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Do you really need all that paper?

Sometimes you do

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PAGE 2 >>

Who'd be in business?

Other options if your business is shaky

Even the best of operators can face financial struggles and at such times a wounded business loses friends quickly.

When a business starts to look shaky, creditors will often tighten their trading terms for fear of suffering losses themselves. Assertive creditors may choose to seek liquidation of a company or bankruptcy of an individual. These options can lead to very poor outcomes.

PAGE 4 >>

Business Briefs

The 'tail' of two crocodiles

Lacoste recently successfully defended its rights in the Court of Appeal.

Business tax proposals announced

In April 2016, the Prime Minister announced a package of proposals to simplify business tax.

Attempt to structure around the Overseas Investment Act proves costly

A recent case serves as a reminder of the wide application of the overseas investment regime and a warning against attempts to try and structure deals around it.

PAGE 5 >>

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Historically, good practice has been to record agreements in some sort of tangible document, a letter, fax or a written agreement and for information to be stored in physical files. Today, emails and other electronic communications are taking the place of letters and faxes. Electronic files such as PDFs, TIFs and Word files are taking the place of hard copies, and information is being stored electronically rather than on paper.

The natural tendency is to do things the way they have always been done and to rely on existing systems for storing information. Relying on electronic communications and information can, however, make people feel uneasy. How many times have you:

- » Scanned and sent a document or a letter electronically and then put the original in the post?
- » Emailed but thought – *this is important, should I do it by letter?*
- » Received or sent an email and printed off a hard copy for a physical file?
- » Generated a report from your electronic systems, printed it and then filed it?

Do we really need all that paper?

The Electronic Transactions Act 2002 (ETA) was introduced for the express purposes of:

- » Reducing uncertainty about the legal effect of information which is in electronic form or is communicated electronically (and the time and place that those communications are sent and received), and

- » Providing that certain paper based legal requirements can be met by using electronic technology.

Electronic format now as valid as paper

With a few exceptions, electronic information is now equally as valid as its paper-based equivalent. The Act provides that information can't be denied legal effect just because it's in electronic form or is an electronic communication. So, if you sign a paper-based contract and then agree to a variation by e-mail don't expect that the variation won't be legally binding just because you haven't signed a paper copy.

Requirement for things to be in writing

A legal requirement that information be in writing, recorded in writing or given in writing is satisfied by information that is in electronic form if the information is readily accessible so it can be used for subsequent reference.

Some documents are still required to be on paper – notices required to be given to the public; information required to be given in writing either in person or by registered post; notices required to be attached to

anything or left or displayed in any place; affidavits, statutory declarations and similar documents; powers of attorney or enduring powers of attorney; wills, codicils or other testamentary instruments; negotiable instruments; warrants or other documents authorising entry onto premises, search or seizure; court documents; some specific statutory requirements, etc.

Legal requirements to store information

The main requirements for keeping records in electronic form under the ETA, whether the records were originally in paper form or in electronic form, are that:

- » The integrity of the information contained in the records is maintained (so make sure it is properly backed up), and
- » The information is readily accessible so it can be used for subsequent reference.

The ETA enables people to retain information that's in paper or other non-electronic form by retaining an electronic copy.

If the information is in an e-mail or other electronic communication, you must also keep information that identifies where it

was sent from, where it was sent to, when it was sent and when it was received.

Inland Revenue accepts that records can be stored electronically; guidelines on the retention of business records in electronic format are set out in its standard practice statement SPS 13/01 [TIB vol 25:3 (April 2013) at 8–20].

It requires taxpayers to keep their business records in New Zealand; this raises issues for people storing their information 'in the cloud'. Taxpayers who want to store their records offshore should apply to the IRD for authorisation before sending their records offshore. However, if either a backup of the business records is retained in New Zealand, or the records to be stored offshore are merely a backup of the records held in New Zealand, then the IRD considers that the requirement to store the records in New Zealand is satisfied and an authorisation isn't necessary.

The challenge

The Electronic Transactions Act has been introduced to facilitate the use of electronic communications and to reduce the need for paper-based storage. The challenge is to look critically at how we communicate and how we store information to reduce all that paper! ●



Who'd be in business?

Other options if your business is shaky

Even the best of operators can face financial struggles and at such times a wounded business loses friends quickly.

When a business starts to look shaky, creditors will often tighten their trading terms for fear of suffering losses themselves. Assertive creditors may choose to seek liquidation of a company or bankruptcy of an individual. These options can lead to very poor outcomes. The result can be staggering liquidation costs, lost jobs for employees, lost owners' equity, disruption for customers and losses to other creditors.

Sometimes it makes no sense for creditors to shut down a business. In these instances there are legal mechanisms available to companies and business owners to make compromises with creditors possible and, to an extent, put the fate of the company or the business owner/s in the hands of common sense.

Voluntary administrations

In the case of companies, voluntary administrations are intended to be a fast and inexpensive alternative to a liquidation. The voluntary

administration regime's purpose is to maximize the chances of a struggling company to continue trading.

An administrator may be appointed by the company's board, a liquidator, a secured creditor or the court where a company is, or is likely to become, insolvent.

A meeting of creditors must be held within 20 working days of appointment of the administrator. The creditors then decide (by a 75% majority in value of debt owed) the future of the company. The creditors may decide to specify the terms on which the company will continue trading and what protection the company will have from existing creditors in a 'deed of company arrangement'. Alternatively, the creditors may decide

to do nothing and return the company to the control of its directors, or to put the company into liquidation.

A deed of company arrangement will bind the company's directors, shareholders and unsecured creditors, and all secured creditors and lessors of property who have voted in favour of it. It may also suspend the ability of creditors to enforce personal guarantees.

Another real strength of this process for the struggling company is that after the creditors have decided that the company will enter into a deed of company arrangement, the court may order that a secured creditor may not exercise its rights, or a lessor may not retake possession of leased premises or chattels.

Such orders may be made only if the interests of the secured creditor or lessor will be adequately protected.

Adequate protection doesn't necessarily mean equal treatment. In Australia, where the rules are similar, the courts have allowed a company to walk away from its lease commitments, paying the landlord only the amount it would have received in a liquidation of the company. The other creditors were paid in full from funds contributed by a parent company.

Insolvency proposals

There's a similar procedure in the case of individuals who are unable to meet their financial commitments. Insolvent people can apply to the court to have a trustee appointed to convene a meeting of creditors to reach a compromise short of bankruptcy. The content of the proposal is flexible but must be accepted by both a majority of the creditors voting and a 75% majority of the creditors in value of debt owed. It must also be approved by the court.

There are very clear benefits for a person to avoid bankruptcy: this includes being able to continue in business, to continue to hold directorships of companies,



Business Briefs

The 'tail' of two crocodiles

Lacoste recently successfully defended its rights in the Court of Appeal¹ to its trade mark which depicts both a crocodile and the word 'crocodile' (mark 70068) despite it never actually having used the mark.

Crocodile International Pte Limited had applied to have Lacoste's mark revoked on the ground of non-use under 66(1)(a) of the Trade Marks Act 2002.

Lacoste argued that its use of its other, more familiar mark, constituted



use of mark 70068 under the Act's extended definition of 'use' which includes 'use in a form differing in elements that do not alter the distinctive character of the

trademark in the form in which it was registered.'

In making its decision, the Court of Appeal agreed with the High Court that it should first assess the points of difference between Lacoste's

familiar mark that has been used and the mark as registered (70068).

It must then ascertain if the differences alter the distinctive character of the mark as registered (70068).

The court held that the differences between mark 70068 and its more familiar mark were insignificant and did not alter the distinctive character of mark 70068, which was dominated by the image of a crocodile. It held the use of the word 'crocodile' added nothing to the distinctiveness of the mark.

Despite the result of this case, it's important to remember to 'use' your registered trade mark to prevent claims of this nature being brought by your competitors. ■



Business tax proposals announced

In April 2016, the Prime Minister announced a package of proposals to simplify business tax, many of which will benefit small and medium-sized businesses. Some of the key tax proposals include:

- » A new pay-as-you-go option for paying provisional tax for small businesses with less than \$5 million annual turnover. This will give small businesses an alternative to the current system which requires three annual provisional tax payments. In order to take advantage of the proposal, businesses will need to use a cloud-based accounting system linked to the Inland Revenue such as Xero.

- » Changes to the 'use-of-money interest' rules that govern the interest paid to taxpayers for overpayment of tax and interest charged for underpayment. The practical effect is that the changes will eliminate or reduce use-of-money interest for the majority of taxpayers.
- » Contractors will be able to elect their own withholding tax rate to better reflect their circumstances and reduce the impact of provisional tax.
- » Certain penalties will be removed, including the current 1% monthly penalty for new debt. However, immediate penalties and interest charges for late payments will still apply.

New legislation is likely to be introduced later in 2016 and most of the proposals have a planned implementation date of 1 April 2017. ■

Attempt to structure around the Overseas Investment Act proves costly

A recent case² serves as a reminder of the wide application of the overseas investment regime and a

¹ *Crocodile International Pte Limited v Lacoste* [2016] NZCA 111

² *LINZ v Carbon Conscious New Zealand Limited and Katey LR Investments Limited* [2016] NZHC 558

warning against attempts to try and structure deals around it.

Carbon Conscious New Zealand Limited (CCNZ) needed to buy some land to meet its planting obligations for a carbon credits scheme. The land was sensitive under the Overseas Investment Act 2005. However CCNZ (a subsidiary of an Australian company) did not have the time it would have required to get consent – it needed to buy the land to start its planting in time to meet those obligations.

After taking advice an arrangement was entered into which involved a new company (Katey LR) being incorporated with the CCNZ general manager's wife as the sole shareholder and director. That company bought the land and entered into some contractual arrangements with CCNZ which included giving CCNZ an option to buy the land.

These arrangements made the two companies associates under the Act, the result being that there was an acquisition

of sensitive land by an associate of an overseas person without consent which is in breach of the Act. The High Court looked at a number of factors including the nature of the breach, the nature of any damage caused or gain made and whether the breach was intentional, inadvertent or negligent. The court ultimately ordered CCNZ to pay a penalty of \$40,000 (after applying a 50% reduction for its admission of liability and co-operation) and \$6,000 in costs.

New Zealand's overseas investment regime is intentionally broad in its application. Any attempt to structure around it is unlikely to succeed, and carries with it the potential for significant penalties. ■

[Continued from page 4](#)

freedom to travel overseas and avoiding the stigma of bankruptcy.

Worth considering

For any looming company or personal insolvency situation where the business owner has the ability to achieve a better outcome for creditors than they would otherwise achieve, these alternative processes should be considered. This might require a contribution of funds from an external source but, in the right circumstances, creditors may also be convinced that the best outcome will come from supporting continued trading.

Such compromises can also give directors protection from personal claims, and creditors a degree of control, with the real prospect of a better financial outcome than they might otherwise achieve using the more severe liquidation or bankruptcy remedies.

Voluntary administration and insolvency proposal procedures give business owners and creditors the opportunity to work together to achieve an outcome, which is mutually beneficial and has wider positive spinoffs. ■

