

Commercial eSpeaking

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Welcome to the Spring 2020 edition of *Commercial eSpeaking*. We hope you are weathering COVID as well as possible.

We hope you find these articles to be both useful and interesting. To talk further with us on any of the topics we have covered, or on any other legal matter, please don't hesitate to contact us – our details are on the right.



COVID relief roundup

How many schemes are you eligible under?

Since the pandemic arrived on our shores, the government has made available multiple types of financial relief; more than one may be available to your business. Although applications under the popular Wage Subsidy Scheme ended on 1 September 2020, other options are still available for support if you need it.

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OIO temporary emergency notification requirement

For all overseas purchasers

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Remote working: the new normal

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Know your contracts

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'Safe harbour' for directors to expire

During the COVID lockdown, changes were made to the Companies Act to provide company directors with a temporary 'safe harbour' from certain duties if the company was facing liquidity problems because of COVID. The 'safe harbour' provision will expire on 30 September 2020.

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COVID relief roundup

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Apprentice Support Programme

If your business has an apprentice who is actually training, you may be eligible to receive \$1,000/month for first year apprentices and \$500/month for second year apprentices. This payment is for a maximum of 20 months from August 2020 to March 2022. Visit [here](#) at Work and Income Te Hiranga Tangata to apply.

COVID-19 Leave Support Scheme

What used to be called the Essential Workers Leave Support scheme has been renamed the COVID-19 Leave Support Scheme as it is now available to all eligible employers, not just essential businesses. An eligible employer with an employee who cannot work from home and is required to self-isolate due to COVID restrictions can, with the consent of their employee, apply for \$585 per week for four weeks (\$350/week for part-time employees). See [here](#) for more information.

COVID-19 Small Business Cashflow (Loan) Scheme

The Small Business Cashflow (Loan) Scheme (SBCS) is designed to help businesses through a low income

period caused by COVID that, based on projections, will recover relatively quickly.

Eligible businesses include the self-employed as well as any small business with up to 50 employees that can directly attribute the need for the loan to COVID. Those eligible business may apply for up to \$10,000 plus an additional \$1,800 for each full time employee (or equivalent) who they employ.

The loan is interest free if it is repaid in full within one year; if not, an interest rate of 3% per annum applies. No repayments are required for the first two years, but the full amount must be repaid within five years of receipt of the loan.

Much like any other lender, the government must be satisfied that your business will remain viable and be able to service the loan over the next five years. To apply, or for more information, visit Inland Revenue [here](#).

Temporary loss carry-back scheme

Many businesses will be familiar with carrying business losses forward to offset the tax payable on the following (hopefully) profitable year.

The temporary loss carry-back scheme allows the exact opposite to occur; a business can use its business losses experienced (or projected) during the 2019–2020 or 2020–2021 tax year against the prior year's profits which will reduce the tax payable on profits already made. This adjustment is made through a provisional tax arrangement with Inland Revenue.

All businesses are eligible and consultation with your accountant is recommended to ensure this is appropriate for you. Apply via the 'I want to' link on your myIR.

Tenancy issues

For many New Zealand businesses, particularly bricks and mortar retailers, rent obligations under a lease are substantial. The government has provided interim relief by increasing the length of notice landlords must give before they may end a lease for non-payment of rent.

The notice period was 10 working days, but has been increased to 30 working days. This interim relief applies to rent arrears from 1 April 2020.

In addition, many tenants have received some form of rent relief from their landlord for the time they were unable to

OIO temporary emergency notification requirement



For all overseas purchasers

It seems as though the Overseas Investment Office (OIO) has been under constant evolution over the last two years. In June, the OIO enacted a change that now requires all overseas purchasers of New Zealand business assets to submit a notification to the OIO *before* the transaction takes place — regardless of the asset value. This submission will allow the OIO to monitor and prevent New Zealand asset ownership being unnecessarily diluted due to stressed sales caused by unprecedented economic pressures from COVID.

Which transactions does this apply to?

Previously, 'overseas persons' who purchased New Zealand business assets valued under \$100 million (excluding land), did not have to apply for OIO consent. Under the 'Emergency

Notification' requirement, however, the OIO must be notified by every overseas person *before* purchasing any New Zealand business assets — even if the transaction holds minimal value. This includes an increase of shareholding in a business in which the overseas person already holds an interest. The requirement to submit a notification does not extend to purchases that require the consent of the OIO, as the office will already be aware, and have the opportunity to reject, those transactions.

What is an 'overseas person'?

An overseas person is anyone who is not a New Zealand citizen or ordinarily resident in New Zealand. In the case of a company, trust, partnership, joint venture or body corporate that entity will be considered an overseas person if the beneficial ownership or control is comprised of more than 25% of people who are not New Zealand citizens or ordinarily

residing in New Zealand. We can help you understand whether you, or your purchaser, are considered an overseas person in New Zealand.

Notifying the OIO

The OIO has a form that must be completed on its website available [here](#). Specific information that must be disclosed in the application includes:

- » The business details and industry being invested in
- » Two years of financial statements of the business
- » Passports of each party involved, and
- » A structural diagram of the purchaser including beneficial and legal ownership.

When does the notification occur?

Notification to the OIO must be submitted before the transaction takes place. It is free of charge to submit. It is recommended that this notification be completed as soon as possible prior to the transaction becoming unconditional so that there is sufficient time for further assessments imposed by the OIO.

What happens after the notification?

Once a notification has been submitted, the OIO will assess the transaction. You will be notified within 10 working days whether

the transaction is approved, if further assessment needs to be taken, conditions are required or if the transaction has been rejected.

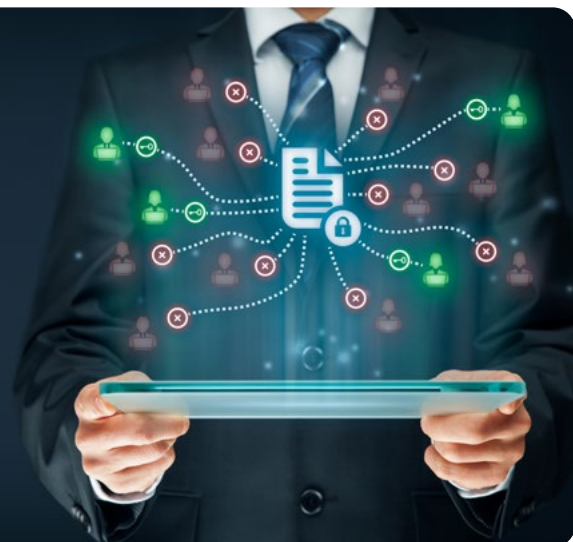
While the OIO intends most transactions to proceed as planned, if it decides further assessment is required it may take more than 30 additional working days. This process underlines how important it is for a purchaser to be organised well in advance of the transaction's proposed settlement date. The OIO will accept transaction notifications during the conditional phase in order to accommodate early notification.

Regime to remain during COVID

The requirement to report all transactions involving purchasers who are overseas persons is reviewed every 90 days by the government. The regime is intended to remain in place while our economy is vulnerable to the impacts of COVID. Even when the Emergency Notification requirement has been revoked, it could be reinstated for future emergency situations — albeit a resurgence of COVID or other national emergency.

If you have any queries on the impact of the OIO's new regime on your particular situation, please contact us. For full details of the information that must be provided to the OIO, please click [here](#). ●

Business briefs



Privacy law changes

The Privacy Act 2020 was passed on 30 June 2020 and comes into force on 1 December 2020. It will repeal and replace the current Privacy Act 1993, and will update the law to reflect the continually-evolving needs of the digital age.

Some of the key changes are:

- » **Overseas agencies:** The legislation will apply to any person or organisation (known as 'agencies' in the Act) located overseas who are 'carrying on business' in New Zealand

- » **Mandatory reporting of privacy breaches:** If an agency believes a privacy breach has caused, or is likely to cause, serious harm, then it must notify the Privacy Commissioner and affected individuals
- » **Compliance notices:** The Commissioner can issue a compliance notice to an agency that has failed to adequately respond and remedy a privacy breach requiring them to do something or stop doing something
- » **Storing information overseas:** An agency will remain responsible for information sent overseas or stored on overseas servers
- » **Criminal offences and penalties:** It is a criminal offence to mislead an agency to obtain someone else's personal information, or destroy evidence where the Commissioner has requested it, and
- » **Penalties:** The maximum fine for a privacy breach has increased from \$2,000 to \$10,000.

We recommend you review your privacy policies before the new legislation comes into force. You must also have clear procedures in place to ensure you and your organisation can comply with these additional privacy obligations.

Remote working: the new normal

As a result of the COVID lockdown, many employees were required to work remotely, and some are continuing this arrangement.

Working remotely comes with some important considerations, particularly in terms of health and safety. If you are an employer, you should be:

- » Meeting your obligations under the Health and Safety at Work Act 2015, and your duty to ensure employee safety, so far as is reasonably practicable

- » Ensuring your employees are taking adequate rest and meal breaks (as if they were in the workplace) in order to meet your obligations under the Employment Relations Act 2000
- » Making sure your employees continue to report any injuries, accidents or near-misses that take place in their remote working space (these could be considered a work-related injury), and
- » Ensuring your employees' remote working set-up is ergonomically-sound and free from any hazards.

These obligations are best set out in your organisation's health and safety policy



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COVID relief roundup

access their premises during the Level 4 lockdown. Any tenants and landlords who have been unable to reach an agreement will be able to register for subsidised mediation through the New Zealand Dispute Resolution Centre (NZDR).

Exact details on the subsidised service are yet to be released, but tenants and landlords may pre-register on the NZDR's website [here](#).

The government intends the service to go live by the beginning of October 2020 and be available for six months until the end of March 2021.

Keep up-to-date with COVID relief

The relief available for businesses is an ever-changing landscape as the government attempts to provide relief where it will be felt most. Checking in regularly with the government support website [here](#) will help you keep up-to-date.

If you need any help with understanding your relief options or eligibility, please don't hesitate to contact us. ●

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Business briefs

and/or a remote working policy for your employees to refer to. It is important these obligations are not just followed in the usual place of work, but also when your employees are working remotely.

Know your contracts

One of New Zealand's largest olive oil companies is facing liquidation after failing to fulfil its contractual obligations.

In April 2018, Matapiro Olives (2008) Ltd and The Olive Press Ltd exchanged emails discussing the supply of olives to make olive oil for the 2018, 2019 and 2020 seasons. As part of that discussion, Matapiro agreed to consign at least 250 tonnes of olives per season to Olive Press, which Olive Press would turn into olive oil for Matapiro.

During the 2018 season, Matapiro supplied approximately 350 tonnes of olives. In 2019, however, Matapiro had a very low yield which resulted in no olives for processing. Olive Press issued an invoice to Matapiro in September 2019 for 250 tonnes of olives at the normal processing rate, but Matapiro refused to pay as they had not used Olive Press' service during that season.

The High Court¹ found that the email exchange between the parties in April 2018 amounted to a binding contract and that Matapiro was liable to pay over \$150,000 to Olive Press.

A simple condition inserted into a formal agreement would have prevented this issue from arising.

This case demonstrates how important it is to get legal advice when negotiating or entering into any contract or agreement so that you properly understand your legal obligations, particularly when large sums are involved.

'Safe harbour' for directors to expire

Earlier this year, the government made changes to the Companies Act 1993 to provide company directors with a temporary 'safe harbour' from certain duties if the company was facing liquidity problems because of COVID.

The safe harbour provision will expire on 30 September 2020. This means company directors will again have duties under sections 135 and 136 of the Companies Act. Under these sections a director must not:

1. Carry on the business of the company in a manner likely to cause serious loss to company creditors, or
2. Agree to the company incurring an obligation the company cannot perform.

We recommend that directors start preparing now for when their duties will resume and to talk with us if there are any concerns about complying with these duties. ●



¹ *Matapiro Olives (2008) Ltd v Olive Press Ltd* [2020] NZHC 1394.