NEWSLETTER

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Business Payment Practices Act

The Business Payment Practices Act 2023 ('the Act') was enacted on 26 July 2023. It will require certain entities ('reporting entities') to publicly disclose specific information about their payment practices. The purpose of the Act is to provide greater transparency in business-to-business payments and enable members of the public and other entities to access information about those payment practices, so that they can make informed decisions about who they want to do business with.

For small businesses, which make up 97% of businesses in New Zealand, long payment delays can create significant problems as they often do not have the financial resources to withstand these delays, nor do they have the market influence to push for better treatment. It is expected that the increased transparency will encourage large entities to improve their payment practices; which will benefit these smaller businesses.

An entity will be a reporting entity and subject to the disclosure requirements under the Act if, at each of its two preceding accounting periods, it had (together with its subsidiaries):

- total revenue of more than NZ$33m, and
- total third party expenditure (excluding salaries and wages) of at least NZ$10m.

A reporting entity will be required to make disclosures every six months on a publicly searchable register. The first disclosure period runs from 1 July 2024 – 31 December 2024, with the second disclosure period running from 1 January 2025 – 30 June 2025. However, only reporting entities which had (together with its subsidiaries) total revenue exceeding NZ$100m at each of its two preceding accounting periods are required to disclose from the first disclosure period commencing 1 July 2024. This phased approach provides additional time for smaller reporting entities to transition to the new

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rules, for example, to change or put in place new processes and systems to be able to comply. Reporting entities will have up to three months after the end of a disclosure period to file their disclosures.

The points below summarise the different types of information that will be required to be disclosed by a reporting entity every six months:

- The average payment time for invoices (from when invoices are received to when paid in full).
- The percentage of the total number of invoices paid in full within specified day periods.
- The percentage of the total value of invoices paid in full within specified day periods.
- Whether the reporting entity allows other entities to use e-Invoicing.
- Whether the reporting entity uses standard payment terms and what those terms are.

There are a number of exclusions from the disclosed information for items such as: salary/wages, tax, rent or lease, utilities charges, transactions not in NZD and intra-group transactions.

Penalties will apply for non-compliance, including up to $9,000 for failing to make a disclosure, and up to $50,000 for an individual or $500,000 for an entity for filing false or misleading information.

If your business meets the definition of a reporting entity, it is time to start considering what internal processes will need to be implemented to ensure compliance with the Act. For small businesses, soon you will be able to use the register to assess potential customers, and where advisable, to amend the terms of trade to ensure they are precise, timeframes are clear, and late payment penalties can be enforced.

Dividends – get the basics right

When the top personal tax rate for individuals increased to 39% from 1 April 2021, it was not surprising to see an increase in the number and quantum of dividends declared by companies (owned by individuals) in the lead up to the change.

With the anticipated increase in the Trust tax rate from 33% to 39% from 1 April 2024 next year (for trusts with a 31 March balance date) it is likely a similar increase will occur. Given the expected 6% difference in tax payable it is reasonable to assume Inland Revenue will review any dividend payments it happens to encounter as part of their audit activity. Worst case, Inland Revenue could assert a dividend was not ‘properly’ documented and therefore not legally effective or the process followed meant that it was “derived” by the trust after the 39% rate came into effect. It is therefore important to get the basics right.

Most companies have standard templates, it is a good idea to check these are up-to-date with current legislative requirements as these do change over time.

A company is generally able to attach imputation credits (comprising previous tax paid) to a dividend, and where it is being paid to a trust that does not hold a certificate of exemption from resident withholding tax (RWT), RWT will need to be withheld and paid to Inland Revenue by the 20th of the month following payment. A late payment of RWT would comprise a potential ‘flag’ that a dividend was not properly executed ‘on-time’.

Dividends are not always paid in cash. It is common for a company to declare a dividend and credit the amount to its shareholders’ current accounts. The process of journalling the dividend can comprise “payment” as it provides the mechanism or entitlement for a shareholder to extract cash from the company in the future or is often used to clear an ‘overdrawn’ shareholder current account. A potential risk is that if the journalling is completed late, say after 1 April next year, the dividend income could in fact be derived at that time and therefore taxable at 39%. If a dividend is to be paid in cash, it should be paid prior to 1 April 2024.

Some may try to argue the date of the dividend resolution is sufficient. However, rather than rely on a ‘view’, paying the cash or entering the journal should put the matter beyond doubt.

Care and attention need to be taken, to ensure getting the basics wrong does not cause a problem.

90 Day Trial Period

In August this year, an Act Party members’ bill, the Employment Relations (Trial Periods) Amendment Bill (Bill), was drawn from the hat. If passed it will see the 90-trial period restored for businesses with 20 plus employees.

To give background to this Bill, in 2009 the National government introduced a 90-day trial period provision that could be included in an employee’s employment agreement, which allowed the employer to dismiss an employee within the first 90 days, without having to give reason. It was initially introduced as a trial, and then rolled out industry wide in 2011.

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Its purpose was to reduce the risk for firms looking to employ new staff, to 'take a chance' and test the fit of an employee. It was considered to be of benefit to both parties; particularly where an applicant may not initially fully meet the job requirements, and hence may not have otherwise been hired.

The validity of the trial period has been contested, with concerns being raised that it particularly disadvantages those newly entering the workforce or on low incomes, and that it can be taken advantage of by employers, including exploiting it as 90 days of labour. In 2018, Labour enacted legislation that removed this 'employer focused' provision for businesses with 20 or more employees. The intention being to restore 'fairness and balance in the workplace', while retaining provision for small business, where it considered the risk to the employer to be more of an issue.

This new Bill would turn back the clock and restore the ability for all businesses to utilise the 90-day trial period. The Bill's explanatory note states 'Any risks that are associated with hiring a new employee exist regardless of the number of employees a business has, and the inability of larger businesses to include a 90-day trial period can result in job seekers not being offered employment if risks – perceived or otherwise – outweigh the benefit to the employer.' And that it is not justifiable that only SMEs can use the 90-day trial period to reduce risk.

In brief, where an employment agreement includes a 90-day trial provision, the employer may dismiss the employee during the trial period (not exceeding 90 days) without having to justify their decision or work through any process, and the employee is not entitled to raise a personal grievance against the employer in respect of the dismissal.

Being an Act party Bill, and with restoring 90-day trial periods for all businesses on National's 100-day action plan, and in New Zealand First's manifesto, this legislation could be enacted fairly quickly.

Protection for Kiwisaver members

Since the KiwiSaver scheme began in 2007, it has had an important role in assisting New Zealanders on the path to a more sustainable retirement - with 3 million active members pointing to its success. In support of the KiwiSaver scheme the Employment Relations Act 2000 (principal Act) included protections for those enrolled in KiwiSaver, that they would not be discriminated against for opting into the scheme. However, a year later amendments made by the Employment Relations Amendment Act 2008, resulted in employers no longer being legally required to offer the same terms or benefits to those enrolled in the KiwiSaver scheme.

With that background, in June this year the Employment Relations (Protection for Kiwisaver Members) Amendment Bill was introduced. Its purpose being to ensure that workers are not discriminated against because they are members of a KiwiSaver scheme or complying superannuation fund; in effect reversing the changes made in 2008.

The Bill would insert a new section (110AA) in the principal Act, termed the 'Adverse affect' test for membership of KiwiSaver scheme or complying superannuation fund. This sets out the test that would be applied to ascertain if an employee is being treated unfairly, due to being in the KiwiSaver scheme. This test determines that an employee's employment is adversely affected if:

- the employee is a member of a KiwiSaver scheme or a complying superannuation fund; and
- the employee's employer refuses or omits to offer or afford to that employee the same terms of employment, conditions of work, fringe benefits, or opportunities for training, promotion, and transfer as are made available for other employees of the same or substantially similar qualifications, experience, or skills (comparable employees) employed in the same or substantially similar circumstances; and
- the reason (wholly or in part) for the employer doing any of those things is that the employee is a member of a KiwiSaver scheme or a complying superannuation fund.

The Bill also addresses the issue of an employer offsetting an employee's KiwiSaver contributions against their salary or wages. Similarly, the Adverse affect test applied to determine if an employee's employment is adversely affected is, if:

- the employee's salary or wages are less than the salary or wages of other comparable employees employed by the employee's employer; and
- the reason (wholly or in part) for the situation described (in the previous bullet) is that the employer has taken into account the compulsory contributions the employer is required to make in relation to the employee.

In addition, the Bill would repeal Section 101B of the KiwiSaver Act 2006, which made provision for an employer and employee to agree that the employer's compulsory contribution could be offset against the employee's salary or wages. It will also amend section 103 of the principal Act which sets out the grounds for a personal grievance claim, to re-insert

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the ground relating to membership of a KiwiSaver scheme or a complying superannuation fund adversely affecting an employee's employment; thus making it easier to file a personal grievance.

The Bill passed its first reading in August, and is with the Select Committee with a report due on 29 February 2024. It had support from National but not Act, so it will be interesting to see if the Bill progresses, and if so, in what form.

Snippets

National's policies on property

Given the general election outcome, we expect to see legislation that will make the following changes.

The ability to claim interest deductions on debt relating to some residential rental properties acquired before 27 March 2021 will be progressively phased out. National's tax policy promises to retain a 50% allowable deduction in the year ended 31 March 2025 (rather than reduce it to 25%), increase it to 75% in the year ended 31 March 2026, and fully restore 100% interest deductibility from April 2026 onward. From start to finish this means the interest deductibility on affected properties will be as set out in the table below.

Date Interest Incurred	% interest claimable
1/4/21 – 30/09/21	100%
1/10/21 – 31/03/22	75%
1/04/22 – 31/03/23	75%
1/04/23 – 31/03/24	50%
1/04/24 – 31/03/25	50%
1/04/25 – 31/03/26	75%
1/04/26 onwards	100%

National also proposed to reduce the brightline period for residential investment properties from 10 years (or five years if the property is a 'new build') to two years by July 2024. As a result, properties acquired before July 2022 should not be subject to the brightline test on sale.

Given how complex the current rules are, there is a risk that unwinding them will be equally complex, hence we are unlikely to be out of the woods yet.

Covid fraud

Given the necessity of providing fast relief, the wage subsidy scheme provided during COVID in NZ was largely based on trust. Today, MSD operates a Wage Subsidy Integrity and Fraud Programme aimed at ensuring the integrity of the payments and who received them. So far, 38 people have been brought before the courts in relation to wage subsidy misuse, 37 businesses have civil recovery action underway to recover payments and 11 cases of significant and complex alleged wage subsidy fraud have been referred to the Serious Fraud Office.

By and large, businesses in NZ were sincere in their wage subsidy claims, but overseas there are some more extreme examples where this was not the case.

Each year, the Association of Certified Fraud Examiners selects the five most scandalous fraud stories of the year. One of those stories was the arrest of 47 people affiliated with a Minnesota based non-profit 'Feeding our Future', which defrauded USD$250 million in COVID relief funds through claiming to feed children during the pandemic. The elaborate scheme used various fake documents, invoices and shell companies to give the appearance of providing meals to children, while using the money to purchase luxury cars, jewellery and coastal property abroad.

If you have any questions about the newsletter items, please contact us, we are here to help.

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