

# Commercial eSpeaking

ISSUE 69 | Summer 2025

Welcome to the first edition of *Commercial eSpeaking* for 2025. We hope the new year has started well for you and your business.

We have an interesting range of topics covered in this e-newsletter; we trust you will find these articles both useful and thought-provoking.

To talk further with us on any of these topics, or indeed any other legal matter, please don't hesitate to contact us. Our details are on the top right.



## Health and safety: Successful prosecution of chief executive

### Lessons to be learned

A stevedore was struck and killed by a falling container at Auckland's port in August 2020. Mr Kalati's death led to Maritime New Zealand's successful prosecution under the Health and Safety at Work Act 2015 of both Port of Auckland Ltd, the company that runs the Auckland port, and its former chief executive.

This is the first time the chief executive of a New Zealand company has been prosecuted over a workplace death. Lessons are to be learned.

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## Fair Pay Agreements Repeal Act 2023

### What this has meant for you

Many people welcomed the introduction of the original Fair Pay Agreements Act 2022 to set minimum pay and working conditions across various sectors. Others worried it could limit flexibility or create extra compliance costs.

Now, the Fair Pay Agreements Repeal Act 2023, passed just over a year ago, has turned back the clock on these industry-wide agreements.

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## Business briefs

### Commerce Act 1986 and Commerce Commission review

Last year the government announced a comprehensive review of New Zealand's competition framework to combat monopolistic practices and lift economic productivity.

### Reform of overseas investment laws to boost economic growth

The Overseas Investment Act 2005 will undergo significant reform.

### Tax changes for charities

Charities can expect to see a raft of tax changes in May. These changes are intended to reduce the scope for exploitation of loopholes in the current framework.

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# Health and safety: Successful prosecution of former chief executive



## Lessons to be learned

Stevedore, Pal'amo Kalati, was struck and killed by a falling container at the Auckland port on 30 August 2020.

Mr Kalati's death led to Maritime New Zealand's successful prosecution under the Health and Safety at Work Act 2015 (HSWA) of both Port of Auckland Ltd (POAL), the company that runs Auckland's port, and its former chief executive.<sup>1</sup>

This is the first time that the chief executive of a New Zealand company has been prosecuted over a workplace death.

## The accident

The circumstances leading to Mr Kalati's death were complex. However, the principal cause of his death was that he had been instructed to work on the deck of a ship contrary to the port company's policy of remaining more than three container lengths away from an operating crane. Consequently, Mr Kalati was in the path of a falling container when the

mechanical locking mechanism securing it to the crane failed while it was being lifted.

## Prosecutions

Maritime New Zealand brought prosecutions against both POAL and its chief executive under section 48 of the HSWA. This section makes it an offence to fail to comply with a duty under the legislation that exposes a person to a risk of serious injury or death.

POAL pleaded guilty; it was fined \$561,000 in 2023. The port's chief executive defended the charges.

## Due diligence requirement

Section 44 of the HSWA imposes a duty on the officers of a company, which includes directors and senior managers such as a chief executive, to exercise due diligence to ensure that their company complies with its legal duties under the legislation.

<sup>1</sup> *Maritime New Zealand v Gibson* [2024] NZDC 27975.

This is defined as exercising the skill and care that a reasonable person would use, taking account of their position, their responsibilities and the nature of the company's business.

This section of the HSWA specifically states that to exercise due diligence, an officer must:

- Keep up to date on health and safety issues
- Understand their business and its health and safety risks
- Ensure their business has, and uses, appropriate measures to eliminate or minimise health and safety risks
- Ensure their business has processes for assessing new information about health and safety risks, such as incident reports, and acting on it promptly, and
- Confirm that the measures and processes referred to above are being used and are working.

The court had to consider the duty imposed by section 44 on an officer in a large organisation when they were not involved in the day-to-day operations of that organisation. The chief executive's lawyers argued that the chief executive could not be expected to know about everything that was going on at the port. The court accepted this but it found that the chief executive had a personal duty to ensure that the port company had measures in place to counter health

and safety risks, and that they were implemented. He also had a duty to verify from time-to-time that these measures were effective.

The former chief executive was found guilty of two of the three charges brought against him. He is yet to be sentenced.

## Lessons for company officers

This is the first case in New Zealand in which a senior officer of a company has been convicted following a workplace death. The outcome of any similar future prosecution will depend heavily on the facts of the individual case. For example, the extent of the duty in section 44 depends on the exact role the officer has in the company and the type of business it operates.

The court's decision, however, makes it clear that officers need to ensure that:

- Their company has systems to ensure accurate information about health and safety matters flows to them from those carrying out the company's work
- They know how the company's staff actually carry out their work as opposed to how they are supposed to do it (work as done v work as planned), and
- New health and safety measures are implemented promptly once they know they are needed.

If you have any concerns about whether your company is fulfilling its duties under the HSWA, or the extent of your personal duties as an officer of a company or other organisation, please do not hesitate to contact us. +

# Fair Pay Agreements Repeal Act 2023

## What this has meant for you

Many people welcomed the introduction of the original Fair Pay Agreements Act 2022 (FPA) to set minimum pay and working conditions across various sectors. Others worried it could limit flexibility or create extra compliance costs. Now, the Fair Pay Agreements Repeal Act 2023, enacted just over a year ago, has turned back the clock on these industry-wide agreements.

## Why repeal?

The main reason for the repeal stemmed from a change in government policy. The FPA, introduced by the previous government, aimed to improve wages and standardise conditions for employees in historically low pay sectors such as cleaners, hospitality workers and early childhood educators. Critics argued that this approach was too broad, as it could force employers to follow terms that they hadn't agreed on, leading to reduced flexibility in workplaces.

By repealing the FPA, the current government signalled that pay and conditions should largely be negotiated between individual employers and employees or through standard collective bargaining processes rather than a universal, sector-wide system. Supporters of the repeal believed this would allow businesses to be more agile and able to respond quickly to changing market conditions.

## Implications for employees and unions

For employees who would have benefitted from agreements under the FPA, the

repeal has meant a return to individual employment agreements or traditional collective bargaining through unions. Workers in industries where wages are typically low may feel the difference most, especially if they were expecting a lift in pay or improved working conditions under the FPA process.

Unions have lost a tool for coordinating negotiations. The FPA regime gave unions a clear pathway to start negotiations on behalf of employees across an entire sector, even if there was initially low union membership. Without the FPA, unions are now focussing again on bargaining at a company level or encouraging voluntary industry-wide agreements. This may be a setback for union-led initiatives to raise pay and conditions in sectors with historically vulnerable workers.

## Implications for employers

Employers now have more freedom to negotiate pay and conditions directly with their teams, without the worry of being locked into sector-wide rules. Businesses that operate in specialised markets or have unique staffing needs may welcome this. They can continue to tailor employment agreements to suit their circumstances, offering different pay structures, benefits or flexible arrangements.

On the other hand, before the repeal some employers saw a benefit in a level playing field for everyone in their industry. If all competitors had to meet the same pay and conditions then there was less concern about undercutting each other on labour costs. Those businesses may now

have to keep a closer eye on what others in their sector are doing, particularly if new entrants offer lower pay.

## Looking ahead

With the Fair Pay Agreements Repeal Act 2023 having been enacted just over a year ago, any ongoing negotiations under the FPA system may have continued in the same manner. In many cases, however, collective bargaining would have reverted to the familiar structures of individual employment agreements or smaller-scale union negotiations.

Unions and advocacy groups are now working on other ways to improve working conditions, such as lobbying government for different legislation or regulations.

Meanwhile, most businesses wanting to be seen as good employers have developed their own internal policies to offer competitive pay and benefits. Despite the repeal, it's unlikely the debate over fair pay will disappear. The broader issues of cost of living, pay equity and income inequality remain hot topics, particularly for Māori, Pasifika, women and young people.

## Final thoughts

By repealing the FPA, the government returned New Zealand's industrial relations framework to a more traditional form of negotiation. That shift has had significant effects on those who had hoped the FPA would boost minimum wages and conditions.

Whether you are an employee wondering about your pay, a union leader planning



next steps or an employer seeking certainty around labour costs, the key takeaway is the same: make sure you understand your current rights and obligations, and be ready to adapt.

If you're unsure about how this change has affected you, do talk with us. With the future of workplace legislation still in flux; staying informed and being proactive will serve you best. +

## Business briefs



### Commerce Act 1986 and Commerce Commission review

Last year the government announced a comprehensive review of New Zealand's competition framework to combat monopolistic practices and boost economic productivity. Limited options and high price points in the grocery, banking and building supply sectors are reflective of market failures resulting from such practices and, subsequently, prompted this review.

**Commerce Act 1986:** The review includes a revision of the long-standing merger regime embedded in this legislation. Although mergers can enhance efficiency, they may also create a power imbalance in the market and limit consumer choice. The current regime will be reconsidered to mitigate the risks posed by larger companies that make small, incremental acquisitions of smaller companies.

The government also wants to provide greater clarity to the Act's anti-competitive conduct provisions. Its aim is to increase certainty as to what constitutes anti-competitive collusion – in turn, appeasing concerns that typically deter businesses from engaging in beneficial collaboration.

**Commerce Commission:** The review will also evaluate the commission's structure and governance – specifically, whether it is capable of effectively enforcing competition laws. The introduction of specific commissioners and a divisional model to contribute to accountability and strategy will also be considered.

The government's focus on strengthening competition laws aims to deliver greater choice, lower costs and increase productivity for all New Zealanders.

### Reform of overseas investment laws to boost economic growth

The Overseas Investment Act 2005 will undergo significant reform, the government has announced. New Zealand is currently ranked the most restrictive country in the OECD for overseas investment.<sup>2</sup> The reform intends to combat this position by increasing openness to foreign investment that should attract more international investors.

To achieve what the government believes will be a more dynamic and competitive economic environment, a suite of statutory changes have been proposed to reduce barriers to investment where such investment does not present any identified risk to New Zealand's interests. Key proposed changes include:

- **Fast tracking approvals:** simplifying the assessment process by establishing basic tests and assuming investment will be permitted unless risks are flagged
- **Targeted scrutiny:** retaining flexibility to analyse investments on a case-by-case basis and impose conditions or block them if necessary, and
- **Retaining current scope:** ensuring the government can continue to scrutinise sensitive investments, including farmland.

Legislation to implement these changes is expected to be introduced this year.

### Tax changes for charities

Charities can expect to see a raft of tax changes in May. These changes are intended to reduce the scope for exploitation of loopholes in the current framework. In other words, the government wants to ensure that entities receiving tax benefits are distributing their funds for charitable purposes – as opposed to

structuring themselves as charities and building up funds that are not being used for charitable purposes.

This review will focus on charities that operate commercial businesses and whether they should pay tax on profits retained in the business. When announcing the changes, the Minister of Finance, Nicola Willis, mentioned that entities such as cereal manufacturer Sanitarium and early childhood education provider BestStart are among the types of organisations potentially impacted by the changes.

This removal of tax-free status is to be balanced against the need to support charities and to recognise the significant role New Zealand charities play in our communities. As a result, some charities may lose certain tax benefits.

These changes are part of a broader tax policy work programme that also includes exploring user-pays models for infrastructure projects and other revenue raising measures. The changes aim to ensure fairness while maintaining vital support for the charitable sector. <sup>+</sup>

2 BusinessNZ, 6 September 2024.