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Happy new year – we trust that 2017 has started well for you.

We hope you find the articles in *Commercial eSpeaking* are both interesting and useful to you.
If you'd like to talk further with us on any of these topics – or any other legal matter – please be in touch.
Our contact details are above.

What to do When the Earth has Moved

The recent Kaikoura earthquake was yet another reminder of the volatile and unpredictable nature of the land on which we all live. As we have seen, even earthquakes that don't cause widespread destruction and/or loss of life can have a major impact on businesses and property owners. We provide some guidance on points to keep in mind if you own, or are a tenant in, a commercial building potentially affected by earthquake damage.

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What to do When the Earth has Moved

The recent Kaikoura earthquake was yet another reminder of the volatile and unpredictable nature of the land on which we all live. As we have seen, even earthquakes that don't cause widespread destruction and/or loss of life can have a major impact on businesses and property owners. We set out below some guidance on points to keep in mind if you own, or are a tenant in, a commercial building potentially affected by earthquake damage.

Civil Defence Emergency Management

If you're a building owner, you have primary responsibility to ensure your building is structurally safe. You must provide assistance to the local emergency management officials (if a state of emergency has been declared) or to the council if there's no state of emergency.

If a state of emergency is declared, civil defence officials are likely to begin a rapid assessment to determine whether your building is structurally safe. They may inspect the building and issue a placard indicating it can be used, or that entry is restricted or prohibited.

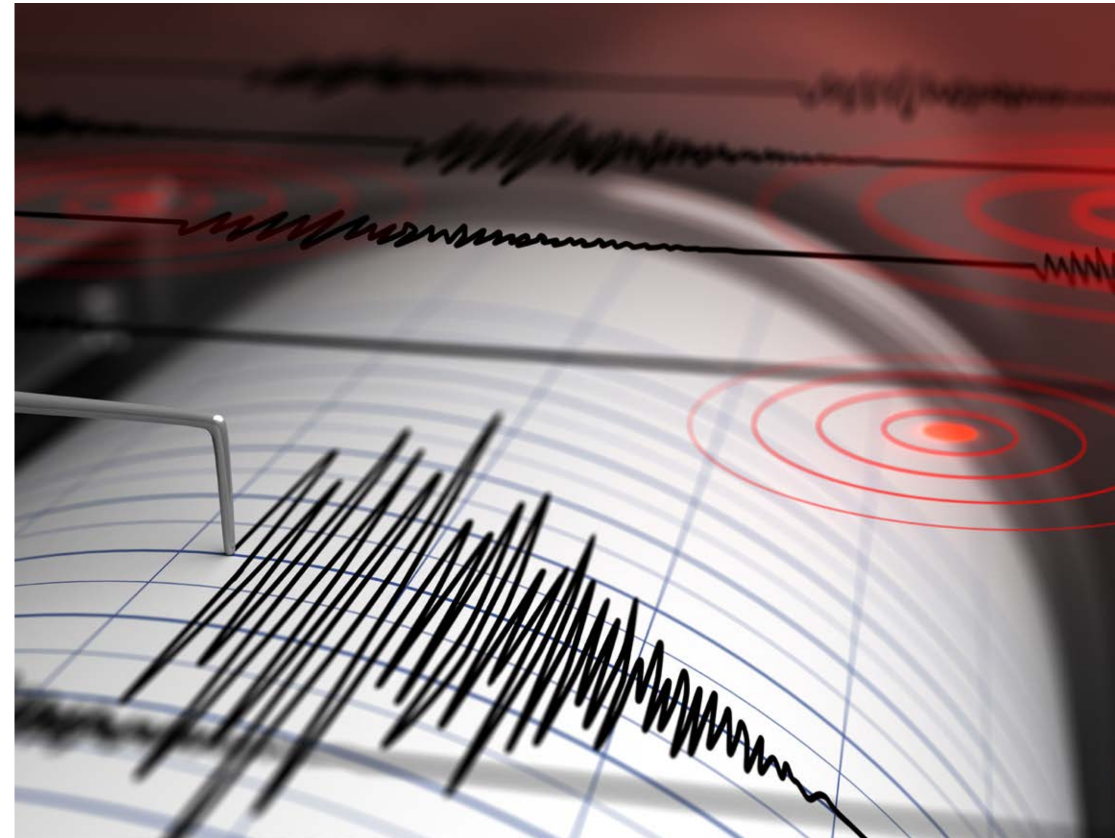
You must co-operate fully with this inspection process, including providing any information requested (for example, any previous engineering advice received).

Civil defence officials can also require you to undertake structural assessments, and make safe or demolish all or part of those structures. They can also require evacuations, and close roads and public spaces. This often occurs where a building is at risk of collapse, and can significantly affect neighbouring businesses.

Health and safety

If your building is, or contains, a place of work, then both you and your tenant will have duties under the Health and Safety at Work Act 2015, including a duty to consult, co-operate and co-ordinate with each other.

Among other duties, a person who controls a workplace or fixtures and fittings within a workplace (shelving, for example) also has specific duties to ensure those things are without risks to the health and safety of any person.



After an earthquake

If there's a risk that the structural integrity of the building has been affected by the quake, an inspection should be undertaken by a chartered professional engineer.

If a structural engineering report is already held, that may provide some recommendations as to the situations in which a further report is required (for

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example, an earthquake over a certain magnitude). If not, building owners and tenants will need to use their judgement as to whether the building's structural integrity has potentially been affected.

The Ministry of Business, Innovation and Employment (which administers both building law, and health and safety legislation) suggests that things to look for include:

- Broken windows
- Broken or cracked concrete/plaster/masonry/linings
- Damaged building components
- Changes in building levels or tilting
- Dangers from neighbouring buildings and environs, such as power lines
- Dislodged services, and
- Significant displacement of furniture and office components.

If engineers confirm the building is structurally safe, you and your tenant/s will need to decide whether it can be reoccupied. If the building is structurally sound, there may be services which require fixing (such as water, sewerage and fire protection) before the building is safe to occupy. There may also be other hazards which can be repaired or mitigated easily, such as dust, broken windows and dislodged furniture. These must be addressed before the building is reoccupied.

Who pays?

Who is responsible for repairing damage depends on what is damaged and the terms of the lease. Under many leases the landlord is responsible for repairing the building itself, and tenants are responsible for repairing any fixtures and fittings belonging to them. However, the terms of the particular lease should be checked carefully.

There are exceptions, however. Under the Property Law Act 2007, landlords cannot hold tenants liable for any damage to the building arising from an earthquake, even if there's an obligation on the tenant under the lease to repair that damage.

Employment

The Employment Relations Act 2000 does not specifically deal with obligations after a natural disaster. However, the duty of both employers and employees to act in good faith remains. Employment agreements or the employer's policies may also deal specifically with the situation, so it's important to check those. Employers should also check their insurance policy to see whether they are covered for payroll expenses if the business is closed.

Generally, if your employees are willing and able to work, but the workplace is shut, then they need to be paid. That is often not financially viable in the long term. Following major events such as the Kaikoura earthquake, the government may offer a wage subsidy to affected businesses. This is designed to encourage employers to keep staff on while the business is closed for repairs.

If the business will be closed for some time, employers and employees should talk with each other about how to best manage the situation. Good faith and common sense go a long way in situations like this.

There are many things to consider after a large earthquake, and it can be a very stressful and confusing time. We have experts who can assist you in navigating through it.

Greater Focus on Lender Responsibility for Consumer Credit

Changes to the Credit Contracts and Consumer Finance Act 2003

The new Credit Contracts and Consumer Finance Amendment Act 2015 (CCCFA Amendment Act) which came into full effect in mid-2016 has tightened rules and regulations for lenders that are affected by the Credit Contracts and Consumer Finance Act 2003 (CCC FA). There is a greater focus on lender responsibility and accountability such as firmer disclosure requirements and rules around cost recovery. We take a closer look at some key areas and what that could mean for you.

The CCCFA regulates the rights and responsibilities of lenders and borrowers in a consumer contract arrangement. A consumer, generally speaking, is someone who has entered into a credit contract for the purpose of household, domestic or personal benefit. The CCCFA Amendment Act has increased the lender responsibilities and regulation compliance under the CCCFA. The key changes are:

- New lender responsibilities
- The development of the **Responsible Lending Code** which sets out the new lending principles
- More rigorous initial disclosure requirements by the lender before entering into a contract
- Greater consequences as a result of failing to meet the initial disclosure requirements, and
- Further restrictions for lenders on recovering costs from borrowers.

A closer looking a lender responsibilities to borrowers

From a borrower's perspective, the amendments under the CCCFA Amendment Act mean better protection and parameters for lending in terms of fair interest rates, disclosure and rights of recovery. These are incorporated into the new Responsible Lending Code. A lender must take extra care when disclosing a credit contract to a borrower to ensure all the relevant details are explained in a simple and understandable manner. This extra level of care does not only apply in a loan situation, but it also affects credit-related insurance contracts, guarantees and buyback transactions.

As a borrower you need to be aware that a lender's responsibility is to assist you, and any guarantors in making informed decisions throughout the term of the credit, to act ethically and ensure the contract is not oppressive in nature. The latter is especially true for any loan sharks wanting to charge higher than usual interest rates – if you think the interest rate is too high, do not sign the contract and get some professional advice.

Disclosure requirements and implications

The new section 99(1A) of the CCCFA Amendment Act has further restricted lenders from recovering costs from a borrower where initial or ongoing disclosure has not been completed in accordance with the legislation. Costs for borrowing are defined under the CCCFA and CCCFA Amendment Act as interest charges, credit fees and default fees under a consumer credit contract. The new section requires lenders to disclose all information, including any unexpected costs that have, in some instances, been glossed over in the past.

The new section goes one step further than its predecessor in that a lender may no longer recover costs for any period of time during the credit contract where disclosure had been incorrectly completed. This is yet to be tested in court; however we expect to see lenders having to update internal practice and educate staff in order to comply with the new legislation. Lenders who discharge their obligations by automatic online lending approvals will need to be particularly vigilant. Borrowers need to question any unexpected costs that arise.

Conclusion

The Commerce Commission has made it clear that the rights and obligations set out in the CCCFA Amendment Act are mandatory for all lenders. Proactive steps have been taken by the Commission to enforce regulations; this was demonstrated in a recent case[1] where the lender was ordered to pay $135,000 for a breach of disclosure requirements under the CCCFA and CCCFA Amendment Act.

Whist the changes are focused on greater consumer protection leaving little room for omissions by lenders, borrowers need to be well informed and understand what they are signing. If it looks like a shark is lurking, get professional advice straight away.

1 *R v Smart Shop Limited* [2016] NZDC 1937

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Business Briefs

OIO changes to streamline the investing and consenting processes

The Overseas Investment Office (OIO) recently announced five new class exemptions and some other changes to the way it goes about its business. It's also looking at a few other potential exemptions, all of which – with the right safeguards – should be welcomed.

The new class exemptions come into force on 1 February 2017. They cover:

- Lease renewals
- Situations where land has previously been the subject of an OIO consent, has remained in overseas ownership and will continue to be used for the same activity
- Transactions due to the Public Works Act 1981
- Situations where a custodian is investing on behalf of another person, and
- Situations where a company is considered an overseas person only because an overseas custodian holds rights or interests in the company's shares.

The OIO has made various changes to the consent application process; these are all aimed at reducing the overall time it takes to deal with an application, without compromising the quality of decision-making.

There are three key changes to note:

1. The OIO is promoting pre-application meetings to discuss things at a high level at an early stage.
2. New application templates are being finalised and should be available in February.
3. There's a triaging of applications by senior staff, with more of a risk-based approach to the assessment of applications that come through the OIO's doors. More complex and higher risk applications may take longer; more straightforward or lower risk applications should be turned around faster.

On the enforcement front, overseas investors should note that the OIO is stepping up its surveillance and investigation function. This will include looking into situations where commitments have been made but not delivered on.

In the background, the OIO is also looking at making changes to some of the existing class exemptions, and also some potential new exemptions. Some of the possibilities include more flexibility for an overseas investor to increase their shareholding in a company without needing consent; exempting certain sale and leaseback transactions from the need to get consent; and also exempting certain transactions where the only sensitive land in question is common property (which can often occur in hotel/resort-type developments). There is a good case for these exemptions and we hope to hear more on them from the OIO in the coming months.

Limited partnerships become popular

A flexible and convenient option, limited partnerships are an increasingly popular business structure for venture capital and private equity firms looking to enter the New Zealand market. The Limited Partnerships Act 2008 enables a form of partnership with:

- General partners (who are liable for all the debts and liabilities of the partnership) and who manage the day to day running of the business, and
- Limited partners (who are liable to the extent of their capital contribution to the partnership) and who can enjoy more of a silent investor-type role.

Some of the key advantages that a limited partnership provides include:

- Partners can be individuals, companies or partnerships that exist under the Partnerships Act 1908
- Status as a separate legal personality
- An indefinite lifespan, if desired
- Various safe harbour activities for limited partners where their actions do not amount to the management of the business or otherwise breach the Act, and
- Tax benefits for partners of the limited partnership.

The Act prescribes similar reporting responsibilities to other company structures, such as preparing financial statements and filing annual returns with the Companies Office. Potential partners must also meet eligibility requirements; for example, being a New Zealand resident.

Overall this internationally-recognised regime has removed previous barriers to foreign investment in New Zealand. It enables home-grown businesses to be more competitive in seeking venture capital funds and other private equity schemes.