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COMMERCIAL eSpeaking

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Happy New Year, we hope that 2014 is a good one for you and your business, and that it prospers in the 12 months ahead.

Enjoy reading this newsletter, and we trust that the articles are both interesting and useful. If you would like to talk further about any of the topics covered in *Commercial eSpeaking* or any business law matter, please be in touch with us, our contact details are above.

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Can be a significant risk for businesses

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Voidable Transactions

Can be a significant risk for businesses

When an insolvent company goes into liquidation it's accepted that not all creditors will get paid 100 cents in the dollar. However it often comes as a shock to creditors when the liquidator requires them to refund payments that had been made up to two years before the company was liquidated.

The liquidator of a company has an obligation under the Companies Act 1993 to fairly distribute the company's assets to its creditors. In doing so the liquidator may choose to claw back payments which the company made from up to two years before the liquidation. The liquidator then makes those funds available to the general body of creditors. The payments that are clawed back are called 'voidable transactions'.

Voidable transactions pose a significant risk for businesses that trade on a credit basis; the construction industry is a particularly good example. In the last six years following the 2008 property market collapse, there have been numerous liquidations of companies throughout the construction industry and, consequentially, many demands for repayment of transactions considered 'voidable'.

It's about fairness to all

The voidable transaction regime, as contained in ss292-296 of the Companies Act, operates on the assumption that a liquidated company trades while insolvent for some time before it's placed into liquidation. It's therefore considered fair that all parties who traded with the company during that period of insolvency bear an equal burden of having traded with an insolvent company. While a demand from a liquidator to refund a, usually long overdue, payment may not seem that fair when you receive it, the overall objective of the voidable transaction regime is not to penalise creditors but to achieve fairness to all. This fairness is achieved by, in the words of the Court of Appeal, "swell[ing] the pool of funds available to the company to be shared rateably amongst all creditors"¹.

Transactions are considered voidable under s292 if two criteria are met. First, the payment must have been made when the company was unable to pay its debts. Second, the payment must allow the recipient to receive more than they would have received in the company's liquidation. During the six months immediately preceding the start of the liquidation, the company is presumed unable to pay its due debts. In other words, the first criteria is presumed to be met. Outside this period the liquidator must show evidence that the company was unable to pay its bills. Whether a payment allows the recipient to obtain more in a liquidation than they would have otherwise received is a straight comparison between the amount the recipient actually received and the amount that the recipient would have as part of the general body of creditors in the liquidation, had the payment not been made.

Transaction perhaps not voidable?

Under s296(3) transactions are not voidable if the recipient can demonstrate all three of the following when they received payment: they acted in good faith, a reasonable person in their position would not have suspected that the company was (or would become) insolvent, and they gave value for the property or altered their position in the reasonably held belief that the payment was valid.

While there's no sure way to avoid having payments clawed back under the voidable transactions regime, the following may limit your exposure:

- » If you supply goods on credit, ensure that those goods are the subject of a security interest properly registered on the Personal Property Security Register, and
- » If you have any reason to suspect that a company is facing financial difficulties, insist that all future transactions are conducted on a cash on delivery basis.

It's also important that you respond promptly to a demand for repayment of a voidable transaction. If you don't file and serve an objection notice within the statutory period of 20 working days, it may result in the liquidator's decision being unchallengeable² and, by default, you will be required to make the repayment. ■

¹ *Farrell v Fences & Kerbs Limited* [2013] NZCA 91

² *Bond Cargo Ltd v Chilcott* (1999) 13 PRNZ 629

A Boost to Employee Share Offers and Capital Raising

The overhaul of the laws that govern New Zealand's financial markets took another big step last September with the passing into law of the Financial Markets Conduct Act 2013. The new regime established under the Act will be phased in over the next few years. Right now though, it's worth concentrating on two aspects of the new regime that should be of interest to many businesses around the country: a broader exclusion from the standard disclosure requirements which should make offering employee share schemes easier, and wider-ranging exclusions which should make raising capital more cost-effective.

Employee share schemes

Employee share schemes can be a great way to attract, retain and incentivise staff, particularly for early-stage companies. However, these schemes aren't widely used in New Zealand. Part of the problem is that the rules you currently need to comply with in order to offer an employee share scheme make doing so impractical and, in a lot of cases, also undesirable.

The exclusion that will be available under the new regime is less restrictive than the current rules, and will enable employers to offer these schemes with more flexibility, and on a more cost-effective basis. Officials have acknowledged that it's important to facilitate these schemes whilst, at the same time, also ensuring that employees receive basic information about the investment decision they're making. So, certain disclosures will need to be made to participating employees, including the company's latest annual report and financial statements (to the extent available), information about how the shares can be sold, and prescribed statements about the risks of employee share schemes. The new exclusion should be able to be used from 1 April this year.

Capital raising

In terms of general capital raising; currently there are a range of exclusions from the need for full compliance with the Securities Act 1978 when sourcing capital from investors. There's a lot of uncertainty and subjectivity associated with the current exclusions, which has meant that they're not as helpful as they should be. The new Act carries over a number of the current exclusions, but makes them clearer with the introduction of more objective tests.

A significant change will be the introduction of a small offer exclusion. This will allow companies to raise up to \$2 million from up to 20 investors in any 12 month period, through 'personal' offers. The rationale here is that compliance with the full disclosure requirements would outweigh the benefits of making the offer. It's expected that companies that want to use the small offer exclusion will need to provide a prescribed warning statement to investors and notify the Financial Markets Authority (FMA) that they're using it. The purpose of this is twofold. Firstly, to ensure investors are aware of their regulatory position and secondly, to help the FMA monitor the level of activity taking place in this area. This exclusion is also expected to come into force from 1 April this year.

Looking ahead

If you're interested in other aspects of the new regime, the next step in its implementation will be the development of the draft regulations, which is currently underway. These will provide a lot of the detail for the framework established under the Act (including the content of the new disclosure documents), as well as on the new licensing frameworks and other key operational changes.

There's plenty to plan ahead for, but if you're looking at setting up an employee share scheme or raising capital in the next few months it's business as usual and you still need to comply with the current rules under the Securities Act.

If you're thinking of offering your employees some shares in your company or you're undertaking some capital raising, do talk with us early on. Despite the new legislation, these are still complex activities and you'll need advice from us and also your accountant. ■

Business Briefs

New Zealand company business numbers

All companies currently registered in New Zealand have now been assigned a New Zealand Business Number (NZBN).

A NZBN is a unique 13 digit identifier allocated to an individual business as part of the government's Better Public Services programme, which is working towards easier interaction between the government and businesses. It's intended for NZBNs to be assigned to every business in New Zealand and for a single searchable public register of businesses to be created. The NZBN will become the main identifier for businesses when dealing with government agencies and will, hopefully, decrease paperwork by allowing businesses to update their details in one place (and then automatically in others). At present there are eight agencies committed to the use of NZBNs including Inland Revenue and ACC.

NZBNs have first been assigned to companies registered at the Companies Office. Existing companies can find out their NZBN by searching the Companies Office website. All new companies registered will also be allocated an NZBN and work is underway to allocate NZBNs to other business structures such as sole traders.

Director residency requirements

An important part of the government's companies and limited partnership reforms package is undergoing its final legislative steps. If you're involved with affected companies and limited partnerships you'll need to take note.

Under the Companies and Limited Partnerships Amendment Bill, every company incorporated in New Zealand will be required to have:

- » A director who lives in New Zealand, or
- » A director who is also a director of a company incorporated in, and who also lives in, a country with which New Zealand has reciprocal enforcement arrangements for low-level fines. The list of approved countries remains to be finalised, but it's expected to initially include only Australia.

Equivalent requirements will be imposed for limited partnerships.

The purpose of this requirement is to ensure that there's an identifiable individual with a substantive connection with the business who can be questioned about its activities and who can, in certain circumstances, be held to account.

Existing businesses will have a mere six months to comply with the new requirements once they come into law, which could be very shortly. Non-compliance at the end of the six month transition period will be grounds for de-registration of the company or limited partnership.

So long, farewell, auf wiedersehen, goodbye! Getting staff resignations right

It's said that the only things certain in life are death and taxes. For business owners, the list also includes resignations. Like death and taxes, resignations never occur at a convenient time, but you should ensure that you are prepared for the inevitable by turning your mind to the following three matters.

The finer details: Check your employee's employment agreement to confirm the manner in which the resignation is to be notified (ie: in writing or verbally), notice periods and whether there are restraint provisions preventing your employee from such things as working for a competing company.

Communication: Consider how and when your employee's resignation will be notified to colleagues, customers or other stakeholders who engage with your employee on a regular basis.

Tools and equipment: Along with the return of any tangible items such as keys, fobs, phone, laptop or iPad, you should ensure any access your employee has to company bank accounts, social media sites (Facebook, Twitter, and LinkedIn) or your website is discontinued. Also, you'll need to think about how you wish to manage your employee's social media connections that they've obtained and used whilst working for you.

The points above can be included in an exit policy so that it's clear from the outset how matters will be dealt with at the time the employment relationship comes to an end. ■