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NEWSLETTER

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Changes To The Companies Act 1993

Company directors should be aware of the changes to the Companies Act 1993 (the Act) that became law on 24 June 2014. Some changes took immediate effect while others will be implemented later this year. This article focuses on two key changes: new criminal offences and registration of companies.

New criminal offences
One change, now in force, was the creation of new criminal offences for serious breaches of directors' duties. It is now an offence where:

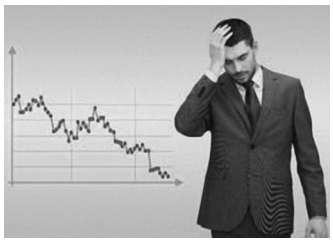
- A director acts in bad faith and not in the best interests of the company and knows that this will cause serious loss to the company (section 138A of the Act),
- A director dishonestly incurs debt for the company when the company is insolvent, or the director knew the company would become insolvent (section 380 of the Act).

These changes were introduced following the widescale collapse of finance companies between 2006 and 2012. The collapse of these companies left many 'mum and dad investors' stripped of their nest eggs. There was concern following the collapse of these companies that it was sometimes not possible to take action against directors for their reckless or dishonest conduct (although many were prosecuted under provisions in the Securities Act, Financial Reporting Act and the Crimes Act). In introducing the new offences, the Government sought to balance the effect of potential criminal liability deterring people from becoming directors or taking business risk, against the need to deter dishonesty and prevent the substantial harm resulting from breaches of directors' duties.

The new offences require that the mental elements of dishonesty, bad faith, knowledge and belief must be proved beyond reasonable doubt. These are high thresholds, and should put honest directors at ease.

Registration of companies
Other changes to the Act relate to the registration of companies. For companies that were formed before 1 May 2015 (existing companies), these changes are being introduced in a staggered way.

Since 1 July 2015 existing companies have been required to provide the Registrar of Companies the dates and places of birth of all directors and details of any Ultimate Holding Company (if applicable). The personal details of directors will not be publicly available, however, details of any Ultimate Holding Company will be publicly available.



From 28 October 2015, existing companies will need to ensure they have at least one director that either lives in New Zealand, or who lives in Australia and is also the director of a company incorporated in Australia. Details of that Australian company must be provided to the Registrar (which includes ACN, name and registered office address). This requirement already applies for all newly incorporated companies.

All this information will be required in order to file an annual return. Failure to file an annual return will result in steps being taken to remove the company from the register.

These changes have been made in an attempt to protect New Zealand's international reputation, by seeking to reduce the misuse of the New Zealand company registration process by overseas individuals and groups, who have used companies incorporated in New Zealand to facilitate crime.

Other changes include enhancing the powers of the Registrar of Companies and changes to the provisions about changing control of companies, to align the Act with the provisions of the Takeovers Code.

For more information about how these changes might affect you, contact your lawyer for advice.

Passing Away Without A Will — What Happens To Your Estate?

When a person passes away without a Will, the Administration Act 1969 (Act) sets out how the Estate of the deceased will be distributed.

Firstly, the family (or other potential representatives) need to determine the value of the assets in the Estate. Where the value is less than $15,000 the process is more straightforward, and letters of administration are not required. For Estates worth more than $15,000, letters of administration will need to be obtained.

The Act sets out the process for applying for letters of administration including who may apply, who the eventual beneficiaries will be, and what share of the Estate they will receive.

Where the deceased leaves behind a surviving spouse, civil union partner or de facto partner, this person is entitled to a grant of letters of administration. If there is no surviving partner or spouse, the deceased's children may apply, or, failing children, a grandchild may apply. The Act contains further provisions for circumstances where someone else has to apply.

Once an administrator is appointed by the High Court, that person then has authority to deal with Estate assets, and those assets are then called in. For example, real estate or shares can be sold, and funds in bank accounts in the name of the deceased can be withdrawn so that all liquidated Estate assets are held in the same account in anticipation of distribution. The Administrator is then tasked to ensure that the Estate is distributed in accordance with the Act.

Section 77 of the Act provides an exhaustive list that determines who the beneficiaries of the Estate are, and what they are to receive. For example, if the deceased leaves behind a surviving spouse and children, the Estate is divided as follows:

- Any jointly owned property (including jointly owned family homes and bank accounts) will pass to the surviving joint owner regardless of the provisions of the Act,
- All personal chattels will pass to the surviving partner,
- The “residue of the Estate” (everything left over after payment of all Estate debts) is divided into shares. Firstly, the “prescribed amount” is paid to the surviving partner absolutely (the prescribed amount is an amount set by Government regulation, and can change from time to time. Currently, the prescribed amount is $155,000),
- Anything then left over is split into thirds. One third of that remainder is for the surviving partner, and
- Two thirds of the remainder is for the children.

Depending on who does or does not survive the deceased, the beneficiaries of the estate could also include siblings, parents, grandparents, aunts or uncles. Where none of these classes of beneficiaries exist, the Estate vests in the Crown. The Crown has discretion under the Act to provide for dependants of the deceased, and persons for whom the deceased might reasonably have been expected to make provision.

These guidelines show the importance of executing a Will where the provisions of the Act do not reflect your wishes. For example, you may wish to make direct provision for nieces and nephews who are not explicitly provided for in the Act, or apportionment of assets under the Act may not be in accordance with your wishes. If you have any concerns you should speak with your lawyer.

Property Sales — Disclosure

The principle of 'caveat emptor', or “let the buyer beware”, applies to buying property. Purchasers are always advised to complete their own thorough due diligence investigation before they buy.

It is important however to remember that despite caveat emptor, the people involved in selling a property (i.e. the vendor and in particular, the real estate agent) have significant obligations to disclose information to the purchaser. These requirements are in place to protect the purchaser.

A real estate agent, as a licensee under the Real Estate Agent’s Act (Professional Conduct and Client Care) Rules

2012 (the Act), cannot rely on caveat emptor when involved in the sale of a property. The obligations on a licensee under the Act require, at a minimum, that an agent discloses known defects to a customer. Clearly, where an agent has knowledge of an issue with a property, the only appropriate course of action is to advise prospective purchasers.

In some situations, the Act requires an agent to go further than simply disclosing known defects. Rule 10.7 of the Act states that where it would appear likely to a reasonably competent licensee that land may be subject to a hidden or underlying defect, the licensee must obtain confirmation from their vendor client and expert evidence that the land is not subject to the defect, or ensure the purchaser is informed so that they can commission expert advice should they choose to do so.

An example where rule 10.7 would apply, is where a house was built in a particular time period using particular materials, the combination of which are commonly associated with a risk of weathertightness issues. Regardless of whether a client vendor discusses this issue or not, an agent is expected to take appropriate action as described above to investigate (and possibly disclose) this risk as part of their obligations.

If a situation arose where a vendor directs an agent to withhold information in respect of defects, an agent must stop acting for that vendor as required by rule 10.8 of the Act. Such an obligation should provide some comfort to purchasers that an agent cannot simply stay silent on any issue, even if that is what their vendor client wants.

The provisions of the Act only apply to licensees, so obligations on the vendor in a private sale with no vendor's agent are not as well defined.

However, most sales of real estate use as a template the ADLS / REINZ Agreement for Sale and Purchase form.
This form includes a comprehensive list of vendor's warranties, for example the vendor warrants that building works at the property completed by that vendor have been properly consented.

While purchasers must complete their own investigations on a property, they can take some comfort in the obligations around disclosure on the people involved in selling property. A combination of upfront clear questions about a property and an understanding of these disclosure obligations is the best recipe for uncovering any issues and avoiding problems down the line.

For Traders — What are Your Obligations When Selling Goods Online?

Online auction websites (like TradeMe) can be an easy stepping-stone towards starting or growing a business. The systems are already in place and there are relatively few barriers to entry. As with any business it is important to be aware of your rights and obligations. Typically, running a business in an online auction environment is no different to running any other business. Outlined below are some issues to keep in mind.

Income Tax Act 1997 (ITA)
Any amount you derive from a business is income, and can attract tax. The ITA provides that 'business' includes any profession, trade, or undertaking carried on for profit. If you intend to make a profit, the presumption is that you are operating a business.

There is no minimum threshold for income tax. Even small, part-time, hobby or after-school businesses must pay tax on income earned. If annual turnover exceeds $60,000 you will also be required to register and account for GST.

If you sell something because you no longer want or need it, you will not typically have an obligation to pay income tax. This is because your primary motivation was not to make a profit, so you are not operating a business for the purposes of the ITA.

Fair Trading Act 1986 (FTA)
The FTA applies to online selling only when a seller is 'in trade'. The definition of 'trade' is wider than the definition of 'business' under the ITA. 'Trade' includes “any trade, business, industry, profession, occupation, activity of commerce, or undertaking relating to the supply or acquisition of goods or services or to the disposition or acquisition of any interest in land.” With such a wide definition, it may not always be easy to determine whether or not you are 'in trade'. If in doubt, seek legal advice.

Those in trade have wide obligations under the FTA, which details that you must:

- make it clear to potential buyers you are 'in trade',
- have a reasonable basis for claims that you make about your products or services,
- not make representations that mislead or deceive consumers about the product or their rights,
- not bury qualifications, limitations and other important terms in fine print or on a link-through web-page,
- not offer to sell goods or services that you do not reasonably believe you can supply. If you source goods from a supplier only once the product has been sold, you must ensure any representations you have made about availability and delivery times are accurate.

Consumer Guarantees Act 1993 (CGA)

The CGA applies to goods and services you sell while 'in trade'. The CGA implies a warranty that the goods sold match their description, are fit for their purpose, are of acceptable quality and will last for a reasonable time having regard to the price. If you breach one of these implied warranties, you may be required to repair or replace the product within a reasonable time, or provide a full refund.

Many people fall into the trap of thinking these rules won't apply, because their business is small, part time or just a hobby. If you have any doubts about whether you are in trade or running a business, or if you are unsure of your obligations, you can seek legal advice.

Building Amendment Act 2013 Update

From 1 January 2015 the Building Amendment Act 2013 (the Act) changed the rules around residential building works. These include the following:

- Works worth more than $30,000 now require a written contract including the building timeframe, the process for varying the contract and the dispute resolution process.
- For works worth more than $30,000, or if requested, a prescribed checklist must be provided together with information about the legal status of the builder, their dispute history, their skills, qualifications and licensing status.
- Work done to a household unit may automatically include a one year defect liability period in which the builder can be required to remedy defects.

The Act also provides implied warranties in all works, that:

- the work will be completed within a stated or reasonable time and will be in accordance with the plans, the building consent, all laws and legal requirements and with all reasonable care and skill in a proper and competent manner, and
- supplied materials will be new (unless otherwise agreed) and suitable for the purpose for which they will be used.

Should you Pay a Deposit

Payment of deposits has become a normal part of everyday business, being commonplace in transactions from house purchases to building work.

However, what is best practice? There is always risk involved when paying money and receiving nothing tangible in return. What happens, for example, if a company or natural person becomes insolvent before completing the work you paid the deposit for? What if a property vendor has spent your deposit but cannot complete settlement on the day, because they owe their bank too much? Typically, you may then find yourself an unsecured creditor and it is quite possible that you will not recover all of your money.

While loss of a deposit happens rarely, you should always consider the risk when paying a deposit. For example, is the other party solvent? Always seek to pay the smallest amount possible and consider requiring security to be granted in return. In property transactions you should consider requiring a deposit to be held in trust as stakeholder until risks have been assessed and minimised.

Building Your New Home — Why Include a Sunset Clause?

When building a new home, there are several important steps in the process that have potential to delay final completion date. In some circumstances for example you may be waiting for a subdivision and new title to issue, or there may be an issue with the build that delays or prevents the issue of the Code Compliance Certificate (CCC).

Delays do not automatically give you a right to cancel a contract. It is important therefore to protect your position in the event of unforeseen delays.

A “sunset clause” sets a date by which something must happen - this may be issue of the certificate of title for the property or the CCC. Where the date set down passes and the title or CCC hasn't been issued, you can cancel the agreement and avoid being locked into an agreement indefinitely.

Please give me a call if you have any queries about any of the newsletter items

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