



Initiatives to support businesses

- Mortgage repayment holiday - Relief available for small to medium-sized businesses.
- Business finance guarantee scheme.
- Temporary changes to the Companies Act to relieve directors from liability for insolvent trading.
- Business debt hibernation (an alternative to liquidation).
- Commerce Act leniency regarding essential goods and services.
- ...and a large number of other announcements.

Mortgage repayment holiday

- Relief for mortgage holders and small to medium-sized businesses.
- 6-month principal and interest payment holiday. Interest will continue to accrue during that period.
- All major banks are offering this. Apply online on your bank's website.
- For non-bank consumer finance: Consider making a hardship application under the CCCFA.

Business finance guarantee scheme

- Bank loans of up to \$500,000 for up to 3 years.
- Banks will carry 20% and the Government will carry 80% of the credit risk.
- A total of \$6.25 billion in loans are available under the scheme.

Business finance guarantee scheme – Who can apply

- NZ businesses with annual revenue between \$250,000 and \$80m.
- Property investment, property development, horticulture, viticulture, aquaculture, agri-service providers are ineligible.
- Must have drawn down all pre-existing existing facilities.
- The loan's primary purpose is to support operating expenses. No more than 5% can be used for Capex. The loan cannot be used to refinance existing debt, or to fund dividends or lending to others.
- Apply through your bank. A normal lending process will be followed by the banks. Usual security arrangements (GSA and guarantees) will apply.

Temporary changes to directors duties

- Under the Companies Act the Directors have a duty:
 - Not to allow the company to trade recklessly (section 135)
 - Not to incur an obligation unless the Director believes the company will be able to meet that obligation (section 136)
- Temporary changes to the Companies Act were announced on Friday to relieve directors from personal liability for breaches of these duties.
- Follows similar changes in Australia and the UK.

Temporary changes to directors duties

Directors will not face personal liability if they allow the company to keep on trading and take on new obligations over the next 6 months, provided:

- in the Directors' good faith opinion the company is facing or is likely to face significant liquidity problems in the next 6 months as a result of the impact of the COVID-19 pandemic on them or their creditors;
- the company was able to pay its debts as they fell due on 31 December 2019;
- the directors consider in good faith that it is more likely than not that the company will be able to pay its debts as they fall due within 18 mths (eg because trading conditions are likely to improve or they are likely to be able to reach an accommodation with their creditors).

Business debt hibernation regime – An alternative to liquidation

A new regime; intended to provide a simple, quick and flexible process to put debts on hold, without passing control of the business to a liquidator:

- Creditors are notified a business intends to put forward a proposal.
- They have 1 mth to vote on the proposal.
- During that month they cannot take action to recover their debt.
- If 50% (by # and value) of creditors agree to the proposal, it will be binding on all creditors (other than employees) and the moratorium continues for 6 more mths.

Available to all businesses not just companies (including trusts and partnerships but not sole traders). Further details to come.

Commerce Act - leniency regarding essential goods and services

- The Commerce Commission has issued a media against competitors who cooperate regarding the supply of essential goods and services.
- During the epidemic competitors may share staff, share distribution networks and take other measures to ensure security of supply of essential goods and services for consumers.

Commerce Commission – Consumer Rights FAQs

- **High pricing:** Businesses are free to set their own prices, but:
 - The Fair Trading Act: If a business gives a reason for a price increase it must be true.
 - MBIE has established PriceWatch where exploitative pricing can be reported.
 - Both Trade Me and Facebook have implemented rules to prevent exploitative pricing.
- **Volume limits:** Can a retailer set a limit on the number of items a customer can buy?
Yes - but limits should be made clear to customers.
- **Refunds:** Consumers might not be entitled to a refund under the Consumer Guarantees Act if cancellation is due to matters outside the provider's control.
- **False claims:** It is illegal to make false claims about products eg "cures".

Other announcements:

- Some law changes have been accelerated:
 - Voidable transactions – The period in which payments can be clawed back has been reduced from 2 years to 6 months (where the parties are not related).
- The start date for some new laws has been deferred: CCCFA amendments and the new financial advice regulatory regime
- The time for consultation has been extended: Financial Markets Infrastructure Bill, Financial Markets (Conduct of Institutions) Amendment Bill and phase two of the Reserve Bank of New Zealand Act review.

Other announcements:

- Temporary extensions to timeframes for holding AGMs, filing annual returns etc
 - This applies to companies, incorporated societies, charitable trusts and other entities under legislation.
 - Certain FMC Reporting Entities will have longer to file annual financial statements.
- Temporary change to relief if you cannot comply with the rules in your constitution / trust deed. (More details on this to come).
- Extending the right to use electronic signatures for certain documents.

A number of unprecedented steps have been taken by the Government:

- National state of emergency has been declared under the Civil Defence Emergency Management Act
- A medical officer of health has special powers under the Health Act 1956
- An epidemic notice has been given under the Epidemic Preparedness Act

If a business cannot comply with its contracts:

- What legal remedies might it have?:
 - Force majeure clause
 - Doctrine of frustration
- Try to negotiate a solution?

Do I have a force majeure clause?

- Check your contract.
 - Courts will not imply a force majeure clause into a contract.
- If so, review and carefully analyse the exact wording of the clause.

(Also check the Governing Law clause in your contract).

Analyse the force majeure clause

- Does the force majeure clause cover pandemics or government orders?
 - Usually, but not always...
 - Sometimes there is a list of events which trigger the rights under the force majeure clause.
 - Sometimes the clause refers to any “event beyond the Parties’ reasonable control”.
 - Does the clause apply for both parties’ benefit?

Was the breach caused by the pandemic / government order?

- To rely on the clause you will need to prove the breach of contract was caused by the pandemic / government order.
- Has it become physically or legally impossible to perform the contract because of the pandemic / government order? Or was the breach caused by other reasons? Has it simply become uneconomic or inconvenient to perform the contract?
- Are there reasonable steps that could have been taken to mitigate or avoid the breach?

Analyse the force majeure clause – Need to give notice?

- To claim relief under the force majeure clause, what steps need to be taken?
 - Written notice to the other party?
 - You are only excused from liability for that breach. You still need to comply with the other obligations in the contract.

Frustration

- If there is no force majeure clause, you might be able to rely on the doctrine of frustration to bring the contract to an end.
- Frustration is where, by no fault of either party, an unforeseen intervening event makes performance of the contract impossible or radically different.

Negotiating changes

- Being in breach of a contract is not an ideal...but it is important to remain proactive in finding a way out.
- This may mean resorting to legal remedies or it may mean trying to negotiate a solution. A good understanding of your contractual rights might give you leverage to negotiate solutions.
- The solution might involve a variation to the contract or a "waiver" of the breach.
- Be proactive and negotiate before you are in breach (Especially for financing arrangements).

Negotiating changes

- During negotiations be mindful of:
 - important longer-term relationships;
 - the reality of the challenges that many businesses are facing in the current environment (risk of insolvency?);
 - reputational risks.

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