

# COVID-19 Update

## Responding to COVID-19 – a business guide

March 2020

### INTRODUCTION

As COVID-19 spreads and the number of cases around the world climbs, businesses need to take definitive action now to address what is shaping up to be the most significant challenge for some time. While New Zealand still has low infection rates of COVID-19 (at the time of publication when the country is at “Alert Level 2”) and strict border controls have been introduced to try to keep it that way it, experts seem resigned to merely “flattening the curve” – while also prolonging the crisis.

The situation in NZ is moving fast and we, along with many NZ businesses, are continually assessing how to respond to COVID-19 as the situation evolves. We have set out below a guide to a number key issues affecting NZ businesses and insights to help you to respond to the challenges that COVID-19 presents. We will provide more insights over the coming weeks.

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### CRISIS MANAGEMENT PLAN AND TEAM

On top of the significant human cost, the economic cost of COVID-19 will be significant. The virus seems likely to impact every sector of the economy due to supply chain issues, suppression of customer demand, government imposed restrictions, travel restrictions, general disruption and the impact on the economy and financial markets. COVID-19 is likely to impact on every part of your business.

If you have not done so already, you should urgently create a dedicated crisis management team, and establish and implement a comprehensive crisis plan.

### COVID-19 IMPACT ON CUSTOMERS AND SUPPLY CHAIN

COVID-19 is having an increasing impact on the operations, customers and supply chain of many businesses. Set out below are a number of key issues and insights to help you respond.

Other than the obvious health impacts, COVID-19 may impact your business in a number of ways, including:

1. government imposed restrictions to address the spread of COVID-19 are likely to impact on businesses’ ability to operate;
2. customers may no longer wish to purchase goods or services from you, or they wish to purchase in lower quantities or at a different time;
3. issues with your supply chain may mean that you are no longer able to meet customer orders;
4. you may no longer wish to purchase goods or services from your suppliers, or you may wish to purchase in lower quantities;
5. your suppliers may be prevented or delayed in supplying to you;
6. your suppliers’ costs may increase and they may want to pass this on to you.

#### How should you respond?

We recommend that you be proactive in managing your customers and supply chain. Consider forecast demand for goods and services, and analyse your supply chain and your customer and supplier contracts carefully.

It is important that you engage with your customers and suppliers and, where possible, work together to ensure that you can maintain a good working relationship as we move away from BAU to a very uncertain time.

For your supply chain it may be that you need to consider - or you may be asked by your supplier to consider - a range of issues, including:

- reducing future orders – if you have future minimum purchase obligations you will need to negotiate with your supplier;
- reducing forecasts so that you reduce your future mandatory purchase requirements – it will be important to react quickly;
- suspending existing orders – or increasing orders for those that have a spike in demand;
- varying time frames for delivery;
- varying what is supplied as the supplier’s supply chain is impacted;

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- seeking to vary the terms of a contract, including price and payment terms;
- seeking to negotiate favoured supply arrangements so that you get supply in preference to other customers of your supplier;
- terminating orders or the entire contract;
- negotiating a commercial solution.

Each supply arrangement and each supply contract will need to be considered on a case-by-case basis, taking into account your procurement and customer needs, and the financial impact on your business. We recommend obtaining specialist legal advice to assist you with any variation or termination. Ultimately the overriding commercial considerations and your relationship with your suppliers (and the importance of this to each of you going forward) will be key to any action you take.

Similar considerations will apply to your customer contracts.

Below are a few key issues for clients and our high level comments. As you will appreciate, for each contract the terms of each contract and the specific circumstances will need to be carefully considered.

### **1. Can we or our customer/supplier rely on COVID-19 to cancel or defer performance under a contract?**

Whether COVID-19 qualifies as a “force majeure event” entitling deferred performance or termination, or a frustration entitling termination of a contract, will depend on the terms of the contract and the specific circumstances. We have included more information in the next section on force majeure clauses and the doctrine of frustration.

### **2. Can we stop purchasing goods or services from our supplier?**

Whether you can stop purchasing goods or services from your supplier depends on the terms of your contract.

For future orders, it will depend on whether you have any future guaranteed or minimum purchase requirements with which you must comply (see below for a discussion of what you can do).

If you have already submitted orders to your supplier then there may be no way to cancel the order without the supplier’s agreement. However, some contracts permit a customer to cancel an order if the supplier has not started production.

### **3. Our supply agreement has minimum purchase quantities that exceed what we want to purchase – what should we do?**

Consider carefully the minimum purchase quantity provisions in your contract and whether there is an option to relieve you from your obligations, for example:

- are the minimum purchase quantities binding or are there any exceptions that might apply?
- is there a clause allowing you to change your forecasts and therefore change your future obligations?
- might a force majeure clause apply?

You could also seek to negotiate a reduction with the supplier. If the supplier has supply issues itself, you may be able to use this as a lever if this becomes necessary.

### **4. Our supplier has failed to supply on time – what can we do to recover our losses?**

Whether you have any right to recover your losses depends on the wording of the contract and it will need to be carefully considered. One or more of the following may apply:

- if you have signed up to the supplier’s “supplier friendly” terms, then your contract likely says that any agreed delivery date is not binding and you cannot recover any losses arising from delayed delivery;
- if there is a remedy, your contract may require notice from you plus an opportunity for the supplier to remedy before you can take action;
- if the supplier has made it clear that it will not perform its obligations, this may amount to repudiation which might allow you to cancel and sue for breach;
- the supplier may seek to rely on a clause that temporarily or permanently relieves it from responsibility – including under a force majeure clause which is mentioned in the next section.

### **5. We are in breach of the terms of our supply contract – what should we do?**

If you think that you may be in breach of the terms of one of your supply contracts, we strongly recommend you get legal advice before you let the supplier know about the breach. If possible, you should take steps to rectify the breach or to negotiate a solution that works for both you and the supplier. If you have maintained

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a good relationship with your suppliers, it should be easier to agree a solution.

### 6. *We expect to breach the terms of our supply contract in the future – what should we do?*

If you think that you may in the future breach the terms of one of your supply contracts, we strongly recommend you get legal advice before you let the supplier know about any possible breach. If you make it clear that you do not intend to perform your obligations under a contract this can amount to repudiation which might allow the counterparty to cancel and sue you for breach. Again, if possible you should take steps to rectify the breach or to negotiate a solution that works for both you and the supplier.

### EVENTS OUTSIDE OF THE REASONABLE CONTROL OF A PARTY (FORCE MAJEURE) AND FRUSTRATION

A party to a contract may be able to get relief from performance under the contract as a result of the impact of COVID-19 by relying on either a “force majeure” clause or the doctrine of frustration. Set out below is information on these issues.

It is usually best to reach a negotiated outcome with your counterparty to avoid a dispute – particularly if you need to retain the relationship.

#### *What is a ‘force majeure’ clause?*

Force majeure clauses provide a party with relief from their contractual obligations:

- where an event or circumstance prevents or delays the party’s performance of their obligations under the contract;
- due to an event or circumstance beyond the reasonable control of the affected party;
- where the affected party is not reasonably able to prevent or overcome the event or circumstance.

Relief under a force majeure clause may have some of the following consequences:

- the ability to suspend performance for the duration of the force majeure event;
- relief from liability for the non-performance or delay while the event continues;
- the requirement for the affected party to take all reasonable steps to mitigate the consequences of the event;
- an extended time period for performance;

- a right for one or (more usually) both parties to be able to terminate the contract if the event continues beyond a specified period.

There must be causal impact between the relevant event and the impact on the affected party’s business. The event must also be beyond the affected party’s control and prevent the affected party from being able to perform their obligations under the contract.

Force majeure clauses need to be assessed based on the terms of the contract and the circumstances affecting performance. A high standard usually applies before a party can claim relief under a force majeure clause. If a party seeks to rely on an event that does *not* qualify then their failure to perform could be a breach of the contract that entitles the other party to damages or the right to cancel the contract for repudiation and sue for damages.

Given the fact-specific nature of force majeure events, a party raising a force majeure and seeking to be relieved from liability is likely to result in a dispute unless the application is clear. We recommend you seek advice to ensure you comply with the terms of a force majeure event and mitigation, notice and consultation obligations.

#### *Could COVID-19 be a ‘force majeure’ event?*

Force majeure clauses need to be assessed on a case-by-case basis and the specific wording of the provision will need to be carefully reviewed. By way of example:

- it seems unlikely that COVID-19 would fall under definitions such as *natural disaster* or *civil unrest*;
- COVID-19 could fall under definitions such as *disease, epidemic* or *Act of God*;
- severe restrictions that may be imposed on businesses to stop the spread of the virus may be sufficient (but early restrictions are *not* legally enforceable);
- it is unlikely to be enough for a party to claim that performance has been rendered impossible because they have *voluntarily* taken precautions in their business, such as employees going into voluntary isolation.

#### *Termination under the doctrine of frustration*

Frustration may apply where there has been an unforeseen event that has occurred that renders the performance of a contract impossible, or fundamentally different from what the parties had originally intended. Like force majeure, the event must be beyond the reasonable control of the parties to the contract.

Establishing frustration can be difficult and the courts have set a high threshold in their assessment of whether a contract has been frustrated. It is not enough that an

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affected party suffers mere hardship as a result of an event occurring. The parties need to show that they never agreed to be bound by the terms of the contract when they have become fundamentally different due to the event occurring. And that the event is not covered by a force majeure clause (or elsewhere in the contract).

### ***Could the doctrine of frustration apply to contracts in the context of COVID-19?***

For frustration to apply, the impact of COVID-19 on a business must be so significant that the affected party to the contract can show that they never agreed to be bound by the terms in the fundamentally different situation after the event has occurred. The success of termination of a contract through a frustration argument in this context would depend on the terms of the contract and the specific circumstances.

There is a risk of repudiation of contract if the terms and circumstances are not considered carefully and a frustration claim is made when it is not available. It will be important to get advice.

## **EMPLOYMENT**

COVID-19 brings with it a range of employment law issues that employers should turn their mind to as soon as possible. Our employment law team has published an article that gives insights into the following COVID-19 employment law issues:

- health and safety in the workplace;
- self isolation and leave arrangements;
- annual holidays;
- restructuring and force majeure; and
- government assistance package (also summarised below).

For more information please see our website for a copy of the article. [Coronavirus and employment](#)

## **PRIVACY**

If you are wondering if you can let others know that someone may be infected with COVID-19, read this article from the Office of the Privacy Commissioner: [Covid-19 and privacy FAQs](#). An individual generally has a right for their medical information to be kept confidential and not disclosed to their colleagues or third parties. However there are exceptions to this – in particular if there is a serious threat to someone else's safety, wellbeing or health.

Businesses need to use their discretion and common sense when relying on this exception, and when deciding what information to disclose. For example, you may be able to

tell people that someone may have been exposed to COVID-19 without it being necessary to identify the individual.

Before you disclose that someone has (or might have) COVID-19, or that they are in self-isolation, we recommend you refresh yourself with your privacy obligations and/or talk to us. Below are a couple of other useful resources from the Office of the Privacy Commissioner:

- [Is it okay to tell other employees that a colleague is sick?](#)
- [When can I use the serious threat exception?](#)

As an aside, the Privacy Bill is in its final stages and will come into force on 1 November 2020. We will be releasing further guidance on what this means for you when the Bill is passed.

## **INSURANCE**

Whether you are covered by insurance for the impacts of COVID-19 depends on your insurance policies. Your business interruption insurance policy may provide some cover but this seems unlikely.

Business interruption insurance is intended to cover loss of revenue or profit caused by interruptions to business. Typically business interruption insurance applies to losses following damage to property – for example due to a storm or fire - and the cost of mitigating that disruption. This type of policy will not cover losses from disruption caused by COVID-19 as there has been no property damage.

Some business interruption policies specifically exclude claims relating to infectious or contagious diseases (such as COVID-19). It may be that you have an extension to your business interruption insurance policy that applies to losses arising from infectious or contagious diseases or similar. Whether this provides any cover for any current or future COVID-19 related losses will depend on the wording of your policy and what has happened.

Insurers are, of course, likely to take a strict approach to causation. If you choose to close your premises out of an abundance of caution in response to COVID-19, there would almost certainly be no cover.

It is important to check your policy carefully, and speak to your broker if you are unsure. When you check your policies, take note of the cover and any limits to this, any applicable excess, the period of indemnity, and the notice period for making claims - prompt notice is likely to be required.

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### GOVERNMENT ASSISTANCE PACKAGE

The government has recently announced a \$12.1 billion COVID-19 economic package to help cushion the impact of COVID-19 and support the economy during the COVID-19 crisis.

The package includes:

- **Wage subsidies:** these are designed to help employers retain staff, and businesses will qualify if they can demonstrate a 30% decline in revenue for any month between January and June 2020 compared to the year before (this includes projected revenue). This allows businesses to receive a subsidy of \$585.80 per week for a full-time employee and \$350 per week for a part-time employee, paid as a lump sum and for a period of 12 weeks. The maximum amount that a business can claim in accumulative wage subsidies is \$150,000.
- **Leave and self-isolation support:** qualifying employees who are cannot work due to self-isolation or because they have COVID-19 can receive weekly payments of \$585.80 if they are a permanent employee or \$350 per week if they are a part-time employee. The employer is required to apply for the payment (available for a period of 8 weeks from 17 March 2020) and then pay it in full to the employee.

There is also support available for self-employed workers and contractors, as well as tax changes to assist businesses. Further information about the package (including eligibility requirements) can be found at the links below:

- [COVID-19 - information for businesses](#)
- [COVID-19 employer support - Work & Income NZ](#)

### COVID-19 AND COMMERCIAL LEASES

One of the greatest concerns for tenants and landlords will be what impact COVID-19 has on the commercial leasing arrangements for the businesses, particularly from any Government-forced shutdown or the financial difficulties that may arise for tenants. Set out below are some key issues for landlords and tenants to consider.

It is important that you understand your rights under the lease but whether you are a landlord or a tenant, we recommend that you speak to each other and try to work together through what is hopefully a short-term temporary issue.

For landlords, you may be better to keep your existing tenant than to face the prospect of losing the tenant. For tenants who may be going through a tough time financially,

you may be able to negotiate a temporary rent reduction or some other financial accommodation with your landlord, and perhaps you could look to offer an extension to or renewal of your lease term as a sweetener.

#### ***Do tenants have to keep paying rent if their premises is closed because of COVID-19?***

Whether tenants need to keep paying rent while their premises are closed due to COVID-19 depends on:

- the terms of the lease; and
- the circumstances surrounding the closure of the premises.

Most modern leases contain some form of “no access” clause. These provisions came about due to physical damage from the Christchurch earthquakes and the resulting “Red Zone” which precluded access to the public for public safety. Many of these clauses focus on access restrictions due to a physical obstacle such as a restricted access cordon or restrictions imposed by law.

The “no access” clause in the current version of the Auckland District Law Society (ADLSi) lease also extends to the situation of a tenant being unable to access the premises in an emergency due to either:

- reasons of public safety; or
- to overcome any hazard, harm or loss associated with the emergency, which includes any restriction on occupation of the premises by a competent authority.

Where the “no access” clause applies, the ADLSi lease allows for an abatement of a *fair proportion* of rent and outgoings for the period of restricted access to the premises.

Some leases (including the ADLSi lease) also provide a right for either party to terminate if the tenant is unable to gain access for a specified no access period, or if either party is able to establish with reasonable certainty that the Tenant is unable to gain access for that period. The default no access period in the ADLSi lease is 9 months (but this can be varied in the lease).

The issue you will need to consider is whether the specific circumstances fall within the clause in your lease and allow the tenant to claim a rent and outgoings abatement while the premises are temporarily closed due to COVID-19.

#### ***Mandated closure of business premises***

The World Health Organisation has declared COVID-19 as a public health emergency of international concern. If business premises are required to close to contain COVID-19 (with a number of exceptions for critical services etc) then it seems likely that the “no access” clause of the ADLSi lease would apply. However, for each lease, the clause and

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the circumstances of closure would need to be considered carefully. The initial steps being taken to contain COVID-19 do not constitute mandatory closure orders but as we move to level 4 this will change as the government issues an epidemic notice under the Epidemic Preparedness Act 2006 and declares a state of emergency.

It may be more difficult to apply a “no access” clause to situation where a tenant is permitted to access the building but cannot fully conduct its business due to an order that applies only to the type of business conducted by the tenant (or a limited number of businesses) – for example an order requiring gyms and restaurants to close. The building may otherwise be available for access and use. Again, it will be important to consider the specific circumstances.

### ***Voluntary closure of business premises by tenant***

The position would be less clear cut if a commercial tenant voluntarily decides not to access the premises (for example

if an employee has tested positive for COVID-19). In that case, a careful review of the terms of the lease will need to be undertaken and specific advice provided considering the circumstances.

If you have any concerns regarding the impact of the COVID-19 pandemic on your commercial lease we can assist you to review the terms of your lease considering your specific circumstances, and to help you to negotiate with your tenant or landlord.

### **WE CAN HELP**

Our thoughts are with all of those who have been and will in the future be affected.

If you would like help to work through the impact of COVID-19 on your business and how to respond, or you would just like a sounding board please to reach out to your usual Jackson Russell contact or one of our specialists in the practice area where you have an issue

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