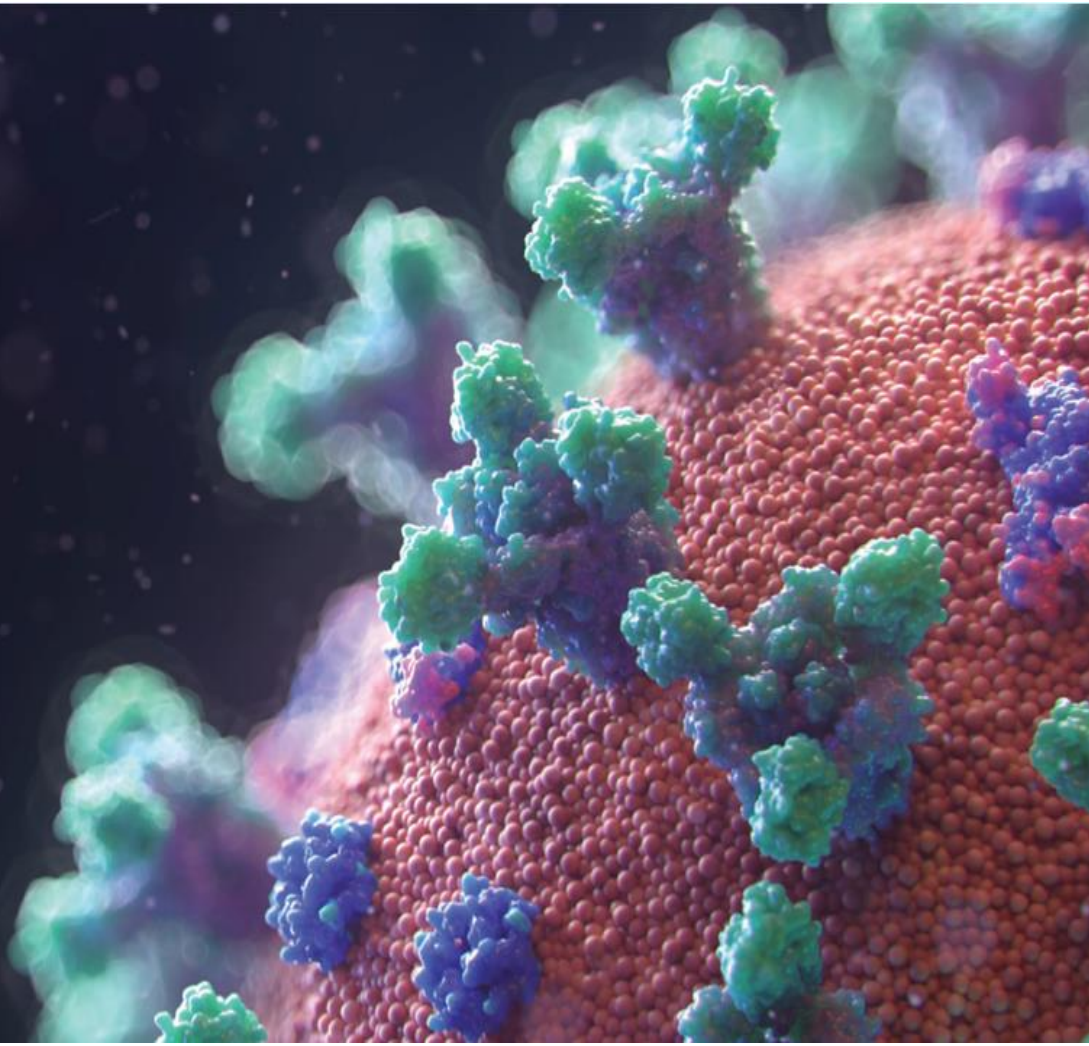




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COVID-19: An introduction to Temporary Changes Affecting Businesses in Australia and New Zealand

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Visit the [Meritas COVID-19 Resource Center for](#) legal guidance and insights in all regions of the world.

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I. Meritas ANZ Member Firm Resource Pages

Looking for business and legal guidance regarding COVID-19 updates and programs in Australia or New Zealand? Meritas has coverage across the region with member firms who are here to assist. Please visit their COVID-19 resource materials for more comprehensive updates.

Auckland, New Zealand: Martelli McKegg [Legal Updates](#)

For Australia:

Sydney, New South Wales : Swaab. [COVID-19 Hub](#)

Melbourne, Victoria: Madgwicks [Coronavirus and The Law: Resources Hub](#)

Brisbane, Queensland: Bennett & Philp [COVID-19 Resource Centre](#)

Perth, Western Australia: Williams & Hughes [Covid-19](#)

If you have any questions please get in touch:

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2. Changes to The Way Foreign Investment is Reviewed In Australia & New Zealand

In this update we highlight changes to the legislation governing foreign direct investment in each country.

Australia

On 29 March 2020, the Australian Government announced changes to the way foreign investment in Australia will be reviewed.

Two key changes

1. All monetary screening thresholds in the Foreign Acquisitions and Takeovers Act 1975 (Act) have been reduced to \$0 meaning all proposed foreign investment into Australia (unless exempt under the Act) will require approval by the FIRB regardless of the value or nature of the foreign investor; and
2. In order to ensure sufficient time for screening applications, the time-frame for reviewing both *new and existing applications* to the FIRB has increased from 30 days to six months.

Important points:

The changes came into effect on 29 March 2020. The Treasurer has expressed that the changes are to be temporary and in place for the duration of the current COVID-19 crisis. It is uncertain whether, at the end of the current crisis, the monetary screening thresholds will revert to their pre-29 March 2020 amounts, or to other amounts. It is also uncertain as to how the FIRB will implement a transition back to a 30 day timeframe for review for applications.

The Treasurer has indicated that, on a case by case basis, the government will prioritise urgent applications for investments that protect and support Australian business and Australian jobs.

For applications submitted before the changes, foreign investors should consider submitting additional information to FIRB concerning the commercial and broader economic impacts of the investment. This may assist FIRB to determine an application as “urgent” and assess it before the extended deadline of 6 months.

Foreign investors should take great care in noting these changes by FIRB as serious civil and criminal penalties may apply for breaches of the Foreign Acquisitions and Takeovers Act, even if unintentional.

A Q&A on the temporary changes to Australia’s foreign investment framework can be found [here](#).

If you have any questions about foreign investment in Australia please get in touch with one of the contacts listed below:

COVID-19: Temporary Changes to Doing Business in Australia & New Zealand

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New Zealand

New Zealand has not made any changes to the way foreign investment in New Zealand will be reviewed as a result of COVID-19.

Proposed changes to New Zealand's Overseas Investment regime had been introduced to Parliament prior to COVID-19, however this has been deferred as a consequence of the COVID-19 shutdown.

Information on the Overseas Investment Act can be found [here](#).

If you have any questions about foreign investment in New Zealand please get in touch with Melissa Higham (mh@martellimckegg.co.nz) or Mike Worsnop (mcw@martellimckegg.co.nz) [Martelli McKegg](#) Lawyers, Auckland .

3. Temporary Relief to Financially Distressed Businesses in Australia & New Zealand

In this update we highlight temporary 'shields' and amendments to the insolvency and regime in each country.

Australia

On 24 March 2020 the Australian Federal Government announced temporary and significant amendments to Insolvency and Corporations law to provide a safety net for businesses during the COVID-19 crisis.

Two Important Changes

1. Temporarily increasing the threshold at which creditors can issue a **statutory demand** on a company from \$2,000 to \$20,000. This will apply for six months.

Allowing companies 6 months, rather than the current 21 days, to respond a statutory demand that has been served on them. This will apply for six months.

There are similar amendments relating to personal insolvency (**bankruptcy proceedings**).

2. Relief for directors from any personal liability for **trading while insolvent**.

Temporary relief for directors from the risk of personal liability for trading while insolvent, where the debts are incurred in the ordinary course of business. This will apply for six months starting on 25 March 2020.

It is important for directors to note that their obligations under the Corporations Act 2001 to exercise their powers and discharge their duties with reasonable care and skill and in good faith remains. Egregious cases of dishonesty and fraud will still be subject to criminal penalties.

In addition to these amendments to the Act it should also be noted that on 22 March 2020 the Australian Federal Government announced that the Australian Taxation Office (ATO) will tailor solutions for businesses struggling due to COVID-19, including temporary reduction of payments or deferrals, and withholding enforcement actions including Director Penalty Notices and wind-ups. The ATO has issued a [media release with further details](#).

What are the consequences of these changes?

Whether these changes have the intended effect remains to be seen. In the short term these changes will preclude an immediate deluge of liquidations and bankruptcies. On the face of it this sounds like a prudent measure. It will give businesses and individuals who are unable to pay their debts more time to work out their options (and hope the economy starts to fire again),

There will undoubtedly be unintended consequences and impacts for creditors as these measures may make it more difficult to recover overdue payments. This could increase credit risk and shift liquidity pressure from debtors to suppliers and creditors. Suppliers will therefore need to be more vigilant with their trading counterparties and consider adjusting their terms to address these risks.

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Creditors could be excused for seeing these new provisions as a signal to instigate more aggressive litigious alternatives against debtors (such as issue proceedings or seeking freezing orders) to give themselves the best chance at getting paid.

If you have any questions about assistance for financially distressed businesses or individuals in Australia please get in touch with one of the contacts listed below:

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New Zealand

Insolvency Law changes

On 3 April 2020 the New Zealand Government announced significant changes to the New Zealand Insolvency Laws to provide a safety net for businesses during the COVID-19 crisis and assist directors to continue to operate their businesses without fear of falling foul of their directors duties relating to Insolvency Matters.

Two Important Changes

1. The introduction of a **six month 'safe harbour' from insolvency duties** under the Companies Act 1993.

The Government plans to amend the Companies Act to avoid potential personal liability of a director for allowing a company to trade in a way which creates a substantial risk of serious loss to creditors – this will be done through amendments to section 135 (Reckless Trading) and section 136 (Trading While Insolvent).

It is proposed that the law be amended to provide that a decision by a director to keep trading and incurring new obligations over the next six months would not be a breach of duty 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; and
- The company was able to pay its debts as they fell due on 31 December 2019; and
- 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

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accommodation with their creditors).

2. The introduction of the **Business Debt Hibernation (BDH) scheme**

The Business Debt Hibernation scheme is the most novel element of the proposed changes. Its intention is to allow "*businesses affected by COVID-19 to place existing debts into hibernation until [the businesses] are able to start trading normally again*".

Debt hibernation will be an additional insolvency mechanism and not a variation of procedures currently available under the law.

Directors of companies seeking to "hibernate" their debts will have to meet a minimum (as yet unannounced) threshold before a company is eligible to put a proposal to creditors. It could be expected that minimum requirements would be that a business was solvent and would have been solvent, aside from COVID-19, and that it would be in the best interests of the business, including its ability to pay creditors, for the business to enter debt hibernation.

BDH (or COVID Business Standstill) is available to companies that meet the newly introduced threshold test only if 50% or more of the company's creditors accept the proposal.

If a company is placed into BDH, it will remain there for six months and have the benefit of a moratorium during that period. During the six month period the company can continue to trade, subject to any restrictions agreed with creditors, but all other rights of enforcement against the company will be suspended.

BDH is not available to insurance companies, banks and non-bank deposit-takers on the basis that those classes of entities are prudentially regulated by the Reserve Bank of NZ.

What are the consequences of these changes?

Similar to Australia, whether these changes will have the intended effect will remain to be seen. They may be useful. However in some cases it may just be delaying the inevitable, and also have unintended consequences and impacts for creditors as these measures may make it more difficult to recover overdue payments.

If you have any questions about assistance for financially distressed businesses or individuals in New Zealand please get in touch with Melissa Higham (mh@martellimckegg.co.nz) or Mike Worsnop (mcw@martellimckegg.co.nz) [Martelli McKegg Lawyers](#), Auckland.

4. Temporary Changes affecting Commercial Landlords & Tenants in Australia & New Zealand

This article considers new moves to freeze the rights of landlords and tenants in respect of evictions and terminations, to extend bank loan deferrals and to encourage further negotiations to allow businesses to “hibernate” through the pandemic.

Australia

On Sunday 29 March 2020, the Prime Minister announced that the National Cabinet had resolved broad principles to help business “hibernate”, to provide relief for tenants from the risk of eviction or termination, and to encourage them to sit down with their landlords and financiers to ensure the survival of their businesses. The following shared principles were agreed:

- a short term, temporary moratorium on eviction for non-payment of rent to be applied across commercial tenancies impacted by severe rental distress due to coronavirus;
- tenants and landlords are encouraged to agree on rent relief or temporary amendments to the lease;
- the reduction or waiver of rental payment for a defined period for impacted tenants;
- the ability for tenants to terminate leases and/or seek mediation or conciliation on the grounds of financial distress;
- commercial property owners should ensure that any benefits received in respect of their properties should also benefit their tenants in proportion to the economic impact caused by coronavirus;
- landlords and tenants not significantly affected by coronavirus are expected to honour their lease and rental agreements; and
- cost-sharing or deferral of losses between landlords and tenants, with Commonwealth, state and territory governments, local government and financial institutions to consider mechanisms to provide assistance.”

On 7 April The National Cabinet released a [Mandatory Code of Conduct \(Code\)](#) for commercial leases that will be applied by each of the Australian States and Territories. To date New South Wales and Tasmania have introduced legislation to this effect. Similar measures are expected to be introduced across other States and Territories.

The Code does not apply to tenants with a turnover of more than \$AUD 50M or tenants which haven't experienced, or do not expect to experience, a 30% decline in turnover as a result of the COVID-19 pandemic. The Government has left it to these tenants to negotiate with their landlord outside the Code.

Leasing conditions for bank loan deferrals

On Monday 30 March 2020, the Australian Banking Association (ABA) announced the extension of the six month deferral of loan repayments to include commercial landlords who meet specific criteria. During COVID-19 banks have also agreed to not enforce business loans for non-financial breaches of the loan contracts (such as changes in valuations).

In return, it will be a condition of accessing the deferral scheme that benefitting landlords must undertake not to terminate leases or evict current tenants for rent arrears due to coronavirus impacts.

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The ABA has signalled that the deferral scheme may be made available to customers with total business facilities above \$AUD 10 million on a case by case basis.

If you have any questions about assistance for commercial landlords or tenants in Australia please get in touch with one of the contacts listed below:

In Sydney, New South Wales - Mary Digiglio (med@swaab.com.au) or Marc Baddams (mrb@swaab.com.au), [Swaab](#)

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New Zealand

A big disappointment for New Zealand businesses has been the Government's approach to commercial leases and payment of rental during lockdown periods.

New Zealand introduced an Alert Level System and has been in Alert Level 4 lockdown since 25 March 2020, moving to Alert Level 3 from Tuesday 28 April 2020. Under Alert Level 4, only essential businesses may continue to operate from their premises. All other businesses are only able to operate if they can work remotely from home. This means many businesses have been unable to operate or have been only operating to a limited extent and many business have been unable to access their premises.

Some New Zealand leases contain "no access provisions" which allow for a reduction in rental and outgoings or operating expenses during periods where a tenant cannot access its premises to fully conduct its business. However many of these provisions are unclear as to the quantum of any reduction during the period and this has caused much angst between landlords and tenants.

Many New Zealand leases do not deal with the possibility of a lockdown at all leaving the tenant without any redress.

The New Zealand business community were hoping that the Government would provide some assistance in this area, in the form of subsidies and also guidance as to how landlords and tenants should deal with the no access periods as has been introduced in Australia. The New Zealand Government however has done very little to assist.

The Government has extended the period during which a landlord cannot terminate a lease and extended the period for giving notices for overdue rental. Neither of these measures however actually assist the tenant with the affordability of rental payments, nor assist a landlord who has agreed to a rental reduction.

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Apart from the time extensions, the Government has largely left landlords and tenants to negotiate themselves. Whilst some landlords have been very understanding and have really come to the party with assistance, not all landlords have done so, nor are some landlords in a financial position to do so.

The move from Alert Level 4 to Alert Level 3 is likely to trigger a whole new round of negotiations between landlords and tenants.

The payment of rental is, for most businesses, one of its largest expenses and the lack of assistance from Government is considered to be a large failing of the Government's approach.

If you have any questions about assistance for commercial landlords or tenants in New Zealand please get in touch with Melissa Higham (mh@martellimckegg.co.nz) or Mike Worsnop (mcw@martellimckegg.co.nz) [Martelli McKegg Lawyers](#), Auckland.

5. COVID-19 and Wage Subsidy Schemes for Employers in Australia and New Zealand

This article outlines the wage subsidy schemes introduced by each country's Government to support business during the COVID-19 crisis.

Australia

The key component of the Federal Government's business support package in response to the Coronavirus is the JobKeeper payment. This payment provides AUD\$1,500 per fortnight, per employee wage subsidy to employers for a period of up to six months. This payment will in effect act as a subsidy to enable employers to continue paying their employee's wages. The estimated cost of this measure is AUD \$130 billion.

The JobKeeper legislation was passed by Parliament on 8 April 2020. The substance of the provisions governing its administration is contained in Rules made by the Treasurer on 9 April 2020.

Key Eligibility Requirements

- Employers will be eligible if business turnover falls by 30%:

In order to be eligible for the payment, the projected turnover of the business must fall by 30% as compared to the same time last year. In order to register for the scheme, a business must self assess that it has had or will have the necessary decline in turnover.

A 50% turnover decline is required for businesses with revenue of AUD \$1 billion or more while charities need suffer only a 15% decline in order to be eligible.

A business will not be eligible if it is subject to the Major Bank Levy.

- Each employee must be paid at least AUD \$1,500 per fortnight before tax.

Each employee in respect of whom an employer receives the subsidy must be paid at least AUD \$1,500 per fortnight before tax. This applies even if the employee would normally receive less than AUD \$1,500 per fortnight. In effect, the wages of such a person will increase and the wages of all employees on AUD \$1,500 per fortnight or less will be at no cost to the employer (except for on costs).

- The payment can only be received by one employer for an individual: Only one employer can claim the JobKeeper payment in respect of a person. Where a person works multiple jobs then a choice will need to be made as to which employer receives the subsidy.
- Employees need to have been engaged as at 1 March 2020. Casual workers will be eligible provided that they are 'long-term casuals' meaning that they had been employed on a regular basis for at least 12 months as at 1 March 2020.

Many employers in the accommodation, food services and retail trade industries will therefore not fully benefit from the subsidy due to a substantial number of their workers being casuals employed for less than 12 months.

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The JobKeeper scheme also gives eligible employers the authority to make what are described as 'JobKeeper Enabling Directions' in respect of eligible employees. These directions are designed to provide greater flexibility with respect to managing the hours, duties and location of their workforce in the face of significant COVID-19 related economic downturn.

The JobKeeper Enabling Directions available to eligible employers include:

- standing down employees (including reducing days and hours);
- changing the duties performed by the employee; and
- changing the employee's location of work

Employers are required to register their interest to participate in JobKeeper through the Australian Taxation Office (ATO) website. <https://www.ato.gov.au/General/JobKeeper-Payment/>

Significant actions will need to be undertaken if employers are to fully benefit from this regime. For assistance please get in touch with one of of Meritas' Australian member firms:

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New Zealand

The key component of the Government's business support package in response to the Coronavirus is the Employer Wage Subsidy Scheme (**Scheme**). If a business has suffered, or expects to suffer, a minimum 30% decline in revenue as a result of COVID-19 then to assist the business to keep staff employed and pay them, the business can apply for the subsidy.

The subsidy is NZ\$585.80 per week for for each employee working 20 hours or more per week and NZ\$350 per week for for each employee working less than 20 hours per week. The subsidy is paid as a lump sum and covers 12 weeks per employee.

The subsidy is available to all employers who have been adversely affected by COVID-19 including registered charities, non-governmental organisations, self employed and sole traders, contractors, incorporated societies, post-settlement governance entities, local government organisations and kindergartens and early childhood centres.

It is not available to government agencies, crown entities, schools or tertiary education institutions.

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Key Eligibility Requirements

- The business must be registered and operating in New Zealand meaning it is registered with the New Zealand Companies Office (if applicable) and physically located in New Zealand;
- The employees must be legally working in New Zealand including employees who have a NZ work visa, have a condition on their temporary visas that allows them to work in New Zealand or international students whose visa allows them to work in New Zealand;
- The business must have experienced a minimum of a 30% decline in actual or predicted revenue over the period of any month from January 2020 to June 2020 when compared with the same month last year, and that decline is related to Covid-19
- New businesses which have been operating for less than a year, or high growth businesses (eg that have had a significant increase in revenue) can apply, but they must determine whether the business meets the 30% decline in revenue by comparing their revenue against a previous month that gives the best estimation of the decline related to COVID-19;
- The business must have taken active steps to mitigate the impact of Covid-19. This could include drawing from its own cash reserves, activating its business continuity plan, making an insurance claim, proactively engaging with its bank, seeking advice and support from a Chamber of Commerce, relevant industry association or Regional Business Partner Programme;
- The business must make best efforts to retain employees and pay them a minimum of 80% of their normal income for the subsidised period if possible.

The Government have made the application for the subsidy a very easy and quick process and it has provided a great assistance to many New Zealand businesses.

If you have any questions about assistance for Employers in New Zealand please get in touch with Melissa Higham (mh@martellimckegg.co.nz) or Mike Worsnop (mcw@martellimckegg.co.nz) [Martelli McKegg Lawyers](#), Auckland.