Commercial eSpeaking

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Welcome to the Winter edition of *Commercial eSpeaking*.

The lead story for this issue is a short commentary of last Thursday's Budget delivered by the Minister of Finance.

We also cover the burning issue about Covid vaccinations, and on page 4 we have the Business briefs section.

We hope you find these articles to be useful and also interesting.

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

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Wellbeing Budget 2021: Key points

A better than expected economic recovery after the scourges of Covid has enabled the government to propose significant investment in health and welfare, housing (particularly for Māori), infrastructure to rebuild from the impact of the pandemic and to continue to make this country safe from the virus.

We provide a summary of the government's proposals.

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To jab or not to jab?

Your employee doesn't want a Covid vaccination?

While many Kiwis are queuing up and eagerly awaiting their Covid vaccinations, not everyone is willing to take 'the jab'.

Recent headlines of sacked border staff who refused their Covid vaccinations have highlighted the difficulty many employers will face in deciding if their staff can reasonably be required to be vaccinated.

We set out the correct process around this knotty issue.

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Mainzeal: lessons for directors

The liquidators brought proceedings against Mainzeal's directors, alleging a breach of directors' duties, including reckless trading and allowing Mainzeal to take on obligations that the company could not perform.

Proposed changes to the Commerce Act

The Commerce Amendment Bill proposes a series of changes to the Commerce Act 1986. Misuse of power and the repeal of safe harbours for intellectual property are only some of the proposed changes.

Incorporated Societies Bill

This long-awaited new legislation will put a modern framework of basic legal, governance and accountability obligations for incorporated societies.

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Wellbeing Budget 2021: Key points

A better than expected economic recovery after the scourges of Covid has enabled the government to propose significant investment in health and welfare, housing (particularly for Māori), infrastructure to rebuild from the impact of the pandemic and to continue to make this country safe from the virus.

This 2021 Budget will have significant positive impacts on the economy and the wellbeing of New Zealanders. The government states that it wants to focus spending on areas that will support enduring, intergenerational change that will give people the capabilities to live lives of purpose, balance and meaning.

The opening of our borders for quarantine-free travel between Australia and the Cook Islands heralds the start of an economic recovery whilst keeping Covid out of our communities.

Infrastructure

Core to this country's recovery, is a significant investment in infrastructure. $57.3 billion has been earmarked for roads and rail, schools and hospitals, housing and energy generation over the next five years. Included is $306 million for an urgently-needed redevelopment of Scott Base.

Benefit increases

Main benefit levels will increase between $32 and $55 per adult per week. An immediate $20 per adult/week will kick off on 1 July, with the balance of the increase starting on 1 April 2022.

Families with children will receive a further $15 per week.

Housing

$3.8 billion is allocated to the Housing Acceleration Fund to increase housing supply. From that fund, $350m will support Māori and iwi housing projects and an allocation will include the provision of affordable rentals, papakāinga and repairs to Māori-owned homes.

For those New Zealanders who are frustrated at the continual rise (and unaffordability) of house prices, the government anticipates a significant slowing down of the housing market. Predicting a peak in June (there's been a rise of 17.5% in the June 2021 quarter), the government sees a softening of the market to a 0.9% rise in the June 2022 quarter and then a steeper increase from 2023 onwards.

Health

As announced earlier, the government has invested $1.5 billion in the rollout of the Covid vaccine immunisation programme. Vaccinations will continue to be free. There is a further $5.1 billion set aside in case of possible new waves of the virus.

The health sector will receive $4.7 billion that will include core initial funding for a new health system (announced in April).

Twenty district health boards will be abolished to be replaced by a new agency, Health New Zealand, with four regional offices and the establishment of a Māori Health Authority. With Māori health outcomes being significantly poorer than non-Māori (Māori die seven years earlier than non-Māori, for example), the government views this as an urgent need.

Included in this allocation is an additional $200 million for Pharmac over four years.

Climate change

$300 million has been allocated to recapitalise New Zealand Green Investment Finance to continue to invest in support of climate change mitigation, with a particular focus on decarbonising public transport, waste and plastic.

Small business

SMEs have not been ignored; $44m is set aside for a two-year national programme to supply core digital business skills training.

General economic outlook

It is pleasing that New Zealand's economy has recovered more strongly than expected from the effects of Covid, although many people and communities are still hurting. Treasury forecasts an annual average real GDP growth of 2.9% in the year ending 30 June 2021, rising to 3.2% and 4.4% in 2022 and 2023 respectively.

To read more about the Budget, please click **here**. Source: New Zealand Treasury +

To jab or not to jab?

Your employee doesn't want a Covid vaccination?

While many Kiwis are queuing up and eagerly awaiting their Covid vaccinations, not everyone is willing to take 'the jab'. Recent headlines of sacked border staff who refused their Covid vaccinations have highlighted the difficulty many employers will face in deciding if their staff can reasonably be required to be vaccinated. Dismissing one of your employees on the basis of vaccination status is not as straightforward as it may seem and, in most cases, will be grounds for a personal grievance.

Special legislation covers border workers and others

Many of the statements made in this article do not cover border workers and associated roles. The COVID-19 Public Health Response Act 2020 and the COVID-19 Public Health Response (Vaccinations) Order 2021 identifies affected roles that, by law, must be carried out by a vaccinated person.

The right to refuse

The general right for New Zealanders to refuse any medical procedure or treatment is entrenched in the Bill of Rights Act 1990. You cannot, therefore, force any person in this country to be vaccinated.

As an employer, you are also not entitled to change an employment agreement or terms without agreement from your employee; consultation, and cooperation, with your employees is essential when asking them to be vaccinated.

Asking staff to get the jab

The first step you must take is establishing whether there is a role that, after a health and safety risk assessment, you reasonably decide must be done by a vaccinated employee. This may be due to a high interaction rate with tourists, working with vulnerable people such as rest home residents or some other valid reason.

If you decide that a particular role reasonably requires vaccination, you can ask your staff in those roles if they will agree to be vaccinated. The process will be similar to a restructure, where employers must first consult with staff. The identified staff should be *asked – not told* – if they are comfortable receiving the vaccine. You should offer to pay any associated costs with getting the vaccine, if required, and give your employee paid time off to receive it.

Refusing the jab?

If your employee refuses a vaccination, you must think about the alternatives for that person. This could include assessing whether your employee can just as successfully complete the role in a protected manner by wearing a mask, gloves and frequently using hand sanitiser. If the answer is still that the role must be held by a vaccinated person, then you must – in good faith – try to redeploy that person elsewhere in the business. Do ensure your employee is engaged in this process so they can assess themselves what roles could be suitable.

When is dismissal justified?

In the very rare case that you have, in good faith, assessed the role as absolutely requiring vaccination, reviewed all alternative roles and duties for your employee and considered all available restructures to keep them on the staff, and there is still no mutually acceptable solution, then a dismissal might be justified.

Out with the old, in with the new

In this Covid climate, some employers may be tempted to only hire vaccinated staff from now on and, as each staff member leaves, replace them with someone who has had the vaccine.

Employers should be very careful to only look at a potential employee's vaccination status for roles that are assessed (in good faith) to need a Covid vaccination. If you only hire staff who have been vaccinated, or advertise all roles as requiring vaccination when they actually do not (such as an isolated back office job), you could be open to a claim of discrimination under the Human Rights Act 1993.

Right now, no one is sure how many New Zealanders will refuse a Covid vaccination. What is clear, however, is that all employers must be very careful to ensure they continue to act in good faith when making any employment decision regarding the Covid vaccination status of current or future employees.

Every workplace is unique in its requirements and additional care must be taken to ensure you do not discriminate against any of your employees.

If you are thinking about some workplace changes to accommodate vaccination status, please contact us for specific advice to suit your particular situation. +

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Business briefs

Mainzeal: lessons for directors

Mainzeal Property and Construction Ltd was a New Zealand construction company placed into liquidation in 2013. The liquidators brought proceedings against the directors of Mainzeal, alleging a breach of directors' duties, including reckless trading and allowing Mainzeal to take on obligations that the company could not perform. The High Court found the directors were personally liable for reckless trading. The decision was appealed to the Court of Appeal.

Reckless trading: The Court of Appeal upheld the High Court's decision relating to reckless trading, finding that the directors continued trading on a 'business as usual' basis, while Mainzeal was in a perilous financial position. Mainzeal was balance sheet insolvent and effectively using creditors' funds as working capital. The directors kept trading, and failed to engage in any meaningful way with Mainzeal's financial position, ignoring the risks that this created for current and future creditors.

Obligations: The Court of Appeal also found that the directors did not have reasonable grounds to think that Mainzeal would be able to fulfill the obligations that were being entered into by Mainzeal once insolvent.

While the Mainzeal case is somewhat unique, the courts' decision is relevant to all company directors, especially those who find themselves as directors of companies that are insolvent or near-insolvent. The case makes it clear that continuing to trade in a 'business as usual manner' without taking a realistic view of the situation will likely result in a breach of directors' duties. As in the Mainzeal case, directors in this situation may be personally liable for the obligations that company assumed due to such breaches.

Proposed changes to the Commerce Act

The Commerce Amendment Bill, introduced to Parliament in March, proposes a series of changes to the Commerce Act 1986. Key changes include:

Misuse of market power: In the Act, the current 'purpose based' prohibition does not allow a person to take advantage of a substantial degree of market power for an anticompetitive purpose, such as deterring a new entry to the market or harming competitors.

The Bill proposes amending the test for determining whether a person has taken advantage of market power to an 'effects' based' test that will be in line with Australia. This expands the scope of the prohibition to cover any conduct by a person with market power that has the purpose, effect, or likely effect, of substantially lessening competition in a market.

Repeal of safe harbours for intellectual property: The current legislation contains provisions that effectively provide special treatment for intellectual property rights. These provisions are repealed in the Bill, meaning intellectual property rights will be assessed under the new Act in the same manner as other property.

The purpose of these amendments is to strengthen the prohibition against misuse of market power and to make other changes to improve the functioning of the Act.

Incorporated Societies Bill

The Incorporated Societies Act 1908 will receive a long-awaited update after many years of consultation and deliberation. The purpose of the Incorporated Societies Bill is to put in place a modern framework of basic legal, governance and accountability obligations for incorporated societies and those who run them.

The aim of the Bill is to:

+ Make societies more robust
+ Help societies govern themselves, and
+ Provide societies and their members with more constructive options when things go wrong.

Officers' duties: The Bill puts in place six broadly expressed duties on officers of a society (modelled on directors' duties from the Companies Act 1993). These include a duty that officers should act in good faith and in the best interests of the relevant society, and that officers exercise their powers of office for a proper purpose.

Gaps in the current Act: The Bill also closes certain gaps in the current legislation, such as providing an express mechanism for societies to amalgamate with each other, based on a simplified version of what is included in the Companies Act.

This Bill is currently at the Select Committee stage with its report due in October; it is expected to become law by the end of 2021. Once finalised it will provide a two-and-a-half to four year transition period for all of New Zealand's 23,000+ incorporated societies to adjust to the new changes. Each incorporated society will need to review and update its rules/constitution in the transitional period once the Bill comes into effect. +