



Parry Field Lawyers

Covid-19

Legal Handbook



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Notice of Disclaimer: Every situation is unique. This publication is intended to provide information on topics for Covid-19 related issues in an accurate and complete way. However, it is not intended to deal with every possible situation or option. The Pandemic is a fast moving situation which means Government policy and what is available is also changing quickly - as at 7 May 2020 we have provided accurate information but the situation will no doubt be changing over time so consult with your advisers before making decisions. Parry Field Lawyers exclude fully any liability arising in respect of or resulting from reliance in part or in full on the contents of this book for any purpose (we're lawyers, so you know we had to put this in). We do recommend you consult with a lawyer before making key legal structuring decisions.

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INTRODUCTION

The outbreak of Covid-19 has created a global health crisis that has had a significant impact on the way we perceive our world and our everyday lives. This crisis has rapidly pushed us into the unknown and left many facing an uncertain future. However, it has been proven throughout history that New Zealand is no stranger to adversity. Time after time, New Zealanders have shown the ability to come together, with the desire to help one another demonstrating the resilience of the nation and this situation is no different.

This handbook aims to help with issues that have arisen during the Covid-19 crisis. Accordingly, the handbook is split into several key sections. We look first at the financial packages set up by the Government, aimed at protecting jobs and assisting businesses to offset some of the financial pressure. Followed by looking at governance and how director's duties still apply during this time, as well as exploring the alternative ways that documents may be signed while in lockdown, as ink and paper may no longer rule. This handbook will also look at contracts and options available to parties during these unprecedented times. We have also included a section on the impact Covid-19 is having on charities and not for profits, and providing some insight on the potential action that can be taken, not just in the short term but also in the long term and the opportunities that may be available to ensure continuation into the future.

The Pandemic is a fast moving situation which means Government policy and what is available is also changing quickly - as at early May 2020 we have provided accurate information but the situation will no doubt be changing over time so consult with your advisers before making decisions.

We have many other free resources that you may find helpful at www.parryfield.com. In addition, we have released the free eBooks '*Social Enterprises in New Zealand: A Legal Handbook*' and '*Churches in Aotearoa New Zealand: A Legal Handbook*.' A unique offering is also *seeds*, a podcast about purpose with interviews of more than 175 inspiring people.

We are trying to empower people like you to succeed and hope this publication will help you to consider and resolve any common legal issues and uncertainties you may find navigating through this uncertain time.

We look forward to connecting with you to see if there are ways our team can support yours.

Parry Field Lawyers
Christchurch, Hokitika and Rolleston
New Zealand

OUR TEAM

We have around 50 staff in three offices who focus on the full range of legal issues. Meet just some of our team! For the full list visit <https://www.parryfield.com/home/our-people/>

Kris Morrison
Partner



Kris is a Partner who regularly advises companies and charities on a range of issues. He also works in the area of technology and advises on intellectual property issues. He is also an experienced board member on a number of charitable trusts and non-profit organisations.

Hannah Carey
Special
Counsel



Hannah advises on a variety of employment related matters. This includes new employment agreements, variations to employment terms, the impact of law changes, and resolving employment disputes, including personal grievances.

Steven Moe
Partner



Steven is a Partner with a particular focus on empowering impact. That takes the form of advice to impact focussed companies as well as NFPs and charities on a regular basis as well as social enterprises. He hosts the podcast [seeds](#) and is a facilitator for IOD courses for Directors.

Ken Lord
Consultant



Ken is a co-author of “Charity Law in New Zealand” and is a consultant who has worked at Parry Field for 40 years. Over all that time he has had a sizeable practice in Property and Personal law including trusts and asset planning combined with strong interests in the charity sector, assisting the elderly and charitable trusts.

Grant Adams
Partner



Grant has practised for 35 + years as a lawyer. His role as Chair in a number of organisations (including the Board of Parry Field) has enabled him to combine his legal knowledge with extensive practical experience. He finds this helps keep the focus on what matters, in an era where compliance and process are placing increasing demands on boards' time and energy.

Aislinn Molloy
Solicitor



Aislinn is a solicitor at our firm who works in our property team and assists with property work as well as with companies and charities in their initial stages.

Paul Cowey
Partner



Paul leads our dispute resolution team with an innovative and enthusiastic approach born of twenty plus years' experience. Paul understands people. He has spent years living abroad in both Europe and Fiji. He now advises, not only on how to resolve disputes using the Court process when necessary, but also on how best to resolve conflict outside the Courts.

Judith Bullin
Senior
Associate



Judith is a Senior Associate in our firm who regularly advises in relation to structures, trustee obligations, Health and Safety and Property matters. Judith is currently a board member for a charitable trust and is the current Chair of an integrated school Board of Trustees.

Pat
Rotherham
Consultant



Pat is a Consultant whose specialty is [trusts](#), their proper administration and asset protection structures. Pat is a Rotarian and has been the organiser of the Hornby Citizens Advice Bureau (free legal advice) for the past 28 years.

Paul Owens
Partner



Paul specialises in property and often advises on the acquisition of new land, leases or other arrangements. He is Chair of the CDN Trust.

Tim Rankin
Partner



Tim is key member of our property and commercial team and is currently involved in some of Canterbury's largest subdivisions. He regularly advises on a wide range of issues, from business acquisitions and disposals, commercial leases, franchises and corporate structuring, including business and family succession planning.

PART 1. FINANCIAL ASSISTANCE & PAYING STAFF



1. APPLYING FOR THE GOVERNMENT WAGE SUBSIDY SCHEME

The Government will support employers if you face laying off staff or reducing their hours because of COVID-19. But you must meet certain criteria to be eligible - described [here](#).

How much?

The amount involved is paid at a flat rate of \$585.80 to a person working 20 hours or more per week and \$350.00 to a person working less than 20 hours per week. That is a payment of \$7,029.60 for a full time employee and \$4,200 for a part time employee.

Criteria to apply?

First, check 2019 revenue against 2020 revenue. Has there been a 30% actual or predicted decline? If so, then you need to confirm:

1. - the decline is due to the impact of COVID19;
 - you will make best efforts to retain staff and pay them (at least 80% of their usual pay). This should be over the - 12 weeks subsidy period;
 - you have taken active steps to mitigate lost revenue eg consulting with your bank or advisors; and
 - Staff provide consent for details (names, contacts, IRD numbers) to be provided to MSD.

2. It is worth emphasising that a predicted drop of income will suffice, so employers should put together a list of factors supporting a predicted drop. That could include the obvious, such as staff not being able to work at all but also, where staff can work remotely, not all staff being able to work for 8 hours a day due to technical constraints or clients being in non-essential industries.

Other steps to take

3. We suggest that you document last year's revenue vs this year. If you've existed for less than a year choose a reasonable month last year to compare with. MSD have noted that they have power to investigate later and it seems likely that some will abuse the system - so best to document both what revenue was and is predicted to be, as well as a list of what steps were taken to mitigate impact.

2. COVID-19: PAYING YOUR EMPLOYEES

The Government is regularly clarifying aspects of the Subsidy and the below is our current understanding of how it may apply as at 27 March 2020.

Do employees still have to be paid?

- As a general rule, where employees are, apart from the shutdown, otherwise willing and able to work, employees are entitled to be paid by their employer. This will be informed by the following however and the terms of each employee's employment agreement.

What are some possible relevant clauses in the employment agreement?

- Check to see what the agreement says on such things as unpaid leave, special leave, annual leave, what happens in a pandemic, reducing hours, varying agreements, or, in a worst case scenario, redundancy.
- Remember however that, any proposed changes to such things as the employees' usual hours of work or pay, regardless of what the employment agreement says, should be discussed with employees in advance (i.e. consultation, listening to their feedback/suggestions), rather than simply presented to employees. Any agreed variation should also be recorded in writing between the employer and employee.
- The duty of "*good faith*" continues to apply, even in these difficult circumstances. In layman terms, "*good faith*" simply reflects the "*golden rule*" and means treating your employees like you would like to be treated (or how you might like a member of your family to be treated by their employer).

The Government subsidy - general information

- See above on applying for the Subsidy.
- Where employees will not actually be physically working or will work for less than their usual hours, say from home, the short-fall, up to 80%, should be recorded as special paid leave.
- So, if an employee is not working at all, the 80% will be recorded fully as special paid leave. If the employee is working half their usual hours, half will be recorded as usual wages/salary and the other half, up to 80%, would be recorded as special paid leave.
- The Government Subsidy must then be used by the employer towards their 80% contribution (or any additional wage payments the employer decides to make to employees).
- The balance - 20% - will need to be discussed and agreed with employees and could be a mixture/combination of unpaid leave, annual leave, sick leave or additional special paid leave. If agreement cannot be reached on employees taking annual leave, the employer can direct employees to use annual leave but only on 14 days' notice.
- The advice we have received on taxation of the Subsidy is that:
 - the wage subsidy payment will not be subject to GST;

- the wage subsidy paid to the employer will not be taxable;
- the wage subsidy paid to the employee, by the employer, will not be deductible; and
- the wage subsidy is taxable to employees, being included as part of their normal wages and therefore being subject to their usual PAYE, Student Loan, Kiwisaver deductions, etc.

“What are Best Efforts?”

What about if I’m unsure if I can pay staff 80% of the usual wages for 12 weeks or whether I might ultimately have to make employees’ redundant?

- The terms of the subsidy refer to employers making “*best efforts*” to retain staff and pay staff at least 80% of their normal income for the subsidised period (in order to qualify for the subsidy).
- As at 27 March 2020, the Government has clarified that, if an employer has made “best efforts” but cannot pay staff 80% of their usual salary/wages, an employer may still claim the Subsidy but must pass on the whole of the subsidy to their employees.
- An employer will still need to be prepared to demonstrate the steps it took, prior to that time, to avoid that situation. In other words, what evidence do you have of your “*best efforts*.” This could include:
 - Seeking third party financial assistance, such as from a bank or landlord or suppliers (i.e. further funding, mortgage holidays, interest free terms, deferred payments, staggered payments etc.);
 - Seeking advice from the Chamber of Commerce, a relevant industry association or your accountant; and
 - Discussing with staff about whether they would be prepared to take their annual leave or sick leave entitlement to top up the Government Subsidy or accept reduced paid hours/unpaid leave. This could include only being paid the amount of the Government Subsidy, if necessary.
- MSD will have the ability to check applications and verify information at a later date, including an employer’s declaration at the time of application that they will make “*best efforts*” to retain staff and pay at least the 80% cap.

What about in a worst case scenario and I need to look at making employees redundant?

- As at 27 March 2020, the Government has clarified that, in order to claim the Subsidy, employers must keep employees in employment for the period of the Subsidy (even if they are only passing on the Subsidy to employees to keep them in employment).
- It remains unclear what will happen if an employer claims the Subsidy but then makes an employee(s) redundant but it is possible (but not yet confirmed) that employers may need to repay the Subsidy relating to those employees, or at least, relating to the period of time after the employee’s employment ended.

- Employers will also need to again be prepared to demonstrate what steps they took to retain staff prior to that time.
- If a redundancy is undertaken, employers should again check the terms of their employment agreement to see what it provides regarding redundancy. For example, it may define when an employee will be considered redundant, the process that must be followed, what notice must be paid out, and whether any redundancy compensation is payable. The terms of the agreement will need to be followed.
- A fair process, carried out in “*good faith*” will again be required, although consultation will need to be done by email, telephone or applications such as “zoom” and relevant timeframes for consultation and decision making may be able to be reduced.



3. WHAT DO I HAVE TO PAY MY EMPLOYEES FOR PUBLIC HOLIDAYS?

Many employers are wondering what they need to pay their employees for statutory holidays.

Here we consider two scenarios (1) where non-essential employees have been working from home over the lockdown period (albeit potentially in a reduced capacity) or (2) not working at all.

In general, employers are still required to pay their employees for statutory holidays that fall on a day that would have “*otherwise been a working day*” for the employee or if the employee has otherwise agreed to work on that statutory holiday (even if it not a usual working day for that employee).

However, as result of the Covid-19 lockdown, some employees are not able to work at all, giving rise to uncertainty about whether or not the upcoming statutory holidays would have “*otherwise been a working day*” for the employee or not. The Holidays Act does not cover off this situation.

The advice below is of a general nature so, if you are considering not paying your employees for the upcoming public holidays, we strongly recommend that you obtain legal advice specific to your situation before doing so. We are very happy to help if need be.

Non-essential employees working from home over Covid-19 who do not work on a statutory holiday

If an employee would have worked on a Friday or Monday (but for Good Friday or Easter Monday, for example), then that employee is entitled to be paid for that statutory holiday. This includes an employee who has been working from home over the lockdown period, albeit potentially in a reduced capacity.

In that case, employers must pay their employees not less than:

- (a) The employee’s “*relevant daily pay*”; or
- (b) The employee’s “*Average daily pay*” for that day.

These words have specific meanings under the Holidays Act. However, in general terms, “*relevant daily pay*” is the amount of pay that your employee would have received had the employee worked on the Friday (Good Friday) or the Monday (Easter Monday). It can include things like overtime, bonuses and the like, if your employee would have usually received those things as part of their pay.

Consequently, if you have agreed with your employees that, over Covid-19, their pay or hours of work will reduce, then their “*relevant daily pay*” will reflect those new agreed hours/days of work (making sure you still comply with Minimum Wage obligations).

Likewise, if you have applied for the Government Wage subsidy, and have agreed with your employees that you will only pay them the relevant subsidy amount each day, then that would be their “*relevant daily pay*” (again making sure you comply with Minimum Wage obligations).

However, if there has been no change to the employee's pay, you will simply pay the employee their usual daily pay.

If you are able to work out "*relevant daily pay*", then this will be the amount you pay your employees. If it is not possible/practicable to do so or the employee's daily pay varies at the moment, then you would use "*average daily pay*".

The employee's average daily pay is calculated using this formula:

a/b

where—

- a. is the employee's gross earnings for the 52 calendar weeks before the end of the pay period immediately before the calculation is made; and
- b. is the number of whole or part days during which the employee earned those gross earnings, including any day on which the employee was on a paid holiday or paid leave; but excluding any other day on which the employee did not actually work.

Non-essential employee working from home over Covid-19 who does work on a statutory holiday

If, however, your employee actually works on the statutory holidays (so long as that is agreed as per their employment agreement), then they are entitled to be paid:

Time and a half, calculated **at the greater of—**

- the portion of your employee's "*relevant daily pay*" or "*average daily pay*" (less any penal rates) that relates to the time actually worked on the day **plus** half that amount again; or
- the portion of your employee's "*relevant daily pay*" that relates to the time actually worked on the day.

If this would '*otherwise be a working day*' for your employee, then they are also entitled to an alternative holiday.

Non-essential employee not working from home over Covid-19

The situation is less clear where a non-essential employee has not been working from over the Covid-19 lockdown (because it is not possible/practicable to carry out their usual duties from home due to the nature of their work).

The Holidays Act provides however that, where it is not clear whether a day would otherwise have been a working day, the employer and employee must attempt to reach agreement on this, taking into account such things as:

- **What the employment agreement says - does it cover off what will happen in the event of a pandemic?**

Some agreements provide that, in the event of a pandemic resulting in a shutdown, the employer will neither provide work nor pay the employee over that time and the employee will not be required to work.

- **What is the employee's usual work pattern, i.e. would they usually have worked that day, but for Covid-19, or does the employee generally only work for the employer when there is available work?**
- **Whether the employee usually works pursuant to a roster system and what that roster would have provided but for Covid-19.**

If agreement cannot be reached, a Labour Inspector can be asked to decide the matter but we anticipate that will be unlikely to occur before the upcoming statutory holidays.

Ideally employers and employee will work hard to try and reach agreement as to how employees in these situations will be paid for the statutory holidays, taking into account both the circumstances of the employer and the employee. However, while, again, specific advice should be sought on your circumstances, our present view is that, if you have obtained the Government's Wage subsidy, at a minimum that amount should at least be passed onto employees. This is based on our current understanding of the Wage Subsidy, which may change if the Government provides further guidance.

4. THE NEW FINANCE GUARANTEE SCHEME: COULD IT HELP YOUR BUSINESS

Some of the hardest hit by the current Covid-19 crisis are small and medium sized businesses. The Government has confirmed that they can now apply to their bank for a loan under the Business Finance Guarantee Scheme (the Scheme), set up by the Government in an effort to protect jobs and support the economy during the Covid-19 pandemic.

The Scheme works alongside the Wage Subsidy Scheme which is already available to businesses. The Scheme's purpose is to help businesses with cash flow and operating expenses in the aftermath of the Covid-19 pandemic.

Not all businesses are eligible for the scheme, however if you are a business with an annual revenue of between \$250,000.00 and \$80 million you can apply to your bank for a loan of up to \$500,000.00 for up to three years. The bank will determine your eligibility and determine the amount available to borrow. Applications under the Scheme are now open and are available until 30 September 2020, or until all available funds, being \$6.25 billion, have been exhausted.

Applications under the Scheme can be made through your bank's website and a standard lending process will be followed through the bank's credit assessment process to determine eligibility. In addition, banks will take into consideration your circumstances due to the Covid-19 pandemic. The interest rate and other terms of the loan will be determined by the bank under their normal lending criteria. Of course a basic question needs to be asked - does your business need more debt or can it survive without taking that on?

This is important to think through because all this really means is that the process is similar to getting a normal loan from the bank - the difference being the Government has agreed to guarantee 80% of the risk in relation to each loan with the remaining 20% to be guaranteed by the bank. If a business defaults on their loan under the Scheme, banks will follow normal enforcement procedures and it is likely that as a part of the loan process and terms the bank will have obtained personal guarantees (usually from company directors) or other security (for example a General Security Agreement over the assets of the Company) that they can enforce before relying on the Government guarantee of the loan. The guarantee provided by the Government is essentially a protection for banks that might not otherwise provide loans to companies and not as a protection for the businesses who are the ones that actually take out the loans.

For more information regarding this scheme you can refer to your bank's website. Participating banks are ANZ, ASB, BNZ, Heartland Bank, HSBC, Kiwibank, SBS Bank, TSB and Westpac.

5. RESTRICTIONS ON BUYING HOUSES EASED DUE TO COVID-19: HOW MIGHT THE REMOVAL OF LVR RESTRICTIONS AFFECT YOU?

Global economic uncertainty as a result of COVID-19 will impact house purchases. On 30 April 2020, the Reserve Bank of New Zealand (RBNZ) announced the removal of mortgage loan-to-value ratio (LVR) restrictions for 12 months. The decision was made to ensure LVR restrictions did not have an undue impact on borrowers or lenders as part of the mortgage deferral scheme implemented in response to the economic downturn caused by the COVID-19 pandemic. In this article we discuss what the changes are and the likely impact they will have.

LVR: What Does It Mean?

LVR is the amount of loan compared to the value of your property. For example, if the property is worth \$500,000 and you have a deposit of \$100,000, the LVR will be 80 percent meaning the loan cannot be higher than \$400,000. LVR restrictions were introduced by the RBNZ in October 2013, as it was concerned about the rate at which house prices were increasing and the potential risk that it posed to the financial system and the broader economy. These restrictions required banks to restrict new residential mortgage lending at LVRs over 80 percent and allowing no more than 20 percent of its total new lending in this category. This placed restrictions on New Zealand banks and the amount of low deposit lending they could do.

If you were thinking about purchasing a home and had a deposit of less than 20 percent of the home's value, your home loan application would have been affected by the LVR restrictions. Your application would have had to go through a number of assessments by the bank in order to determine whether it could lend you money or not. If successful, borrowers would face an additional fee called a low equity margin. This resulted in a percentage added to your interest rate that remained there until your loan reduced to the 80 percent threshold. These restrictions certainly did not make it easy for first home buyers and many felt they had been locked out of the property market. However, such restrictions clearly did not deter them. In December 2019 the amount advanced on mortgages was \$6.5 billion, with \$1.2 billion being advanced to first home buyers, giving this group its highest share since August 2014 (at 18.5%).

Removing LVR

The announcement from the RBNZ to remove LVR restrictions was a strategic one to bolster the economy and increase demand for property as New Zealand comes out of lockdown, with this decision to be reevaluated in 12 months. The removal of restrictions on the amount of money that can be lent to high-LVR borrowers will not only have an impact on new home buyers, but also investment property buyers and those who are already current homeowners.

First Home Buyers

If you have been looking at buying your first home for some time but have been put off by the LVR restrictions, the announcement may have come as a breath of fresh air to you. While it is likely that low equity margin rates may still be applicable, as long as you are credit worthy with income and meet the bank's lending criteria, you could very well be on your way to buying your first home. The removal of LVRs will not only mean it will now be easier for you to obtain lending, it will also mean that you will now have the opportunity to 'shop around' and choose a bank that best suits your circumstances. Up until now, you may only have been able to get a pre-approval from your current bank, as most banks have been reluctant to give pre-

approvals to non-bank clients in case their existing clients could not be approved. This should no longer be the case and an opportunity is there to be taken advantage of.

Investment Property Buyers

Due to the higher risks associated with these types of loans, the current policy classifies investor loans as high-LVR if they are more than 70 percent of the property's value. These high-LVR loans could make up no more than 5 percent of a bank's total new lending in this category. It is likely that this percentage will increase over time, but given the period of uncertainty we are in, it is hard to gauge when this will occur and what the removal of LVR restrictions will truly look like for investment property buyers.

Current Homeowners

The impact on current homeowners is minimal. However, this may make it easier to apply for home loan top ups, especially if you were already close to the 80 percent threshold. It may also mean if you have suffered a loss of income or your property value has decreased to mean your mortgage is now over 80 percent, it may not be as dire for you or the bank as it was before.

Conclusion

The announcement from the RBNZ to remove LVR restrictions was certainly welcomed, especially as the implications of Covid-19 from a financial point of view continue to be negatively felt throughout the country. It will certainly be interesting to see what occurs over the next 12 months as the impact of Covid-19 becomes clearer and whether LVR restrictions will be reinstated.

PART 2. BUSINESS AND GOVERNANCE



6. COMPANY DIRECTORS AND COVID-19: WHAT SHOULD YOU BE DOING

Uncertain times require strong leadership from company directors. We are each adjusting to a new normal of video conferences replacing meetings and realising how much time we previously wasted on travel. But there are also immediate and difficult questions which directors of companies are faced with as the implications of a nationwide lock down continues. In this book we want to ask some of those hard questions so that you can proactively begin to prepare for the coming weeks and months.

As well as making sure you are complying with Director Duties (see next chapter on that) it is important to think widely about all the stakeholders of the company rather than just the shareholders. This includes employees, suppliers, customers - how are each of these groups impacted and what is the flow on effect on the company? You might want to have an action plan regarding:

- **Employees:** How are they doing? Is clear messaging going out about the status? How can you help reduce stress and anxiety through e.g. zoom catchups?
- **Wage subsidy:** Will there be a 30% predicted drop in revenue? If so, explore the subsidy described [here](#).
- **Leases:** Have you got one? Read [this article](#) if so as now may be the time to contact your landlord.
- **Bank funding:** Talk early with your funder and ensure you know what the position is in relation to any loans you have. Are there any other funding sources to be exploring?
- **Shareholders:** Is it worth considering raising some more capital from them (depends on unique context of your company as to whether that is an option but extra liquidity might not hurt).
- **Contracts:** Do any of them have force majeure clauses in them - for your benefit, or not - that might mean these get paused? What impact will that have on your revenue? [Have a read of this article for more on this.](#)
- **Overseas suppliers/customers:** Is there someone overseas that may have issues continuing due to the shutdown that will flow on to impact you? Having considered all these factors does it impact on the viability of the company? Is there a risk of later realising that the company was trading recklessly? Can it continue to enter into new obligations if there is uncertainty about future revenue? Is there some external advice required to make good decisions?

Conclusion

The point of these questions is not to inspire fear it is to get directors thinking about the actual position of their company in light of many complex factors at work right now. Directors should be asking questions of management - perhaps requesting more frequent updates and meetings - and documenting what their decisions are in minutes so there is a record of what they decide. We will get through this and strong leadership from Company directors will be vital for organisations to cross the bridge and get to the other side of the crisis.

7. COVID-19: CHANGES TO DIRECTORS DUTIES & OTHER INSOLVENCY LAWS

The Government has announced several urgent insolvency and corporate law changes in response to the COVID-19 Pandemic, in an attempt to keep solvent businesses afloat during this turbulent economic period. These include:

- permitting electronic signatures where necessary;
- giving entities unable to comply with their constitutional obligations because of the pandemic temporary relief;
- giving the Registrar of Companies authority to extend deadlines imposed by legislation
- amending sections 135 (“**reckless trading**”) & 136 (“**duty to relation to incurring obligations**”) of the Companies Act 1993 to afford directors greater comfort when making difficult decisions regarding their ability to continue to trade;
- bringing forward changes to the voidable transactions regime; and
- introducing the business debt hibernation scheme.

Once enacted, the Government has confirmed their application will be given retrospective effect from 3 April 2020.

Changes to Directors’ Duties

In light of concerns directors may prematurely place companies into liquidation for fear of personal liability incurred should they continue to trade or to take on new obligations, two significant amendments have been made to sections 135 & 136 of the Companies Act 1993.

- Section 135 places an obligation on directors to abstain from agreeing, causing or allowing for a company to be operated in a manner likely to create a substantial risk of serious loss to the company’s creditors.
- Section 136 places an obligation on directors to abstain from taking on a new obligation if they do not believe, on reasonable grounds, that the company will be able to fulfil its obligations under the arrangement

Under the announcement, directors who continue to trade (including the taking on of new obligations), will be afforded a “safe harbour” period from potential claims providing these criteria are met:

- the directors consider, in good faith, that the company is or will likely face **significant liquidity problems** in the next six months due to the pandemic;
- the company was able to **pay its debts as they fell due on 31 December 2019**; and
- the directors consider in good faith that it is more likely than not the company will be able to **pay its debts as they fall due within 18 months** (for example, utilising the business debt hibernation scheme to get the business back on track).

This “safe harbour” is to be enacted for (initially) a six month period. Notably, directors must continue to act prudently and in good faith in their dealings with creditors, as all other directors’ duties continue to apply including the duty to act in good faith and in the best interests of the company under s 131.

How the change to section 136 will be drafted will be of great interest to directors of companies currently under pressure as a result of the lockdown. The requirement that director(s) be satisfied that “...*the company will be able to pay its debts as they fall due*”

within 18 months” may be challenging for directors, who will have to show they have maintained appropriate financial records consistent with the size and nature of the company, that their assumptions are reasonable and (where appropriate) the directors have acted on advice. Contracts with longer-term obligations such as leases may not fall within the safe harbour period so directors need to be prudent when accessing longer-term obligations, whether existing or new.

With this in mind, it is important to keep accurate and up-to-date financial information. This includes reasonable budgets and forecasts for the next 18 months. This will allow directors to reach an informed decision on the company’s likelihood of being able to meet its debts as they would fall due in 18 months.

Changes to sections 135 & 136 come at a time when directors are increasingly concerned about their civil liability when dealing with third parties while their business is struggling. Often this results in directors prematurely resigning and appointing an external administrator. This is in part due to the recent High Court decision in *Mainzeal Property and Construction Limited v Yan* under which the directors of Mainzeal Property Limited were collectively ordered to pay NZ\$36 million for a breach of section 135.

In December 2019, the Companies (Safe Harbour for Insolvent Trading) Amendment Bill was proposed with a view to alleviating directors’ concerns regarding their liability when deciding to continue trading, notwithstanding the company being insolvent. This Bill reduces directors’ civil liability when a company is (or will become) insolvent and its directors undertake new debts in an attempt to improve the company’s position. It remains unclear what extent the amendments mentioned hereinabove will reflect contents of this Bill.

Changes to the Voidable Transaction Regime

According to the current voidable transaction regime, a liquidator can “claw-back” payments made from the debtor company to its creditors two years before its liquidation. It has been proposed to shorten the two year vulnerability period to six months when the debtor company and the creditor are unrelated parties. Originally, this change was contained in the Insolvency Law Reform Bill; however the Government has included it amongst the recent changes because of the increase of liquidations predicted.

Business Debt Hibernation

The Business Debt Hibernation Scheme (“**the Scheme**”) is to be introduced to the Companies Act 1993 to supplement the relief measures that already exist between creditors and businesses. Debt hibernation effectively allows businesses to place their existing debts into “hibernation” until they are able to start trading again.

With the rationale of enhancing a company’s ability to stay afloat in the face of the pandemic, the scheme aims to:

- increase discussions between creditors and directors;
- enable directors to keep control of their companies rather than appointing an external administrator;
- encourage continued trading between the company and its creditors by providing certainty to both parties; and
- be simple and flexible.

Companies wanting to participate in the Scheme will have to meet certain criteria. This has not been announced in full, but it is expected to include:

- the business would have been solvent had the Pandemic not occurred;
- it would be in the best interests of the business (including its ability to pay creditors) for the business to enter debt hibernation;
- the creditors of the business will need to be notified of the company's intention to enter into the Scheme;
- once the company notifies its creditors of their intention to enter into the Scheme a one-month moratorium will take effect immediately while creditors cast their votes;
- consent must be obtained by at least 50% of creditors;
- if the business obtains the consent of 50% of creditors, the Scheme becomes binding on all creditors, except employees, and there will be a moratorium on the enforcement of debts for a six month period once the proposal is passed; and
- further payments made by the company to third party creditors during the Scheme will be excluded from the voidable transactions regime - this affords third party creditors with greater protection that, in the event of the company's insolvency, the advance will not be clawed back.

8. COVID-19 AND HEALTH & SAFETY

The Covid-19 crisis has seen many changes to the way we work. Who would have thought entire organisations could move from being based in an office to everyone being remote within just a few days? One important consideration for those with staff is what impact this has on their health and safety obligations.

Guidance from WorkSafe

WorkSafe has noted the concerns from employers about how to continue to meet the Health and Safety at Work Act 2015 (HWSA) requirements in these unprecedented times. A guiding principle of HSWA is that workers and others need to be given the highest level of protection from workplace health and safety risks, as is reasonable. This applies just as much now, as it did before.

As an employer you must look after the health and safety of your employees, and take all reasonably practicable steps to ensure your employees health and safety. Whether you have staff working from home, or you are carrying on as an essential business, your obligations under the HWSA continue and have not altered under the current Covid-19 crisis. [WorkSafe](#) have set up a useful page, providing answers to questions frequently asked, and outlining its approach and expectations during this time.

How about essential businesses?

If you are carrying on an essential business, safe work practices should now be in place to limit the spread and exposure of Covid-19 to your staff and others. Whether this has been done by isolating workers, substituting higher risk procedures with lower risk activities, or putting in place administrative and/or engineering measures. The use of personal protective equipment (PPE) may have now been implemented as well. If you are an employer who has staff working from home, their home is considered a workplace, therefore employers have a responsibility under HSWA to eliminate or minimise any health and safety risks, so far as reasonably practicable.

As employer's health and safety obligations remain unchanged, it is important to note that employees also have obligations and should be acting in accordance with HWSA as well.

What should the governing body be thinking about and doing?

If you are part of a board then best practise would be to:

- Continue to review the health and safety measures you have in place during this time.
- Keep up to date with the announcements from the Government.
- Check in with staff regularly and see how they are going.

Examples of how to check on your staff include: For staff who are working from home, are they taking regular breaks? Are their workstations properly set up to work safely? If you have essential workers, how are they feeling? Do they feel adequately protected with the health and safety measures that are in place? What about stress and mental health for staff - how are they coping?

9. COVID-19: CONSTRUCTION PROTOCOLS

The Government has announced COVID-19 Construction Protocols to guide building and construction companies in their transition back into work at alert level 3. These cover the following areas:

- preparing for returning to work;
- site entry;
- operations on site;
- leaving site; and
- management protocols.

Sitesafe has provided detailed guidelines on these protocols which can be accessed through the following link: <https://www.sitesafe.org.nz/globalassets/guides-and-resources/new-zealand-covid-19-construction-protocols.pdf>.

Companies must prepare, share and implement a control plan before resuming work - this does not need to be registered but all employees must be aware of it. Companies are also required to prepare a response plan in case any employees contract COVID-19.

It is important that workplace managers keep an accurate record of which employees have accessed a particular site - this is to assist with contact tracing in the event an outbreak occurs. It is important that managers take extra care to manage movements between different sites to prevent potential transmission. In the protocols, it is stated that employees should sign on and sign off at each site he or she is working at.

Tasks which can be completed remotely should be, even if that is less convenient than carrying out such tasks in the office or on-site. Social distancing procedures must be in place, requiring workers to be 1 - 2 metre apart.

If sub-contractors are going to be working at the same site, managers of each company must communicate effectively to ensure the above protocols are followed by all parties.

Companies must take additional care with cleaning worksites during and after the end of the working day and make it clear to employees they should not come to work if they have been exposed to COVID-19 or are exhibiting any flu-like symptoms.

The Health and Safety at Work (General Risk & Workplace Management) Regulations 2016 continue to apply meaning that managers must juggle their obligations under the Protocols with existing procedures.

Things to be aware of

As a result of these restrictions building and construction companies must adhere to, it is likely that there will be delays in completion dates. If the usual number of employees cannot work on-site due to social distancing requirements, this is likely to extend completion dates. Consequently, increased costs may be incurred including preliminary & general, contract & works insurance, and the cost of extended equipment hire.

Who bears the costs of delay will depend on the construction contract in place between the principal and the contractor, as well as any contracts between contractor and sub-contractor.

10. LEGAL CONSIDERATIONS OF ZOOM

A few weeks ago not many of us had even used Zoom video conferencing - today it has become a daily way of checking in with colleagues or clients, or holding large scale meetings, even virtual Friday drinks. In fact it has gone from 10 million users in a day to 200 million. But from a legal perspective is there anything we should be aware of and what is the best practise when it comes to keeping our communications secure?

Here we are going to talk about some of the recent incidents and explain some of the features of Zoom that might help. We also want to consider the recording function on Zoom - does that mean you can just record anything? We will finish off with some other things we have noticed when using Zoom - including privacy considerations.

Recent incidents involving Zoombombing

Zoombombing is where someone uninvited joins a call and disrupts the meeting. With a lot more use there are a lot more things being reported. In Singapore some online classes were Zoombombed recently. In the US a small community - where everyone pretty much knows each other - held an event due to the lockdown, and had people join it and share inappropriate images. When the people were kicked out of the meeting they came back in posing with names of legitimate people from the community, and continued posting so the meetings had to shut down.

It seems likely that this will increase in future - and if you have a larger meeting then it is more likely the invite has been forwarded on to others who might take advantage of the platform provided by your meeting.

So what are some strategies to keep communication safe?

There are a few things you could try doing - some within the app itself and others are just common sense. These include:

- **Set a password** - while this adds an extra administrative task for those joining the call, it is also an extra level of protection as you can require people to enter a password.
- **Have a waiting room** - if you do this then you can see who wants to join the call, and it allows an extra way to vet people before they join. Particularly if there is some reason to worry someone might come uninvited it is worth considering.
- **Keep your ID secret** - When sending out information just send the unique meeting ID without also including your personal meeting ID, that will help to stop people trying to log into another room of yours at other times.
- **Other tools** - it is possible to mute everyone, disable screen sharing by others apart from the host, or lock out some people - have a play around with the settings.
- **Use another platform?** Remember when Skype was first introduced? It was the original Zoom and still is there, providing another way to hold video calls with people. Other ways we see being used include WhatsApp and Facebook Messenger. While we haven't used these we know that Google Hangouts and Microsoft Teams are also good. If you are worried and the calls are with one other person mainly then those might be options to consider. Of course, similar privacy and security considerations will apply no matter which platform is chosen.

It is important to implement such strategies, especially if you are discussing the personal information of others. In the current situation, many workplaces are trying to maintain the approach of business as usual as much as possible through the use of Zoom. Therefore, you need to be mindful when discussing personal information of clients or customers, even if this occurs in an internal meeting, that you adhere to Privacy Principle 5 in the Privacy Act 1993. This principle is designed to protect personal information from unauthorised use or disclosure.

Generally the zoombombing happens when there is a widely shared link for the public to attend and learn more about a topic - those are easy prey. If you are having a small meeting or are confident that the links are going to a limited number of people then this is less likely to be an issue.

What about recording?

Just because you can record doesn't mean you should if you don't have consent. Obtain that at the start of each call if you are going to record. In New Zealand, the Privacy Commissioner has put out this briefing on "can I record someone without telling them" [here](#). The basic principle is simple: get consent.

Privacy principle 3 in the Privacy Act 1993 is the most relevant and provides, among other things: *"Where an agency collects personal information directly from the individual concerned, the agency shall take such steps (if any) as are, in the circumstances, reasonable to ensure that the individual concerned is aware of ...the fact that the information is being collected; and the purpose for which the information is being collected; and the intended recipients of the information ..."*

The Zoom privacy policy notes this about recording: *"Your meetings are yours. We do not monitor them or even store them after your meeting is done unless we are requested to record and store them by the meeting host. We alert participants via both audio and video when they join meetings if the host is recording a meeting, and participants have the option to leave the meeting."*

The key principle here is simple: Let people know that you are recording and get their consent.

Privacy & Security

While the technical side can be confusing, Zoom provides guidance on how they encrypt things [here](#). It is also worth taking a look at their privacy policy [here](#). It's always fascinating to get past the corporate language to read the actual wording - the nuts and bolts - of how they operate. Some of the key things are:

- They don't sell personal data and only collect user data needed to provide the services;
- They do not monitor meetings but do allow users to record them; and
- They have a separate policy that applies to children and younger users;

It's interesting to read in some of the detail of what features there are - for example there is an attention tracker: *"This feature ... places a small clock icon next to a participant's name to indicate only to the host when Zoom is not the active window on the participant's computer for more than 30 seconds, when the host is sharing their screen."*

The CEO of Zoom published [this](#) post recently and committed to openness and transparency and they do seem to have taken a number of steps. Part of that said: *“Transparency has always been a core part of our culture. I am committed to being open and honest with you about areas where we are strengthening our platform and areas where users can take steps of their own to best use and protect themselves on the platform.”*

Virtual Backgrounds

When we think about privacy one other way is to make use of the virtual background feature of Zoom - that stops people seeing your private space. Remember if things get recorded then screen shots and recordings can stick around for a long time. Virtual backgrounds help. You can choose images provided by Zoom or create custom ones. It can be a useful tool to know how to use.

How to change Zoom background on your desktop app:

1. In the Zoom app, click your profile in the top right corner, and click icon (settings).
2. A menu will appear to the left, click ‘Virtual Background’.
3. Default background options provided by Zoom will appear. You can choose one of those by clicking on it (ensure ‘I have Green Screen’ is unticked).
4. Alternatively, you can upload your own photo. Click the + icon next to where it says ‘Choose Virtual Background’. A box will appear allowing you to upload a photo from your computer. Click on the one you want, and it will appear alongside the other pictures as an option for you to choose from.

How to change Zoom background on your mobile app:

1. You need to be in the meeting to change your background.
2. Click on ‘More’ in the bottom right hand corner, then click on ‘Virtual Background’.
3. Default options are provided, or you have the option of uploading your own picture from your Camera Roll.

The ability to change backgrounds in Zoom has seen many get creative in order to lighten the mood in these uncertain times. Whether you want to hide the mess that lurks behind you, or you would just like to pretend for the next while you are on that tropical vacation that you never got the chance to take. You might even want to be in a scene of your favourite TV show! The options are truly endless. Why not bring a bit of excitement to meetings, and keep your colleagues guessing by changing up your Zoom background every time?

Conclusion

This crisis has introduced many new things and accelerated the adoption and use of certain technology like Zoom. While that move is likely to be permanent and in person meetings may reduce - why travel from Christchurch to Auckland for a meeting if it can be done simply from home? It does pay to be aware of the different features that make holding your meetings more secure and also ensure you do not fall on the wrong side of the law when it comes to recording them.



PART 3. SIGNING DOCUMENTS



11. THE ROLE OF A NOTARY PUBLIC AND WHAT HAPPENS DURING COVID-19

The role of the Notary Public in New Zealand could not be better described than as follows:

A notary public (sometimes called a notary or a public notary) in New Zealand is a lawyer authorised by the Archbishop of Canterbury in England to officially witness signatures on legal documents, collect sworn statements, administer oaths and certify the authenticity of legal documents usually for use overseas.

The primary task of a Notary Public in New Zealand is therefore to “officially witness signatures on legal documents ...”. Best practice has in the past demanded a physical appearance by the person before a Notary Public witnessing the signing of a legal document. The appearer (“applicant”) must also identify themselves to the Notary, providing evidence by documents and circumstances sufficient to satisfy the Notary that the applicant is who she/he claims to be. Such evidence has been demanded by notaries since 2750 BC. li How, though, is this service performed in crises such as we are now experiencing, during which personal contact is not possible? Before examining some newly minted suggestions about possible methods to allow continuance of notary work from the Notary Society, a few general observations may be of interest regarding witnessing and identification.

Witnessing Signatures : Identification: The Problem of Fraud

To officially witness signatures and identify people who appear before you may at first sight appear to be a simple task. However things are not always simple. The person appearing before a Notary may not be who they appear to be, even in New Zealand.

They called him “The Doctor”. Based in Bangkok, for years hunted the man “revered among Bangkok’s criminal underworld for producing the most sophisticated forged travel documents on the market for just \$2,000-\$3,000.” Hidden in a secret compartment were 173 passports from France, Israel, New Zealand, Iran and Syria, and a cache of electronic chips, moulds for visa stamps, ribbons, inks and specialist printing equipment.

Therefore the Notary will take care to identify the person appearing before her or him, by asking for several forms of identification, and scrutinising documents in great detail, even to the point of using a magnifying glass or UV light. One flaw to look for is a slight shadow at the edge of the photograph, which may not be ascertainable on a valid passport.

In Australia documents establishing identity for notarial purposes have been attributed points, with Passports, Citizenship Certificates, and Firearm Licences at the higher end 70 points, Rates Notices and Utility Accounts at 20 points, and Motoring Association Cards and Taxation Assessment Notices at 10 points.

Covid-19 Crisis and Notarial Service

Given the mandatory isolation requirements and restrictions on movement resulting from the Government's Covid-19 virus Alert Level 4, and the consequences of the Epidemic Preparedness (Covid-19) Notice 2020 issued by the Prime Minister of New Zealand on 25 March 2020, and given that notarial services are not in the category of being considered "essential", it is not currently possible for a notary to lawfully be present with the applicant when asked to witness a signature on the document.

One method may to meet an applicant by audio-visual link and describe in the Notarial Certificate which system (Skype or Zoom) was used.

The Notary may then ask the applicant to scan and email complete copies of the document(s) together with copies of identification such as the photograph page of their passport, driver licence or other form of identification.

The applicant must then identify themselves by name and hold up to the camera the photograph and personal identification page from passport and driver licence, and these, of course, must match. If the Notary knows the applicant very well this may not be necessary.

As well, each page of the document to be signed must be held up to the camera, and also match.

As New Zealand Notaries may only practice within New Zealand, the Notary may request additional evidence, if this is in doubt (for example, the applicant could hold in sight a local newspaper dated the same day as the appointment or walk outside and point the device's camera at parked cars with NZ number plates).

The applicant must then place the document down on a desk in view of the camera and the Notary must witness the applicant signing the jurat page and initialling each preceding page, holding each page of the signed and initialled document up to the camera.

The Notary will qualify the Notarial Certificate with the rider that she/he had seen the applicant sign, as far as it was possible to do so by following these procedures.

After the signed and scanned document is printed and notarised, the Notary (or the applicant) should arrange a courier service for the transfer of the hard copy to either the Te Tari Taiwhenua: (Department of Internal Affairs), or back to the applicant as applicable (subject to any Governmental restriction on the use of courier services).

12. ELECTRONIC SIGNATURES IN NEW ZEALAND: ARE THEY ALLOWED?

Are physical signatures necessary when executing legal documents?

Not always. The rules are found in the Contract and Commercial Law Act 2017 (CCLA). The core principle is that a signature must be **RELIABLE** in order to have any legal effect. In determining whether the signature you have provided is reliable, the questions are:

1. Does the signature adequately identify you?
2. Does it indicate your approval of the information in the document?
3. Given the nature of the transaction, is the means by which your signature was provided (physical or electronic) appropriate?

An electronic method must satisfy the first two aspects above in order to be recognised as an “electronic signature” in New Zealand. Generally, an electronic signature is **presumed to be reliable** provided:

1. The means of creating the electronic signature is:
 - (a) linked only to the signatory;
 - (b) under the control of the signatory alone; and
2. Any alterations to either the signature or the information in the document, is detectable.

However, this presumption **may** be overturned if the electronic signature is held not to be ‘*as reliable as is appropriate*’ given the purpose and circumstances in which the signature is being required. This is very much a fact-specific determination that will depend on the context of each situation. It is suggested that the following factors be considered:

- the size of the transaction (i.e. the level of risk e.g. documents involving large sums);
- how often you transact with the other party concerned; and
- whether the other party (and yourself) often enters into the sort of agreement represented by the document.

Practical examples of these principles

Below are some case law examples that help illustrate the standard:

Wilfred v Lexington Legal Ltd

An electronic signature (in the form of an email from a client to their lawyer signing “best regards – Harmon”) sufficed as being a reliable for the purposes of entering into a contract for legal services.

Company Net Ltd v Registrar of Companies

Original signatures were required by the Registrar of Companies in relation to company incorporation documents – albeit in this case, there were issues of identifiability that

caused concern. The Companies office makes clear that they do accept electronic signatures for most documents.

See: <https://companies-register.companiesoffice.govt.nz/help-centre/managing-your-online-account/filing-documents-with-electronic-signatures/>

Welsh v Gatchell

Agreements for sale and purchases of land can be signed electronically. Notice to the other party about electronic signatures is already provided in the standard terms of the Auckland District Law Society document which is commonly used for these types of transactions.

Consequently, although electronic signatures will generally be considered reliable, where there is a lot riding on a particular document (i.e. a sizeable transaction as opposed to a mere box ticking activity), it appears prudent to require physical signatures. Where physical signatures pose significant inconvenience and you wish to sign electronically, we advise that you give express notice to the other party that an electronic signature will bind all parties to the contents of the document, and that you expressly specify the form of electronic signature required.

What documents can be signed electronically?

As noted above, documents can be signed electronically as long as the signatory is identifiable and the signature is reliable. However, there are two main caveats to this:

Legal Requirement

Where there is a legal requirement on you to give information to a person (thus requiring your signature), you must obtain that person's consent to receiving the information through means of electronic signature.

Documents of Integrity

Electronic signatures have no effect on documents that concern "matters of integrity" such as:

- Documents relating to citizenship, elections, fish and game, civil aviation, corrections, credit contracts and consumer finance, disabled persons community welfare, fisheries, medicine regulations, misuse of drugs, passports, and court procedural documents;
- Documents that relate to affidavits, statutory declarations, documents given on oath or affirmation (although there are some short term changes due to Covid-19 which we discuss below);
- Powers of attorney and enduring powers of attorney, Wills, codicils and the like (as above, there are some short term changes due to Covid-19 which is also discussed below);
- Negotiable instruments;
- Bills of lading;
- Warrants to enter, search or seize; and

- Fair Trading Act 1986 provisions in relation to consumer standards information on goods or services, and products or safety standards.

Is it sufficient to provide electronic pdf versions of the signed documents or are originals always required?

The inclusion of a counterparts clause in documents allows parties to exchange pdf copies of signed agreements through email or fax. The party last to sign the document effects a binding contract upon their provision of the signed document to the other party/parties. It is common practice for physical signatures to be exchanged in this manner i.e. physical signature presented in electronic form/through electronic means will suffice.

The absence of a counterparts clause in the document itself however means that wet-ink physical signatures will be required. A signature may be deemed unreliable where it is performed in a manner that wasn't agreed to between the parties as evidenced in the document.

Provision of the originally signed documents is also required when executing deeds. Section 10 of the Property Law Act 2007 requires a signed deed to be delivered in order to take effect. Delivery is commonly understood as being the physical handing over of documents either in person or through post. If the intention is to effect delivery otherwise, we advise that this be made clear in the document itself by recording that the deed shall be deemed delivered upon transmission of a scanned copy of the original executed document by one party to the other.

13. WHAT YOU NEED TO KNOW ABOUT SIGNING DOCUMENTS IN LOCKDOWN

Implications of Covid-19

In property transactions, each party must sign an Authority and Instruction form allowing their respective lawyers the ability to make changes to a property's title on their behalf. Physical signatures on these documents must typically be witnessed by a lawyer or Justice of the Peace. However, in response to the Covid-19 situation, interim guidelines issued by Land Information New Zealand (LINZ) record that Authority and Instruction forms can be signed by means of an electronic signature – until at least these guidelines are revoked. Alternatively, wet-ink physical signatures will need to be witnessed over a video link.

The Government has also made a temporary law change to modify the requirements of witnessing and signing wills and enduring power of attorneys (EPAs). These changes allow wills and EPAs to be signed and witnessed using audio-visual links (for example Zoom, Facetime and Skype etc). For further guidance on how these documents can be witnessed and signed, it is explained [here](#) for wills and explained [here](#) for EPAs.

In terms of statutory declarations and affidavits, it appears that these may be administered electronically as well – however, physical signatures would still be required. As above, signatures in these cases need to be witnessed over a reliable video link.

If anything is not clear here then we would be happy to discuss with you – as usual individual circumstances usually mean that the context is important to consider.



PART 4. CONTRACTUAL ISSUES AND OBLIGATIONS



14. SUSPENDING A CONTRACT: WHAT IS 'FORCE MAJEURE' IN A CONTRACT

The law recognises that in certain events which are beyond the control of a party that it is not fair for that party to have to continue to comply with the contract. In light of COVID-19 it is prudent to consider if the pandemic might be a trigger for this in your contracts.

The first step is to check what the contract actually says. It won't apply if there is no such provision in the contract. Normally it will be called a "Force Majeure" clause. The courts will generally have a high standard if a party wants to rely on this as a ground to not fulfil the contract. The sorts of factors which will be relevant are:

- **How are the events described? Is it generic or specific?** In this particular case it will be relevant to see if there is any reference to "disease" or better, epidemics? If there is a reference to an "Act of God" then that might arguably cover this too. The most important thing is to check the specific words.
- **Even if there is an event, does that mean that the performance cannot be done?** Just because something costs more doesn't make it impossible - it may be that you still have to comply. Again, the context is key.
- **A party needs to be in control** - one of the things I have seen is some arguments that a "strike" should be a force majeure event - if it is listed then it may be, but typically the management can control a strike occurring, or not. So, it might not qualify as a force majeure event. When it comes to COVID-19 again it may be that a party has no control.
- **The last factor relates to mitigation.** A party should take steps to ensure that the contract is complied with (i.e. they are mitigating and stopping the impact, if they can). The key point here is perhaps that the wording of the contract needs to be reviewed. If there is no such clause then it might be possible for the doctrine of frustration to apply - this is where an event makes performance impossible compared to what had been agreed. Again, context is key. The other thing to look for in contracts would be a "material adverse change" clause - these can apply where an event occurs that means the contract is affected. You should also review any termination clauses just to see what they provide for e.g. 30 days written notice? Start by reviewing your contracts and consider your current situation and what the next few weeks and months will hold. If you would like to discuss your contract and situation then we would be happy to do so.

15. COVID-19 BUYING AND SELLING A HOME

Many people across New Zealand have agreed to purchase and sell property with settlement scheduled during the COVID-19 lockdown period (level 4). This poses several issues that need to be taken into consideration:

1. Pre-Settlement Inspections

If you are purchasing property, you will not be able to complete a pre-settlement inspection in person. You could however agree to do one via video-call.

2. Signing Documentation

The usual process is that you would meet with your lawyer in person to sign your settlement documentation. This is no longer possible due to the lockdown restrictions which mean that clients will need to meet with their lawyers via videoconferencing to sign their documents.

3. Issues with moving house

While you may be able to complete settlement in the monetary sense and title to the property can still be transferred, you will not be able to physically move into the house. Further, vendors may not be able to move out of the house which means that they cannot give vacant possession upon settlement.

In some instances this won't be an issue, such as where the property is tenanted and the tenants are staying on or you are purchasing or selling bare land.

What can you do?

We would suggest that you get in contact with your lawyer to discuss your particular situation. You may need to negotiate a delay in the settlement date. It has been suggested that both parties could agree to defer settlement to the 10th working day after the Government reduces the COVID-19 level to level 2 or below. Ultimately, however, it will depend on your particular situation.

As noted above, there will be situations where it will be fine for settlement to go ahead during the level 4 lockdown period.

It was noted by the New Zealand Law Society that, *"Lawyers need to counsel clients accordingly. Admittedly that will be difficult for some to understand and accept, but it is the reality in which we find ourselves"*.

16. LEASES AND COVID-19

As we are in the midst of an uncertain time there are lots of different questions and things to consider. For business owners, how can COVID-19 impact your commercial leases?

If you have such a lease, the impact of COVID-19 depends what it says - so it is worth checking your agreement with the Landlord. If you have a recent ADLS version Deed of Lease (which is industry standard) then there is a definition of “Emergency” which includes an epidemic. Clause 27.5 then has provision about access to the property in an emergency that refers to “a fair proportion of the rent and outgoings shall cease to be payable...” in some circumstances where you are unable to access the premises as a consequence of the emergency. Use that clause as the basis to talk with your Landlord in the coming weeks.

As a side note, if you only ever signed an Agreement to Lease, don’t panic that it doesn’t have that clause, as the Deed of Lease provisions are deemed to be incorporated into the Agreement to Lease as well (if it is an ADLS form) - see clause 4 of the ADLS Agreement to Lease form.

We have also done a video explaining all of this - check it out on our website.

At this time we want to support businesses who have questions about what they should do next and we will be posting comments on issues we see arising from time to time.



PART 5. COVID-19 AND CHARITIES



17. CHARITIES, NFPS AND COVID-19: WHERE TO?

*Simply by sailing in a new direction,
you could enlarge the world.*

Allen Curnow

COVID-19 is having an impact on all parts of our society. Some of the most vulnerable organisations are the ones that in turn help those most in need. While business has a strong voice to advocate for assistance what about charities, NFPs and community organisations? What are the unique challenges they are facing and how might they respond to the new world we will be facing?

This is not a small sector, although it is so diverse that it sometimes lacks a unified voice. Statistics New Zealand recently [highlighted data](#) showing the monetary value of non-profit institutions at \$12.1 billion in 2018. According to Charities Services, there are more than 27,000 registered charities that employ around 130,000 staff and millions of hours are given in volunteer hours each week. But the importance of this sector goes beyond the statistics - each of us will be aware of a charity or NFP that we know or support which embodies the best of us: demonstrating kindness, compassion, empathy and understanding. That is what is most needed, yet the organisations at the front lines offering it are also most at risk in this crisis.

When Allen Curnow wrote the words above in 1942 he had in mind the first explorers to New Zealand and certainly not COVID-19 and its aftermath. But perhaps this will turn into an opportunity for many organisations to reflect on their purpose and strategy and then begin to sail in a new direction too.

What are the key challenges currently facing the NFP sector?

The good precautions in place to reduce and eliminate the spread of Covid-19 have resulted in normal fundraising grinding to a halt with a number of usual activities and new initiatives being postponed or cancelled. Uncertainty around employment is causing many donors to tighten their purse strings as well. With both fundraising and a reliance on donations being vital for many NFP organisations, this has left a financial hole to be filled.

All of this is heightened by the fact that many charities do not carry significant reserves, will not be able to access additional capital or debt easily, and will have reduced access to volunteers. The outcome is a situation that will affect the ability of many of these groups to survive, which in turn will most impact the vulnerable in our communities who they most often serve.

A letter sent in early April from a collective of charity, non-profit and community groups to the Prime Minister highlighted that such groups will be hard hit by the crisis. It suggested ways the Government could assist to alleviate some of the financial pressure that is currently being felt by many, such as an emergency stabilisation fund, special low interest loans, tax relief to incentivise donations and dedicated support to provide assistance to the unique challenges faced by the sector.

What action should NFPs be taking in the short term to address these issues and, in particular, those NFP's currently worried about their solvency?

The Government has tried to offset the financial burden felt by many due to Covid-19 with a number of financial packages. This included \$27 million for essential services in the social

sector to ensure such services can continue to assist during the lockdown. However, for those unable to access these funds there are other options:

- **Wage subsidy scheme:** If they have not already and are eligible, these groups can apply for the Government's wage subsidy scheme. What many are realising is that this doesn't cover all costs (or even all of the wages) but it will help.
- **Emergency funds:** If you have funds reserved for that 'rainy day', this situation may just be that. Consider your options, as accessing your emergency funds may relieve some of the financial pressure.
- **Virtual fundraising:** If you do not have an online fundraising plan, this is the time to create one. As many New Zealanders are spending more time on the internet than ever before, now is the time to get your message out there. Fundraising can be done through email campaigns or social media - an alternative is television, as Sky have just announced it is offering \$1 million worth of TV advertising airtime to charities and community organisations aligned with Covid-19 support efforts.
- **Get advice:** If you are worried about the issues that you are facing, particularly in regards to solvency, speak to an independent advisor who will be able to discuss options and potentially a way forward with you.

What opportunities are there for the sector in the long term as a "new normal" is entered into? What do NFP's need to be thinking about now in order to help ensure their long-term viability?

In these unprecedented times, it can be difficult to consider the long term, when you are just trying to get by day-to-day. However, for some entities this may be the chance to look for a reinvention. Strategic thinking is more essential than ever. What has been outmoded or part of tradition in an organisation that needs to be trimmed back or thought through?

There are a number of charities out there that aim to assist and serve with the same purpose. Has the option of consolidation ever crossed your mind? Now could be the time to merge and join forces. Consider the resources and skills that could be brought to the table if combined, and the opportunities that it could potentially bring.

It's important to stay positive. Now is the time to consider and explore new opportunities and look at the resources that are available to you. In doing that here are some other key principles to focus on:

- **Preparation:** As a Board have you prepared plans regarding key issues: health & safety of employees, contingency plans in light of changed circumstances, regular review of accounts, review of contracts and analysis of leases and rights to suspend them, communications strategies etc.
- **Leadership:** This is the opportunity for the leadership to set the tone for the rest of the organisation to follow. When the crisis has passed how will the leaders and their attitude towards others be remembered? Emphasise clear and concise communication to employees, service users, donors and other stakeholders.
- **Collaboration:** Open up discussions with others in your sector, and beyond - what are they going through and can you learn from each other? Is there some synergy or unexpected mutual benefit that could come from those conversations? This is

something we have seen arising several times already as people learn from others they may not have spoken to before the crisis.

One thing is for sure and that is the old ways are unlikely to work in the new environment. It is the organisations which are nimble and able to look for opportunities which will survive. Doing that will likely involve sailing in a new direction, and as Allen Curnow said, that may result in an expanded world with new possibilities.

This article was originally published on the Institute of Directors New Zealand website.



ABOUT PARRY FIELD LAWYERS

What makes us unique?

We started 70 years ago so have a proven track record. Our team of around 50 staff work closely together in the areas of Property, Advisory and Disputes. We think that gives us unique advantages as we can be fast moving and nimble. Having the size to deal with major transactions, our rates are more competitive than larger operators. We work with clients across the country.

Our Vision

Heart: Provide practical legal guidance while integrating our core values into our practice.

Team: Implement a team environment that unleashes and empowers every individual.

Growth: Develop new and enduring relationships. Explore innovative approaches to legal practice.

“To the heart of what matters”

Our tagline above was developed just before the Canterbury earthquakes in 2011. We see the client in a rounded way and want to help them with ‘what really matters’, for legal services.

Disputes: We act for both individuals and organisations, providing comprehensive, well-reasoned legal advice, combined with pro-active and creative solutions. Our aim is not just to provide sound legal advice but resolutions which deliver the best practical outcome for clients.

Advisory: We support those involved in business, whether big or small, and whether at the early stages in forming a company or entering into a joint venture, ongoing support and compliance, raising capital, or assisting with the sale of the business to a purchaser. We come alongside business owners and seek to fully understand your market and industry so we can provide the best advice possible.

Property: Our property specialists offer comprehensive advice on matters of all sizes. At the end of the day you are not just another client. We want to personally help you achieve your property goals, whether big or small, with confidence.

Taking an Innovative Approach

Gaining a better understanding of the business of our clients and solidifying relationships with them is a priority for us. Sometimes things call for a different approach. We are also a tech focussed law firm who enjoy working with start-ups, tech companies and other new businesses seeking angel investors. In fact, ask us about our own start-up focussing on AI powered chat bots for the legal industry! We help our clients to get their legal structures right from the beginning. We enjoy being lawyers who challenge the way law firms traditionally work with their clients.

This is our first edition of this Handbook - if you think there are other topics we should cover, or areas to expand on, or even parts that were not helpful, we would appreciate feedback so it can improve. Please email stevenmoe@parryfield.com if you do have comments.

Thank you.