

Looking ahead  
MAY 2020

## Looking ahead

### By Friday businesses will have a clearer planning horizon for the next 12 months.

Finance Minister Grant Robertson says the “vast majority” of businesses and workers will be “back at it” in Level 2 which makes it sound close to normal, but social distancing rules of one metre will still apply in the workplace (two metres with “strangers”) and the borders will still be largely closed.

The Government will present its budget tomorrow, so we will know where it is directing its Phase Two stimulus, and the limits of its largesse. We will also have the benefit of Treasury’s fiscal and economic forecasts, which will be grim but will provide an insight into Treasury’s view of the depth and duration of the economic contraction.

And we will have more of an idea of the Government’s ambitions for the post-COVID economic rebuild. Robertson is clear that we can’t afford to waste the opportunity created by the pandemic, saying:

*“While many of our economic indicators were strong – low debt, low unemployment, rising wages and government surpluses – there were ways in which we had not reached the standards we aspire to as a country.*

*“Too many children were growing up without the basics, housing has been too expensive, many of our waterways are still not swimmable, our emissions have been rising, people are working harder but don’t feel they are getting ahead”.*

Policy directions the Government has either already embarked on, or indicated, include: building digital capability at both individual and national levels, creating a more skilled, flexible, confident and resilient workforce, putting a massive investment into infrastructure and dealing to the housing shortage.

So it may be time to take stock – review your COVID-19 response to date, and accelerate your business strategy planning for the next 12 months.

**With this in mind, we have identified some of the issues you may want to consider.**

## WORKFORCE AND HEALTH & SAFETY

- Consider what your future needs might look like and start planning now. There is no reason to delay on implementing workplace changes, including redundancies, where you are confident in your future forecasts.
- Consider what you will need from your workforce and any changes you might need to achieve this.
- Consider what your working arrangements will look like under an extended period at Level 2 and how you can make sure that you are adhering to the Government's recommendations and guidelines. Can your workforce continue working from home? For those who need (or prefer) to come to the office, how will those arrangements be managed? Consider staggered start, finish and break times. Work out how physical distancing will be managed and how to ensure appropriate cleaning can be conducted.
- Changes in work patterns or hours will likely need agreement with staff. A formal variation is recommended for those arrangements that require more structure. An informal flexible arrangement will likely work for other parts of the workforce.
- Ensure that your Health & Safety plan is disclosed to all staff and those who may visit you or with whom you are working. Check those plans against WorkSafe guidance and ensure that you are not inadvertently creating any new risks as a result of workplace changes.

## PREMISES

- Explore the abatement provisions of your lease, if you haven't already. These are likely to apply if you are on a version of lease post 2012.
- What is fair and reasonable in relation to abatement during an extended period at Level 2? This will depend on your assessment of the degree to which the physical features of your premises allow you to operate safely at Level 2 (or not).
- What is the effect on active construction projects – is the site suspended? What are the variation claims at play? Does the legislative underpinning for the lockdown and the restrictions imposed by the Director General of Health represent a change in law for the purposes of 3910?
- What is the impact on the market in your sector post COVID-19 lockdown? Increased demand for construction? Decreased demand for office space? Rise or fall for requirements for shared office facilities?
- Good documentation of property arrangements has proven invaluable for clients responding to the period of lockdown so far. Is your portfolio in good shape? The operating environment will continue to change and questions will continue to arise – getting on top of your property arrangements will continue to be an advantage.

## YOUR KEY (CONTRACTUAL) RELATIONSHIPS

- If you or a supplier have given force majeure or breach notifications, now is the time to review whether the contract is retrievable and those notifications may be withdrawn, or whether performance may be resumed, and if so on what basis.
- We expect parties to go through a period of negotiation around the timing and amount of payment obligations, which may have been postponed or suspended by agreement during the level 3 and 4 restrictions, and which may be affected by the extent to which performance as normal is now possible.
- Where the contractual relationship needs to be amended by agreement, it's important to take care with how that amendment is documented, including whether it supplements or supersedes the existing contract, and which drafting prevails where there is a clash of terms.
- Electronic signatures and exchange of contracts remain available as an effective means to agree most contracts.

## ACCESS TO THE COURTS

- The Courts will slowly return to normal but in person hearings, where they occur, are likely to be limited to the immediate parties, witnesses and media.
- Many hearings will continue to be held by video link, and lengthier hearings or non-urgent matters may continue to be deferred as the backlog is cleared.

## FINANCE

### Business Debt Hibernation regime to become available soon

- The Business Debt Hibernation (*BDH*) regime should provide some help to smaller businesses to work through longer term restructuring solutions.
- Customers/suppliers of entities in BDH are free to negotiate new terms for supply/transactions negotiated post hibernation.
- Existing debts (including specifically secured debts such as a mortgage or charge over particular property) prior to BDH are subject to an up to one month moratorium on enforcement pre-BDH vote, and up to six months post-BDH vote (passed by a majority of non-related party creditors by number and amount).
- While in BDH, voidable transaction provisions generally do not apply (to encourage businesses to keep transacting with the entity).

### Voidable transactions

The "relation back" period for non-related party transactions will be shortened from two years to six months before liquidation/bankruptcy for corporate/individual insolvency.

### Credit Contracts

Amendments to the Credit Contracts and Consumer Finance Act 2003 effective on 1 May 2020 mean that:

- people borrowing from high-cost lenders will never have to pay back more than 100% of the loan principal
- compound interest on high-cost loans will be banned, and
- fees for defaulting payments will be limited to \$30 (unless the lender can show that the higher amount reflects their costs).

### Tax

- We have seen a number of tax measures enacted or announced already, including financial support for businesses (e.g. loss carry-back scheme, relaxing loss continuity requirements, reintroduction of depreciation on commercial buildings, immediate deductions for low value assets, concessions around employee benefits) and administrative matters to ease compliance burdens. Given that, we wouldn't be surprised if there wasn't too much new on the tax front in the budget.
- But we are expecting more to come on tax, whether in the budget or soon after. Areas ripe for change are:
  - insolvency, where debt remission income arising in the context of debt restructuring is problematic commercially so relief would be welcome as the economic realities of the lockdown bite, and
  - depreciation/asset write-off, to incentivise businesses to spend.
- Something we hope not to see is tinkering with the GST rate. Rate changes bring with them a material compliance cost burden on businesses and complex transitional issues for long term contracts, making it an inefficient way of delivering tax relief.
- Finally, not for this budget, but future budgets will need to find a way to pay for the COVID-19 spend-up. Perhaps the CGT debate is not over after all...

### GOVERNANCE AND ENGAGEMENT WITH THE BOARD

#### Director's duties – reckless trading and incurring of obligations - safe harbours

Directors' decisions to keep on trading, as well as decisions to take on new obligations, over the coming six months will not result in a breach of duties if:

- in the good faith opinion of the directors, 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 months (for example, because trading conditions are likely to improve or they are likely to be able to reach an accommodation with their creditors).

#### Meeting and voting using electronic means

Electronic meetings may generally be convened, held and votes cast, even if not expressly contemplated by constitutions, trust deeds or rules of the entity.

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