



JacksonStone House
3-11 Hunter Street
PO Box 1925
Wellington 6140
New Zealand

Tel: 04 496-6555
Fax: 04 496-6550
www.businessnz.org.nz

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Clerk of the Committee
Finance and Expenditure Select Committee
Email: fe@parliament.govt.nz

Submission by BusinessNZ on the COVID-19 Response (Management Measures) Legislation Bill

Thank you for the opportunity to comment on the above Bill.

BusinessNZ notes the short time to comment on this Bill, affecting its ability to fully canvass its membership's views. In fact, BusinessNZ understands there was little or no consultation with affected parties before the Bill was introduced into the House mid last week with submissions closing today.

Notwithstanding, BusinessNZ is generally supportive of much of the Bill's content which deals specifically with Covid-19 related issues (for example in permitting more remote participation). However, we have serious concerns with, and oppose, the ability of the Government to interfere with legitimate commercial contracts between landlords and tenants through proposed changes to the Property Law Act 2007.

It is a fundamental pillar of a market economy that property rights should be clear, unambiguous, and able to be upheld in a court of law. Where property rights are removed or reduced by way of regulatory takings, compensation should be paid.

Therefore, there was strong justification, given the Government effectively closed legitimate businesses for Covid-19 lockdown reasons, for assistance via taxpayer-

funded compensation before there was any thought of requiring landlords and tenants to adjust lease terms previously negotiated as part of normal business-related activity.

In fact, many landlords and tenants, as they are entitled to, have come to mutually agreed outcomes without the need for the proposals outlined in this Bill. But state interference in private contracting cannot be supported.

Effectively, the COVID-19 lockdown amounts to a regulatory taking which should not be legislatively condoned. Instead, as pointed out, BusinessNZ believes that core to the issue of property rights, where a regulatory taking has occurred, is the acknowledgement of the right to compensation. As a general principle, property rights should not be diminished without compensation. This is a long-held view. BusinessNZ considers the presumption of compensation to be a vital economic system check and balance.

The need to compensate for regulatory takings is hardly a new or novel concept in public policy terms. Over recent years the Crown, in regulating private property rights in the perceived public interest has at the least, accompanied regulation with compensation. This has occurred most notably in the areas of carbon emissions and fisheries management.

It follows from the above that BusinessNZ considers current requirements for the payment of compensation where property is taken, or its use or value restricted, should be strengthened. Apart from the Public Works Act, there is currently no allowance, other than in one or two specific instances, for the payment of compensation for regulatory takings (that is, for a reduction in private property rights in the public interest).

Without reasonable security from confiscation by the state or others, the incentive on individuals and businesses to invest and build up productive assets is severely weakened.

The Bill's covering note states that the intent of Schedule 6, Part 4: Amendments to Property Law Act 2007 is to support commercial tenants and landlords to come to an agreement to adjust the rent (including outgoings) due under their leases. This will mean the parties share the financial burden of the COVID-19 response, enabling more businesses to remain solvent through the COVID-19 pandemic. A way to resolve disputes is provided for if no agreement can be reached.

By contrast to a requirement for compensation, these provisions are extremely problematic and undermine a fundamental feature of NZ's legal system that regards contracts as legitimate between consenting parties, with no ability for others to interfere in what has been agreed, neither government nor any other agency. Such interference would effectively undermine, if not rewrite, the parties' commitment to each other. This is retrospective legislation, generally undesirable, and only to be considered in the most extreme circumstances. It should not be used to undermine private contracts for commercial leases.

Moreover, BusinessNZ is seriously concerned that such a major change in commercial activity is to take place in the absence of a Regulatory Impact Statement (RIS). It appears the Treasury has determined that as this is a direct COVID-19 response, the RIS requirement is suspended. This is totally unacceptable and makes a mockery of the Select Committee process.

In summary, BusinessNZ supports, in principle, the Government providing compensation via taxpayer assistance where businesses have been required to shut-down due to COVID-19 restrictions (a regulatory taking). However, the Bill's proposals for changes to the Property Law Act 2007 set a dangerous precedent and one with a potentially chilling effect on broader investment in NZ generally. The question many businesses will be asking is – will my sector be next?

BusinessNZ recommends that Schedule 6, Part 4: Amendments to Property Law Act 2007 be deleted.

Once again, thank you for the opportunity to comment on the Bill.

Yours sincerely



Kirk Hope
Chief Executive
BusinessNZ