

Welcome to the Winter edition of *Commercial eSpeaking*. In this issue, we highlight some key points in the government's second Budget, *The Wellbeing Budget*, as well as articles that will be useful in your day-to-day business.

To talk further with us on any of the topics in this e-newsletter, or on any other legal matter, please be in touch. Our contact details are above.



## ***The Wellbeing Budget 2019***

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The wider economy was looked after with increases in funding to KiwiRail, the establishment of a new venture capital fund, investment in science and research, and so on.

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## **PPSR lease losses**

**Can be a real risk for business**

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**Mainzeal case – highlights director responsibilities**

The Mainzeal case has highlighted the importance for directors to know and understand their duties under the Companies Act 1993.

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Some possible implications for this country, and a game-changer for global data sovereignty.

**Do you have the right to play the music you're playing?**

A 2018 High Court decision has shown you should consider your right to use a third party's intellectual property, such as playing music in the course of your business operations.

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### Mental health

The government's investment in mental health includes:

- » \$1.9 billion to be allocated towards mental health funding over the next five years.
- » The introduction of a new universal frontline mental health service; this is expected to help 325,000 people with

mild to moderate mental health needs by 2024.

- » Acknowledging there is a current skill shortage, the government has committed to not only train more mental health professionals, but also to build more facilities.
- » \$40 million over four years is to be allocated to suicide prevention services.

### Child wellbeing

The government is committed to reduce material hardship – a measure of access to essential items for living. Currently this

figure is 13.3% of New Zealand's children; the government aims to reduce this to 10.3% by 2021 and to 6% by 2028.

- » \$1 billion has been committed to improve child wellbeing in New Zealand.
- » A surprise move is to index main benefits to the average wage increases – rather than to inflation – from 2020 onwards. Under this new regime, by 2023 the amount beneficiaries receive per week will be up to \$17 more than they would have received had the current CPI system remained in place. This change does not, however, apply to student allowances,

# PPSR lease losses

## Can be a real risk for business

When the Personal Property Securities Register (the PPSR) was established in 1999, most businesses were quick to catch on that it was a good idea to register security over goods that were sold under a line of credit. What wasn't so easily recognised is that the register was designed to also capture leases of goods that are indefinite or extend past one year.

Businesses that frequently lease goods, or provide hire purchase arrangements, with the intention of remaining the true owner of the goods leased, do not always register their lease on the PPSR. They believe it to be an effective means of security that they retain legal ownership of the goods. This ownership can, however, be defeated by a registered interest on the PPSR and result in significant loss to their business.

## Good intentions

The PPSR was designed to increase the transparency of lending and to be a source of truth for all financiers, purchasers

and lessees. Where entities purchase goods and require credit, or financing, the financier or seller can register that interest on the PPSR. This puts other potential financiers (or purchasers) on notice that those goods are financed or leased by the entity trying to sell, or use, those goods for additional finance.

## Don't court risk

What then happens, however, when a business has *leased* an impressive work yard of equipment? If this is not recorded on the PPSR, a future financier has no reason to believe that the property isn't truly owned by the entity asking for credit. The right to register on the PPSR therefore extends to goods that are leased for greater than one year; this means that future financiers are put on notice that the collateral being put forward is not truly the property of the entity asking for credit.

When goods are leased for an indefinite period, or greater than one year, the lease

should be registered on the PPSR. This ensures future financiers of the lessee do not include the leased property when considering the assets of the lessee, so that in the instance of liquidation the leased goods are protected.

## An example

Your company has leased four diggers for 18 months to XYZ Construction Ltd. As you intend to remain the owner of those diggers, you do not register them on the PPSR. XYZ later approaches a bank for a loan. The bank checks all XYZ's assets (including your diggers), does not see them registered on the PPSR and reasonably concludes they are the property of XYZ. The bank then lends them \$1 million. Subsequently, XYZ goes into liquidation and your diggers are seized by the liquidators as assets to be sold to pay back the company's bank debt. Even though you are the true owner of the diggers, the bank had the first registered interest on the PPSR and defeated your ownership.

However, if you had registered the lease on the PPSR, then the bank (and subsequently the liquidator) would have been on notice that the diggers were not the property of XYZ, and would not be entitled to take your diggers to recover their losses.

## Make sure you register

The PPSR will continue to penalise businesses that do not register an interest in property – being credit, leases or hire purchase arrangements – by putting their priority behind those of registered parties.

If your business leases goods for a period greater than one year, and you do not register your lease on the PPSR, then those goods are at significant risk of being lost should any of your lessees become insolvent.

If you're unsure if your leases or hire purchase arrangements fall under these circumstances, please don't hesitate to contact us. ■



## Business briefs

### Mainzeal case – highlights director responsibilities

The recent high-profile Mainzeal case<sup>1</sup> has highlighted the importance for directors to know and understand their duties under the Companies Act 1993.

Four of Mainzeal's directors were found liable for \$36 million in damages for breaching section 135 of the Act which is headed 'reckless trading'. This section prohibits directors from agreeing to cause or allow the business of the company to be carried out in a way that is likely to create substantial risk of serious loss to the company's creditors.

The directors of Mainzeal authorised a transfer of around \$40 million to Mainzeal's parent company in China relying on a promise that the money would be repaid. The directors then allowed the company to continue trading and to incur further debts to creditors while it was balance sheet insolvent. When Mainzeal started to hit stormy financial waters, the directors attempted to call on the loan to the parent company. They found, however, that Chinese restrictions meant that there was no way for the parent company to pay back the full sum immediately.

When Mainzeal went into liquidation in early 2013, it owed about \$110 million to unsecured creditors.

The High Court ruled that the directors were reckless in allowing the company to continue trading in this way. The directors have appealed the decision and a hearing is likely to take place later this year.

The Mainzeal case is one of many reminders of the importance for directors to understand the obligations that come with their role. ■

### The CLOUD Act: Clarifying Lawful Overseas Use of Data

#### Some possible implications for this country

The Clarifying Lawful Overseas Use of Data Act was enacted in the United States in 2018. It enables federal law enforcement to force US-based electronic communications or remote computing service providers to disclose requested data in their possession, custody or control, whether or not that data is stored in the US or a foreign country. This is a game-changer for global data sovereignty.

The legislation was a response to the case of *Microsoft v United States*<sup>2</sup> where it was

ruled that the FBI, undertaking a drug trafficking investigation, could not compel the US-based Microsoft Corporation to turn over data stored in Ireland. The only way for US law enforcement to access overseas data had been to form a Mutual Legal-Assistance Treaty with the country where the data is stored.

Even though the 2018 Act was passed in the US, it could have serious implications for businesses and individuals in New Zealand.

You may think your sensitive data is safe if it is stored at a data centre located in New Zealand, but that data could be accessed and disclosed if stored through a US-based service provider. ■

### Do you have the right to play the music you're playing?

A 2018 High Court decision<sup>3</sup> has shown you should consider your right to use a third party's intellectual property, such as playing music in the course of your business operations.


If you use music or play the radio in a business or public setting that is considered a 'public performance' you could be contravening a provision in the Copyright Act 1994. This includes playing



1 *Mainzeal Property and Construction Group Limited v Yan* [2019] NZHC 255.

2 *United States v. Microsoft Corporation*, 253 F.3d 34 (D.C. Cir. 2001).

3 *Australasian Performing Right Association Ltd v 3228 Business Ltd* [2018] NZHC 3088.

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## The Wellbeing Budget 2019


- Working for Families or the accommodation supplement.
- » Funding increases to decile 1–7 schools (educating half a million children) so parents won't be asked to pay a donation. The proviso is that those schools must stop asking parents for that donation.
  - » Significant investment is to be made to better support Māori and Pasifika communities.
  - » There is to be \$95 million invested on science and research on climate change and into new energy technologies.
  - » \$161 million has been allocated to support the development of innovative businesses, commercialise products and adopt cutting-edge technologies.
  - » \$25 million over four years will be spent to help the farming sector deal with the effects of climate change.
  - » With all the District Health Boards now operating in deficit, the government has budgeted \$190 million to support those DHBs.
  - » \$1.7 billion will be available for the building and redevelopment of hospitals.

## The wider economy

- » KiwiRail is to receive more than \$1 billion: \$741 million of this is allocated to rolling stock, the Interislander ferries and capital requirements, and \$300 million will come from the Provincial Growth Fund for rail investment in the regions.
- » \$1.4 billion will go to the Auckland City Rail Link.
- » The government will establish a \$300 million fund for investing in New Zealand venture capital markets.

For a more detailed overview, you can read The Treasury's Budget at a Glance document [here](#). To read the Minister's entire Budget speech, please click [here](#).

If you would like to talk with us about how the Budget may impact you and/or your business, please don't hesitate to contact us. ■

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## Business briefs

music and/or radio broadcasts in any commercial environment, such as a café, restaurant, bar, shop or factory.

In December 2018, The Rock Salt Bar & Restaurant at Kerikeri was ordered by the High Court to pay \$4,605 in damages and \$18,000 in additional damages for failing to obtain a licence to play music in the course of its business. In this instance, The Rock Salt Bar & Restaurant was found to have infringed copyright of the Australasian Performing Right Association (APRA), and ignored requests to stop using such copyright until they obtained an applicable licence. A licence to use the copyright was offered to The Rock Salt Bar & Restaurant by APRA a number of times in 2017 and 2018, but the offer was ignored.

In his judgment, Justice Palmer noted that he awarded the additional damages of \$18,000 on the basis of 'the flagrancy of the breach, the importance of the music as a reason for customers' attendance over a significant period of time and contempt towards the copyright regime indicated by the defendants' behaviour'.

This case goes to show that if you're a business owner, you must consider whether you have a right to use third party intellectual property rights in all aspects of your business. Otherwise you could be exposing your business to unnecessary financial risk. ■

