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Welcome to the Winter edition of *Commercial eSpeaking*. This edition, of necessity, focuses very much on the implications to business from COVID-19. We hope you find these articles to be useful.

To talk further with us on any of the topics in this e-newsletter, or on any other legal matter, please don't hesitate to be in touch. Our details are to the right.

The Wellbeing Budget 2020: Rebuilding Together

The government's Budget, presented by the Minister of Finance the Hon Grant Robertson on 14 May has addressed, in the words of the Minister, "a one-in-100 year health and economic challenge" as it moves to rebuild the economy post-COVID-19.

We look at the government's key spending and outline its support for business.

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Not a 'gift', there are employer obligations

Many New Zealand employers are scrambling to maintain solvency while balancing their employer obligations during the lockdown; thousands of businesses accepted the government's COVID-19 wage subsidy as a necessary lifeline. The subsidy was not, however, a gift. We take a closer look at employers' obligations when accepting the wage subsidy.

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COVID-19 can be 'frustrating'

Some businesses and individuals have found themselves party to a contract they can no longer perform.

Debt recovery process

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'Safe harbour' for directors

In May, legislation was passed amending the Companies Act 1993 to help businesses facing insolvency due to COVID-19.

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The Wellbeing Budget 2020: Rebuilding Together

The government's Budget, presented by the Minister of Finance the Hon Grant Robertson on 14 May has addressed, in the words of the Minister, "a 1-in-100 year health and economic challenge" as it moves to rebuild the economy post-COVID-19.

"With the outbreak of COVID-19, New Zealand now faces a 1-in-100 year health and economic challenge. The pandemic continues to evolve, and it has already caused enormous social and economic disruption. It has required agility on the part of New Zealanders, the Government included," said the Minister.

"We have quickly reoriented the Budget 2020 package to focus on maintaining critical support for existing public services and supporting key infrastructure investments. This has meant putting 'on ice' new initiatives under priority spending areas that were announced in the Budget Policy Statement. We may well return to these projects, but for now our focus is on our response, recovery and rebuild from COVID-19."

The focus of the Budget is to grow New Zealand's economy, create jobs, strengthen the country's public service and to start to rebuild together.

Key spending:

- $50 billion to deliver the COVID-19 Response and Economic Recovery Plan with the goal of saving up to 138,000 jobs
- $4 billion business support package that includes a $3.2 billion extension to the wage subsidy scheme
- $3 billion infrastructure investment and a public housing build programme for 8,000 new homes that should boost productivity and create more jobs
- $1.6 billion trades and apprenticeships training package
- $1 billion environmental jobs package that includes initiatives to boost pest control and for the restoration of wetlands
- $3.3 billion to strengthen core services, including health and education
- $1 billion to Māori focussing on job creation, and
- Almost $200 million to support Pacific peoples.

Business support

The government's $4 billion business support package includes a targeted $3.2 billion wage subsidy scheme extension.

From Wednesday, 10 June (when the current scheme of 12 weeks runs out) businesses that have, or expect to experience, a 50% loss of revenue over the previous 30 days compared with the same period in 2019 will be eligible. The initial scheme had businesses needing to show a 30% drop in revenue. The wage subsidy will now become available to high-growth firms, and to Callaghan Innovation-recognised research and development start-ups.

The payment remains the same at $585 per full-time employee; it will continue to be paid as a lump sum.

The Budget has introduced the reinstatement of depreciation deductions for commercial and industrial buildings, an increase in the provisional tax threshold, an increase in the threshold for writing off low-value assets and much more.

The tourism sector has been particularly badly hit during the COVID-19 pandemic. Many businesses have experienced zero turnover since the summer and face a bleak outlook until at least 2021 due to our border being closed. The government will provide $400 million for a domestic tourism campaign and to provide support so businesses can plan their futures.

Paying for it all

Treasury's projection is that by 2024, New Zealand will have borrowed nearly $200 billion, almost doubling the country's current debt. It is estimated that New Zealand will record deficits in the tens of billions of dollars until around 2028.

We are here to help

New Zealand has not known such a shock to its economy for almost a century. The year ahead will be difficult for us all, no matter what our circumstances, as we all rebuild our lives post-COVID-19.

Please don't hesitate to contact us if you need advice or simply need a sounding board. We are here to help you.

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Government's COVID-19 wage subsidy scheme

Not a 'gift', there are employer obligations

Many New Zealand employers are scrambling to maintain solvency while balancing their employer obligations during the COVID-19 lockdown; thousands of businesses accepted the government's COVID-19 12-week wage subsidy as a necessary lifeline. The subsidy was not, however, a gift. We take a closer look at employers' obligations when accepting the wage subsidy.

Not all applications were equal

Obligations imposed on an employer are different depending on when the subsidy application, and the associated declaration, was submitted.

For applications submitted up to 4pm on 27 March 2020: you were obliged to use your *best endeavours* to retain all staff, and to make the best endeavours to pay at least 80% of your employee's regular wages.

For applications submitted after 4pm on 27 March 2020: you have an *obligation* to retain all staff during the 12-week period of the wage subsidy and to make best endeavours to pay at least 80% of your employee's regular wages. You are also unable to make any changes to pay or hours of work without express agreement from each employee.

Best endeavours to pay at least 80% salary

'Best endeavours' has previously been considered a very high threshold[1]. It means you may be required to act against your own commercial interests, but not to the extent of financial ruin. This means that while your budget is tight, asking your employees to accept pay cuts to retain a profit margin or protect the year-end result will not be considered 'best endeavours' and you will be in breach of your obligations.

As well, before paying your employees less than 100% of their wages you must ensure that you can demonstrate, through thorough financial analysis, that the salary/wage amendments are required to ensure the survival of your business, and you must consult with your employees before making any changes.

Can I reduce all staff to 80% salary?

A common misconception among business owners is that as long as they pay their staff 80% of their regular salary, they may decide to immediately reduce wages. **If you submitted prior to 4pm on 27 March 2020**, you must still consult with your employees and give them an opportunity to respond to your proposed changes. You must seek agreement to any changes made, and before making any final decisions regarding changes to your employee's working conditions or potential redundancies.

However, if you submitted your subsidy application **after 4pm 27 March 2020** you cannot make any changes to hours, wages, entitlements or working conditions without consultation and agreement from your employees. This means you must propose the measures required, and then ensure each employee has individually agreed to the arrangement[2].

Considering redundancies?

For applications submitted **before 4pm on 27 March 2020**, you must apply the same rigour to prove you couldn't retain your employee before making them redundant during the 12-week subsidy period. The redundancy process must be followed as per any other restructure or redundancy outside of the COVID-19 measures. The process is explained here.

If you submitted your application **after 4pm on 27 March 2020** you are not allowed to make your employees redundant during the 12-week period covered by the wage subsidy. If it becomes apparent before the 12-week period ends that redundancies will be required, you may begin the consultation process with your employees before the end of the 12 weeks. This consultation must involve the standard steps for a restructure, and the final decision and subsequent redundancies must only occur after the conclusion of the 12-week subsidised period.

Regardless of when you applied for the wage subsidy you have an obligation to MBIE to notify it of any changes to your

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1 *Artifakts Design Group v NP Rigg Ltd* (1993) 1 NZLR 196.
2 Unless your employee has negotiated through their union.

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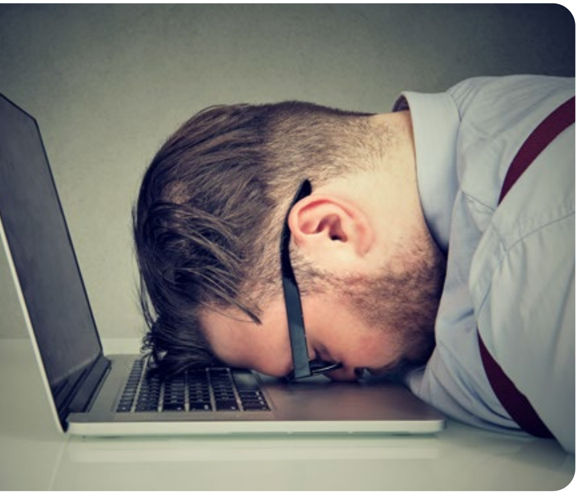

COVID-19 can be 'frustrating'

COVID-19, and the restrictions imposed by the government in an attempt to control it, have deeply affected our lives. However, it's not just our social lives that have become frustrated. Some businesses and individuals have found themselves party to a contract they can no longer perform due to COVID-19 and the government restrictions. Whether it is an event scheduled during a lockdown that can no longer be held, a customer who you can no longer supply or transport goods to due to travel or border restrictions, or a service you can no longer provide, the 'doctrine of frustration' may be able to help.

The courts first recognised the doctrine of frustration in the 1800s case of *Taylor v Caldwell*[3] where two parties had a contract to lease a music hall that burnt down before any concerts could be held. The court held that the contract was frustrated and the parties were discharged from their obligations under the contract.

'Frustration' has a very high threshold. The event causing frustration cannot be caused by either of the parties and must make contractual performance impossible, or radically alter the obligations under the contract. You cannot rely on frustration if the event has become difficult or expensive.

If you can prove frustration then you may be able to recover some or all of the money already paid under the contract. Some, or all, of any money you owed under the contract may also cease to be payable.

Contracts may also have a 'force majeure' clause; also with a high threshold. This clause may excuse a party from performing (in whole or in part), allow a delay in, suspend performance of or provide a right to terminate the contract. Where the clause specifically refers to government actions or epidemics it may potentially be used for COVID-19.

If you think either of these situations can give your business some relief, we're happy to help.

3 *Taylor v Caldwell* [1863] EWHC QB J1.

Debt recovery – what is the process?

The economic fallout from COVID-19 will have many businesses facing issues with unpaid debt. As cash flows tighten, this is a good time to understand the process of debt recovery.

The exact procedures will differ depending on the agreement you have with your debtor and the type of debt, but the general process is as follows:

1. Informal reminder: it is quite common for a payment to be late or forgotten; usually an email or phone call to remind the debtor is all that is required.
2. Formal notice: if your debtor does not make payment for an extended period you should notify them in writing of the unpaid debt, and that they are required to make payment under the agreement or terms of trade. The notice should give a timeframe for payment to be made.
3. Letter of demand: if payment is still not made, you can then issue a letter demanding the debtor makes payment or you will take legal action to recover it. This letter could provide an offer to negotiate a payment plan.
4. Legal action: if still unsuccessful, then you may begin legal action to recover

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Government's COVID-19 wage subsidy scheme

staff. As well, all your usual obligations under the Employment Relations Act 2000 still apply despite the extraordinary environment of the pandemic.

Wage subsidy scheme extension

An extension to the government's wage subsidy scheme was announced in the Budget. This will run from 10 June to 1 September; applications open on 10 June. For more information on this, go here.

Government has good resources

MBIE/Employment New Zealand continues to update its resources for businesses during this difficult time, including checklists and guidelines for redundancies. The subsidies, relief and subsequent obligations are an ever-changing landscape as the impact of COVID-19 continues to unfold. Click here for the latest information.

If you have any questions about your specific circumstances, are concerned you may have breached your obligations as an employer or you have any employment law queries, please don't hesitate to contact us.

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the amount owing. This could involve applying to the court for a judgment to recover the amount.

5. Enforcement: if an order for repayment is made, then you can apply to have the judgment enforced. Possible enforcement orders could include a repayment schedule, confiscation of assets, using a debt collection agency or even the appointment of a liquidator.

In these post-COVID times, many businesses will be struggling with cash flow and the viability of their business may be in question. It pays to remember that the style and tone of communications with your debtor may make the difference between being paid or not paid.

The debt collection process can vary depending on the situation and there can be pitfalls if the process isn't followed correctly. If you are unsure about how to proceed to recover a debt, please don't hesitate to contact us.

'Safe harbour' for directors

In May, legislation was passed[4] amending the Companies Act 1993 to help businesses facing insolvency due to COVID-19. The changes include:

- A 'business debt hibernation' regime that will allow businesses that meet the required criteria to place existing debts into hibernation for one month, or up to seven months if creditors approve
- Providing directors of companies facing significant liquidity problems due to COVID-19 with a 'safe harbour' which will, under certain conditions, relieve directors of their duties with regard to reckless trading and incurring further obligations. Directors need to be aware that this safe harbour will not release them from their other duties under the Act. The safe harbour lasts for six months from 3 April but may be extended until 31 March 2021
- Enabling the use of electronic means (such as holding meetings electronically, voting electronically or using electronic signatures) even when a business's constitution does not allow this
- Providing relief for businesses that cannot comply with their constitutions due to COVID-19, and
- Giving Registrars (government officials responsible for the Companies Register or the Personal Property Securities Register, for example) and Ministers of the Crown the power to grant exemptions from certain statutory obligations.

If you think any of the above measures could apply to your situation, please don't hesitate to contact us for advice specific to your business.

4 COVID-19 Response (Further Management Measures) Legislation Act 2020 and the COVID-19 Response (Requirements for Entities – Modifications and Exemptions) Act 2020.