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lawyers

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COMMERCIAL eSpeaking

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Welcome to *Commercial eSpeaking* Spring 2015 edition.

We hope you find these articles interesting and useful. If you'd like to talk further about any of the topics covered in this e-newsletter or any business law matter, please be in touch with us. Our contact details are above.

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Changes to Health and Safety Law are on Their Way

The long-awaited Health and Safety Reform Bill passed into law on 27 August and the Health and Safety at Work Act 2015 will come into force in April next year. As you are no doubt aware, the legislation will have significant implications for all businesses and the farming sector. If you are a business owner or farmer, you should note the upcoming changes and get prepared. … CONTINUE READING

Business Interruption Insurance

Make sure you have a well thought-out policy

When considering your next business insurance policy the most important part is the fine print. Many people, particularly business owners, have recently learnt harsh (and expensive) lessons on their business insurance. The Christchurch earthquakes and North Island floods have been particularly severe on businesses, unfortunately catching many by surprise and many business owners have been ill-equipped to deal with the fall out. Having a robust business interruption insurance policy can go a long way towards protecting you and your business in tough times … CONTINUE READING

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The next issue of Commercial eSpeaking *will be published in early 2016.*

Changes to Health and Safety Law are on Their Way

The long-awaited Health and Safety Reform Bill passed into law on 27 August and the Health and Safety at Work Act 2015 will come into force in April next year. As you are no doubt aware, the legislation will have significant implications for all businesses and the farming sector. If you are a business owner or farmer, you should note the upcoming changes and get prepared.

Under the new legislation, any 'Person Conducting a Business or Undertaking' (PCBU) will have a primary duty to ensure the health and safety of all its workers as well as any others affected by its work, and to identify, minimise and eliminate risks and hazards in the workplace. The legislation will also impose substantial duties on 'officers' of PCBUs to be proactive when it comes to matters of health and safety, and on workers to promote the health and safety of themselves and others around them. Penalties for failing to maintain a safe work place will be significantly higher than under the current law.

In July the Select Committee presented its recommendations on the proposed legislation and Parliament made further changes during the final readings. The main changes are:

Worker participation: The new legislation takes steps to make everyone in a workplace responsible for health and safety – from directors down to workers. The Select Committee recommended introducing more flexibility for smaller businesses in low-risk sectors which will be exempt from the onerous participation requirements. The amendments in this area are controversial – welcomed by many businesses but criticised by opposition parties and workers' unions.

Multiple PCBUs: As the legislation is more far-reaching than existing laws, businesses will find their duties often overlap with other organisations. They will have to consult, cooperate and coordinate with other businesses, as far as reasonably practicable and to the extent they have the *ability to influence and control the matter.*

The duty of officers: The legislation imposes personal duties on people with senior governance roles. Once it comes into force, directors and others with *significant influence* over the business will have a duty to exercise due diligence and ensure their organisation meets its health and safety obligations.

Defining a workplace: All PCBUs will have an obligation to identify, minimise and eliminate risks and hazards in any workplace they control. A workplace is defined as a place where work is carried out, including anywhere a worker goes or is likely to be while at work. Following the Select Committee's report, the legislation was amended to clarify that some areas are not a workplace at all times, and will only be covered while they are.

Farming sector: When the Bill was introduced, there was significant concern from the rural sector on the implications of the proposed legislation on their businesses. Amendments have clarified how the provisions will apply to farms. The duty on farmers managing or controlling 'workplaces' will only extend to parts of the farm which are necessary for the farm business. Other parts of the farm, including the farmhouse, will not be covered. Farmers will not be responsible for the health and safety of visitors to the farm, except in areas where work is being carried out.

High-risk workplaces: The government has released its list of high-risk workplaces that will be subject to the strictest health and safety requirements. The proposed list, which identifies 57 extremely high and high-risk industries, includes:

- Oil and gas extraction
- Rail freight transport
- Scenic and sightseeing transport
- Forestry and logging
- Hunting and fishing
- Meat and meat product manufacturing
- Road freight transport, and
- Horse and dog racing activities.

Controversially, it doesn't include many types of farming including dairy, beef and poultry.

What can your business do to prepare?

The new law comes into force on 4 April 2016. Given the implications of the legislation, we recommend business owners and farmers begin taking steps to prepare now. You should:

- Familiarise yourself with the new law
- Understand hazards and risks in your workplace
- Prepare to engage your workers on health and safety
- Ensure officers are informed and engaged
- Keep alert for further guidance from Worksafe NZ, and
- Seek appropriate legal advice.

If you're unsure on how to proceed or would like more advice, please don't hesitate to be in touch with us.

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Business Interruption Insurance

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When considering your next business insurance policy the most important part is the fine print. Many people, particularly business owners, have recently learnt harsh (and expensive) lessons on their business insurance. The Christchurch earthquakes and North Island floods have been particularly severe on businesses, unfortunately catching many by surprise and many business owners have been ill-equipped to deal with the fall out. Having a robust business interruption (BI) insurance policy can go a long way towards protecting you and your business in tough times.

The purpose of BI insurance is to help businesses survive a loss of profit as a result of being forced to cease trading for a period of time, usually following a disaster. BI policies are generally linked to material damage insurance policies as they are triggered following physical damage to property which then causes interruption and a subsequent financial loss to a business. BI insurance is ultimately designed to restore a business to the same financial position prior to the loss being suffered.

Policy wording is important

The wording of your BI policy is of the utmost importance. You need to clearly understand what cover you need at the time that the cover is obtained, not at the time of the loss. Some of the key questions to consider are whether you'll be covered:

» While your business premises are being repaired?

» If all your clients' businesses shut down?

» If access to your business is disrupted because of a government-imposed cordon, eg: red zoning, not only because of physical damage?

» For multiple events?

These questions are just a small example of what should be considered so that your business stands the best chance of surviving lost profits and being affected by sudden, unforeseen costs.

Depopulation and indemnity periods

Two particularly pertinent BI issues are depopulation and indemnity periods. The former refers to the adverse effect of people or customers leaving an area and is particularly controversial and, although dependent on the policy wording, now not likely to be covered.

Meanwhile, the indemnity period refers to the period of time in which BI policies will operate. Commonly, policies operate for 12 months, which in many cases is simply not long enough for businesses to recover. Many businesses have been caught out by cover starting from the date the damage is incurred *not* from when a business closes. This can have a detrimental impact on business owners whose businesses, say for example, continue to trade immediately after an insured event expecting that a claim can be made later when repairs are necessary only to find that the indemnity period has expired. Some insurers are, however, offering deferment periods. These allow policyholders to begin their indemnity period at a later, more suitable date than when the loss was incurred. Other insurers are offering longer indemnity periods. Although these policy variations are likely to cost business owners more in the first instance, they could be well worth the investment in the future.

Getting the right advice

In terms of getting BI insurance advice, insurance brokers specialise in obtaining the right type of cover for their clients and assisting when the time comes to make a claim. As well, we can support you interpret policies, help you put forward a well presented claim and, if necessary, help resolve any dispute with the insurance company providing the cover.

Overall, the most important point is that you must take the time to read and fully understand your BI insurance policy, and make sure you seek advice when in doubt. Understanding what you and your business are, and aren't, insured for is incredibly important. ■

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Business Briefs

Zero hours contracts – new legislation introduced

In mid-August, the Employment Standards Bill was introduced into Parliament and, amongst other things, deals with the controversial issue of zero hours contracts. A zero hours contract is a contract for casual working under which an employer doesn't guarantee any hours of work but their employee is expected to be available for work when or if called on by their employer. Zero hours are, generally speaking, considered to be unfair to employees.

The Bill prohibits zero hour arrangements *unless* the employment agreement provides that an employee is entitled to 'compensation' for being available to work. The Bill does not define what compensation means, so it's up to an employer and their employee to agree the level of compensation.

What do employers need to do? If you use zero hours contracts in your business, you should consider how you will adjust your employment agreements if/when the Bill becomes law. If you need any help on how to word these agreements, please get in touch with us. ■

Red-zoned earthquake claimants entitled to more

Canterbury's red-zoned homeowners have recently received a boost following a Supreme Court decision[1]. In *Southern Response Earthquake Services Limited v Avonside Holdings Limited*, Avonside's property was damaged beyond economic repair and red-zoned following the Canterbury earthquakes. Avonside's insurance policy stated that the insurer, Southern Response, would pay the cost of buying another house, including necessary legal and associated fees, provided that this cost did not exceed the cost of rebuilding the house on its current site.

Avonside elected to purchase another house and claimed the costs associated with a notional rebuild including the associated fees. The case related to whether or not there should be a sum for contingencies and professional fees when calculating the amount payable under the policy. Southern Response disputed that in the event that there was no actual rebuild, contingencies and professional fees should not be payable.

By their nature, contingencies are for items that cannot be defined in a building contract. These sums are usually under the control of an architect or engineer and may be expended or deducted under that person's authority. Professional fees cover the costs of engineers, designers, surveyors and project managers. In this case, each amount was measured at 10% of the total cost of rebuild.

In deciding whether or not contingencies and professional fees should be added to the cost of rebuilding the Supreme Court stated, "The amount payable under the policy can be no more than the cost of rebuilding the house on its present site. The exercise that is required is to estimate the actual cost of rebuilding the house on the site." The Supreme Court went on to say that the fact that in this instance the rebuild was notional, rather than actual, does not affect the inclusion of the allowances for risks usually encountered. The Supreme Court agreed with Avonside and held that both contingencies and professional fees should be included when calculating the cost of rebuilding a house, even if that rebuild is notional. ■

Cheaper capital raising ahead for small code companies

The Takeovers Panel has granted a class exemption allowing small code companies to issue new shares, without needing to first obtain shareholder approval, in circumstances where the issue would otherwise breach the Takeovers Code.

The Code prohibits a person from holding or controlling more than 20% of the voting rights in a code company (broadly, a listed company or a company with 50 or more shareholders (holding voting shares) and 50 or more share parcels) except where permitted under the Code, ie: with prior shareholder approval where that arises from a share issue.

The exemption permits, for example, a shareholder holding 18% of the voting shares in a small code company being issued voting shares which take their aggregate holding to 22% without incurring the costs of a shareholder meeting and an independent advisor's report.

The exemption only applies to *small* code companies, being unlisted code companies with $20 million or less in total assets on a group basis, and only to share issues (not acquisitions of existing share parcels, buybacks, etc). It's also worth noting there are certain procedural requirements for using the exemption. As well, holders of 5% or more of the company's shares can object and force full compliance with the Takeovers Code. ■

1 *Southern Response Earthquake Services Limited v Avonside Holdings Limited* [2015] NZSC 110.

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