

Overcoming COVID-19: Critical Legal Pathways

PUBLIC LAW/GOVERNMENT ACTIONS

DOMESTIC RESPONSE AND GOVERNMENT SUPPORT SNAPSHOT OF DOMESTIC RESPONSES

Constitutional powers Declarations of a state of emergency and adoption of containment measures such as travel bans, border restrictions, school closures and restricting non-essential services

New Zealand:

- State of emergency powers under the *Civil Defence Emergency Management Act 2002*
- Quarantine powers under the *Health Act 1956*
- Epidemic notices under the *Epidemic Preparedness Act 2006*
- Parliament prorogued and new cross-party *Epidemic Response Select Committee* created
- Parliamentary power to authorise spending prior to appropriation under *Imprest Supply Act 2020*

Monetary policy & Government spending Central Bank measures to support the flow of credit including through cutting of official cash rate, expanding holding of government bonds, lowering of reserve requirement ratio (eg. Australia, EU, Norway, NZ, Rwanda, Singapore, Sweden, UK, US)

Increased government spending, such as through commencement and acceleration of public works and infrastructure programmes (eg. UAE, Uzbekistan, US)

Aid spending such as funding the IMF's Catastrophe Containment and Relief Fund (eg. UK)

Economic support Business tax relief (eg. China, France, Germany, NZ, Viet Nam, UK, US)

Defer business contributions to pension funds and social security (eg. France, Viet Nam)

Loan repayments being extended, deferred, or rescheduled (eg. India, Singapore, Viet Nam, Uruguay, US, Uzbekistan)

Mortgage repayment and rental payment deferrals and freezes on rent increases (eg. Canada, NZ, Samoa, UAE, Viet Nam)

Public loan guarantees for businesses (eg. Germany, NZ)

Measures to keep whole and retail prices in check (eg. Uruguay, Samoa)

Stop or reduce collection of additional interest on deferred payments (eg. West Bank and Gaza)

Wage subsidies (eg. Denmark, France, Hong Kong, NZ, US, UK)

Specific relief for micro and small and medium enterprises, incl. loans and tax relief (eg. France, NZ, UAE, UK, Uruguay, Samoa)

Relax red tape Relax AML compliance requirements to make it easier for businesses (eg. NZ)

Exemptions for business registration fees and similar requirements (eg. UAE, Viet Nam)

Relaxation of corporate law requirements – eg. insolvent trading, insolvency filing times (eg. Australia, Germany)

Measures to stimulate use of e-money (eg. Zambia)

Automatic extension of certain classes of visa such as students and temporary workers (eg. NZ)

Eliminate tariffs on key "COVID-19" goods such as medical and hygiene products (eg. NZ)

PRIVATE LAW: INSIGHTS AND TRENDS

Businesses, lenders & insurers

GOVERNANCE

Insights:

- Accurate and updated financial information will be critical to decision making
- Under pressure, regularly assess whether it is appropriate to carry on trading
- In certain circumstances, may need to prioritise the interests of creditors
- Carefully assess whether informal and formal debt restructuring arrangements are available instead of potential liquidation (eg. creditor compromises and voluntary administration)
- Early understanding of counterpart solvency is key
- Relief available for listed issuers eg. changes to periodic reporting and capital raising requirements (NZX Listing Rules waivers / Takeovers Code Exemptions)

CONTRACT TERMS

Insights:

- Triggering *force majeure* (FM) or MAC/MAE clauses may provide immediate relief but longer-term harm, eg. if provide cancellation rights
- Where no FM clause, common law may mean contract is "frustrated". This avoids future payments, but may mean payments already received need to be refunded
- Legislative overrides may apply: eg. CCLA 2017
- Identify if any contracts contain rights to appoint receivers
- Check whether your contracts contain 'ipso facto' clauses (permitting termination or revised obligations or insolvency)

INSURANCE

Insights:

- Business continuity insurance likely inapplicable, but check – specialist cover may include COVID-19 losses
- Check existing policies for notifications required due to COVID-19/ lockdown eg. empty premises; significant transactions; insolvencies
- Use the opportunity to identify your general notification requirements under liability insurances – in tough economic times claims may be more frequent
- Review appropriateness of existing covers to take into account the uncertain times ahead. Do you have the right insurances and the right limits in place?

FINANCE, FUNDING & SECURITY

Insights:

- Identify \$ access over the short and long-term and revise business plans to reassess performance, revenue and costs
- Focus on immediate cash flow options, eg. tax + repayment relief. Check legislative overrides (eg. mortgage holidays)
- Engage with lenders to avoid covenant breaches or default triggers (eg. MAC), and check lender rights to pass on increasing funding costs
- Check suppliers with retention of title terms + PPSA registration backing

Trends to watch:

- Impact of COVID-19 on asset valuations and valuer availability for audited accounts
- Pressure for banks to reduce customer margins in exchange for funding support
- SME COVID-facility guarantee for banks

DISPUTES

Insights:

- Civil cases continuing but hearing backlog likely
- The most effective resolution of COVID-19 related disputes will ring-fence issues to allow trading to continue where possible

Trends to watch:

- Big opportunity for courts and parties to adapt technologically
- Big opportunity for mediation and arbitration to innovate using remote dispute resolution
- Possible that some statutory time limits (eg. for appeals) will be modified, but less likely for time-bars

MARCH 2020

SUSPEND, RENEGOTIATE OR APPLY EXISTING CONTRACTS

Q2/Q3 2020

RESOLVE DISPUTES EFFICIENTLY TO PRESERVE RELATIONSHIPS

POST-COVID-19 LOCK-DOWN

INCLUDE PROTECTIONS AND FLEXIBILITY IN NEW CONTRACTS

GOVERNANCE

Insight:

- Note the six months temporary relief to the insolvent trading regime in Australia

Trends to watch:

- Companies that are part of an international group will need to stay abreast of potentially fast moving foreign COVID-19 regulatory context

CONTRACT TERMS

Insights:

- Assess which law applies to govern the impact of Covid-19 on the contract:
 - (i) an applicable law clause;
 - (ii) the UN Convention on the International Sale of Goods; and/or
 - (iii) foreign law mandatory rules (eg. frustrated contracts, change of circumstances or change of law rules)
- FM may be triggered at different dates in different countries and in different ways: don't assume FM will cover a payment or supply default from an overseas counterpart

Trends to watch:

- Revisions to standard form contracts or industry standards to reflect COVID-19 risk

CONTRACT TERMS

AVAILABLE TOOLS:

FM clauses; waiver; price adjustment; material adverse change; change of law; LDs; service credits; limitations; exclusions; termination

INSURANCE

Trends to watch:

- Increased risk that foreign counterparties may not obtain required level of cover if cost-cutting: ensure this is specifically contracted for if critical

FINANCE, FUNDING & SECURITY

Insight:

- Proactively confirm practical and legal restrictions on counterparties. Watch for liquidity or production roadblocks, emerging insolvency risk, and rating downgrades

Trends to watch:

- Willingness of overseas wholesale markets to fund NZ lenders
- Difficulty of accessing overseas corporate bond markets
- Continuing exchange rate hedging and counterparty risks
- State liquidity measures focussing on domestic goals, rather than international liquidity and trade flows

DISPUTES

Insights:

- Additional benefits (eg. flexibility, adaptability and enforceability) from international arbitration already in place in cross-border contracts
- If commencing formal dispute, consider at outset whether final award or judgment will be enforceable against foreign assets

HUMAN RIGHTS

Threats: most human rights (eg. freedom of movement or religion) can be restricted subject to certain conditions, but there is a risk of excessive restrictions

Needed: ongoing careful consideration of human rights impact and availability of grievance mechanisms

GLOBAL PUBLIC HEALTH LAW

Threats: breaches of international law possible if States fail to protect life and health, both inside and outside their borders

Needed: better international cooperation & coordination especially on supply of essential equipment; review sufficiency of current international framework (incl. 2005 Intl Health Regs)

INTELLECTUAL PROPERTY

Threats: that IP rights enshrined in international law (eg. TRIPS) hinder States' access to treatments/ vaccine

Needed: flexibilities to ensure availability, such as by allowing compulsory licensing for production of generic drugs

TRADE & INVESTMENT

Threats: access to needed items impeded due to export restrictions on medical supplies and food, and tariffs on "COVID-19 goods"; rising protectionism

Needed: eliminate relevant export restrictions and tariffs; renewed commitment to liberal rules-based trade; coordinate trade and aid policy

AIR TRANSPORT

Threats: vital role in responding to the crisis (eg. air cargo services) & in recovery of the global economy put at risk by ongoing & excessive restrictions

Needed: international coordination & compliance with requirements such as those in Convention on International Civil Aviation, eg. ensuring sustainable air freight operations

DATA GOVERNANCE

Threats: intrusive surveillance technologies used to contain spread of COVID-19 (eg. monitoring bracelets) could be misused when crisis recedes

Needed: improved and better coordinated data governance systems to maintain public trust and maximise the benefits of technology

MOVEMENT OF PEOPLE

Threats: maintenance of restrictions on movement across borders after the crisis lessens will impede economic recovery; lack of coordination may lead to logjam and confusion

Needed: balanced and coordinated approach allowing safe movement across borders (eg. internationally-agreed health certification requirements) while minimising impediments that hinder economic recovery

ECONOMIC COOPERATION

Threats: weaknesses in governance of global institutions risk undermining support of global recovery efforts

Needed: greater coordination of fiscal stimulus, avoidance of competitive exchange rate devaluations, keep global supply chains open, ensure adequacy of global financial safety nets (IMF, development banks)

INTERNATIONAL RELATIONS/TRADE

Governments

Exporters & importers

CROSS BORDER TRADE:
International goods + services contracts

SUPPORT