Leasing at Alert Level 3

On Tuesday 28 April 2020, New Zealand moved to COVID-19 Alert Level 3. What does this mean for commercial leases?

The Government has issued the Health Act (Covid-19 Alert Level 3) Order 2020 (*Government Order*), which sets out the requirements for businesses operating under Alert Level 3. The restrictions in the Government Order are non-exhaustive and should be considered in conjunction with other Government directives and guidance for specific industries.

Operating from your premises

Depending on the nature of a business, the Government Order prescribes the circumstances in which the business may open from its premises:

Type of Business

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Government agencies providing essential services (eg. immigration, corrections and emergency services)

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Essential healthcare services

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Early childhood centres and schools

Infection Control

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	Keep children at appropriate distances
	• For schools
• Supermarkets and dairies	• Physical distancing between customers
• Petrol stations	• Prevent fuel consumption (services)
• Pharmacies	
• Accommodation services	
• Venue businesses	• Physical distancing between customers
	• Ensure that wedding, present, and
• Public transport (except small passenger service vehicles)	• Physical distancing between customers
• All other business	• Physical distancing
	• Support of

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Physical distancing measures are set out in the Government Order by reference to the type of business. For most businesses, this means having systems and processes in place which:

- ensure people remain 1 metre away from other people or, if closer, are there for less than 15 minutes, so far as is reasonably practicable taking into account the nature of the business; and
- mitigate the risks that arise to the extent that the above distance requirements are not fully maintained.

Unless a business implements the required infection control measures, it must remain closed. The Government has also asked that everyone that can work from home should do so, although this is not included in the Government Order.

Abatement of rent

A number of clients are now enquiring as to how the Alert Level 3 restrictions impact on any rent abatement provisions in commercial leases. Where a lease contains the commonly-used ADLS “no access in emergency” provision (or similar), for the clause to apply the emergency must “prevent the tenant from accessing the premises to fully conduct the tenant’s business”.

As at Alert Level 4, each lease must be assessed on a case by case basis.

Under the Government Order, most premises may only open if the necessary infection control measures are implemented. It is worth noting that the position on the Government’s <https://covid19.govt.nz/> website is more restrictive than the Government Order – for example, on the website people are encouraged to work from home if they can. From a legal perspective, the Government Order is the source of legal restrictions, not the website, but the wider directives and guidance issued by the Government will still be relevant in assessing the restrictions applicable to each particular premises.

A tenant should provide its landlord with details of the extent to which its ability to operate fully from the premises is prevented due to the Government restrictions as a whole. Under leases containing a rent abatement provision such as clause 27.5 in the ADLS Sixth Edition, a fair proportion of rent and outgoings should then be abated based on this information. Regarding the main categories of commercial tenants:

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Many hospitality and retail tenants are now operating from their premises in a limited capacity, allowing for contactless pick up of online orders, for example. While this may allow part of the premises to be utilised for the tenant's business – such as a restaurant or café's kitchen, or a retail tenant's storage space – this is not a full operation of the tenant's business or the premises. While the proportion of rent and outgoings that cease to be payable will be less than that at Alert Level 4, some abatement will likely still apply.

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Office tenants are now able to access their premises, but many cannot operate fully from the premises, for example they cannot admit customers or clients and must maintain physical distancing. Others will be able to fully operate, for example if they seldom admit customers or clients and have workstations already sufficiently separated. Depending on the level to which a tenant is able to operate from the premises, a fair proportion of rent and outgoings may still cease to be payable under a no access provision.

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Many warehousing and industrial tenants are now operating, although this may be at a limited capacity. Again, each tenancy needs to be assessed on a case by case basis as to the extent that the tenant is able to operate from the premises.

The no access provisions are based on the ability for a tenant to access the premises to operate its business, not whether or not it chooses to implement the necessary infection control measures and begin to operate. Any abatement should therefore be based on the legal restrictions for each premises, together with Government directives and guidance, and not the discretionary actions of the tenant.

Given the rapidly changing situation and uncertainty around future alert levels, it is recommended that landlords and tenants continue to work together to agree on a position for Alert Level 3 that is satisfactory to both parties. This position will need to be reconsidered at Alert Level 2 once specific restrictions for that alert level are announced. It is anticipated that the majority of premises will be able to reopen at

Alert Level 2, potentially with fewer associated restrictions, and therefore the no access provisions in leases will likely have a diminished impact and, in some cases, may cease to apply.

If you have any questions about how the Government Order affects your lease, please feel free to contact any of our [commercial property](#) lawyers.
