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NEWSLETTER

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INSIDE THIS EDITION

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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.

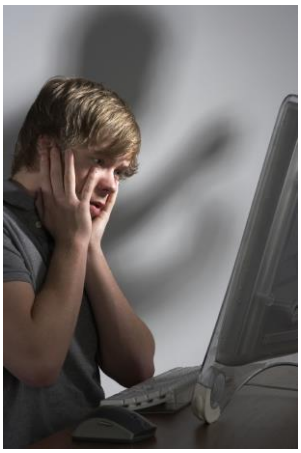
These changes have been made in an attempt to protect New Zealand's international reputation, by seeking to reduce the misuse of the New Zealand company registration process by overseas individuals and groups, who have used companies incorporated in New Zealand to facilitate crime.

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.

Cyber Bullying - on its way out?

The Harmful Digital Communications Act 2015 (the Act) became law on 2 July 2015. Sections 22 - 25 and Part 2 apply immediately, with the balance of the Act taking effect on a date to be determined, but no later than 2 July 2017.



Taking immediate effect – criminal liability
It is an offence to post a digital communication that causes harm to a victim, if the poster intended to cause harm, and if an ordinary reasonable person in the victim's shoes would have been harmed by that post. A conviction can see individuals receive up to two years in prison or a fine of up to $50,000, while companies can be fined up to $200,000.

The Act provides limited protection from liability to websites (such as Facebook) that could host harmful content, provided the content was posted by a user, not by the host itself. To gain this protection the host must strictly comply with the procedures in the Act. For example, they must make it easy for a user to make a complaint. They must also attempt to forward a complaint to the author of the post, and unless the author objects, the post must be removed within 48 hours of the complaint (in some circumstances up to 96 hours). It is not an offence to ignore this procedure; the host simply loses statutory protection.

Part 2 of the Act amends other laws, including making it a criminal offence to motivate another person to commit suicide, and extending the meaning of harassment (in the Harassment Act 1997) to include situations where offensive material is posted online and remains there for an extended period.

Taking effect at a later date – civil remedies
The balance of the Act, not yet in force, contains two additional remedies for victims. Firstly, the Act puts in place a statutory body to assist with and investigate complaints, and if necessary, negotiate with website hosts to remove harmful posts. Again, it is not an offence for an individual or a host to ignore complaints or the statutory body.

Secondly, if the statutory body cannot negotiate the removal of a post or has not deterred a poster from repeat action the District Court can order that specific content be removed, that conduct be stopped, or that a correction, apology or right of reply be published. These orders can be made against the original poster as well as the website host. If necessary, the Court can order that the identity of an anonymous author be revealed to the Court. These remedies are in addition and separate to the criminal offences discussed above. Failure to comply with an order can see individuals receive up to six months in prison or a fine of up to $5,000, while companies can be fined up to $20,000.
Commentators recognise that the Act addresses an important and real need – protecting the vulnerable and limiting harmful behaviour. Opponents have criticised the Act as being too wide, leaving it open to

abuse. Ignoring a complaint, however frivolous, means a website host loses protection from liability. It is feared that some hosts might therefore remove all content subject to complaints simply because it is easier or safer for them to do so. Critics fear illegitimate complaints could be used to unfairly target a person, publication or field of discussion, increasing compliance costs for hosts and limiting freedom of speech. Of course, time will tell how this plays out.

Child support

The Child Support Scheme is managed by the Inland Revenue Department of the New Zealand Government (IRD) and operates under the Child Support Act 1991 (the Act).

The Child Support Scheme (Child Support) is financial support paid by parents who either do not live with their children or who share the care of their children with another person.

The Act provides a formula to work out the amount of child support payable. In a nutshell, it uses the adjusted taxable income of both parents and subtracts standard amounts for personal living costs and the parent's other children, while taking into account the care each parent provides for the children and the costs of raising them. A care cost percentage is then determined by the IRD.

Child support is not mandatory for parents or carers who do not receive a sole parent or unsupported child benefit from Work and Income New Zealand, as those parents or carers can make arrangements between themselves. However, if an arrangement cannot be agreed, those parents and carers can seek the assistance of the IRD to determine the amount of child support payable.

On 1 April 2015 the first set of major changes were introduced to the 20 year old formula used to calculate child support. We summarise the major changes as follows:

- Both parents now receive assessments that take into account both of their respective incomes and it provides allowances for any other children of their own who live with them (taking into account the age of those children and the defined current cost of raising children in New Zealand).
- The parent's assessments no longer provide allowances for partners or children living with that parent who are not their own.
- The threshold of the amount of care recognised by the IRD has been reduced. Previously the child support formula only took into account if a parent cared for a child 40% of the time; however, this has now been reduced to 28% of the time or 103 nights or more a year, or two nights a week.

From 1 April 2016, further changes will be incorporated. We summarise the major changes as follows:

- The qualifying age for children eligible for child support will reduce from under 19 years to under 18 years, unless the 18 year old child is still enrolled in and attending school.
- Changes to penalties and write off rules for child support. These include: replacing the current 10% initial late payment penalty with a two stage late penalty payment of 2% on the day after due date and a further 8% eight days after the due date, reduction in incremental penalty charges, and relaxing the rules pertaining to writing off penalties and interest in particular events.
- Introducing two further grounds for administrative review of IRD decisions to the current 10 grounds, which take into account re-establishment costs and debt offsetting.

It is estimated that of the approximate 137,000 parents paying child support, 33,000 will have their amount increased under the new changes and a further 46,000 will pay less, with 58,000 being unaffected. If you are unsure as to how these changes may impact on you, we suggest that you contact your lawyer to discuss your situation in detail.

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 a 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.

Snippets

Building contracts & retention sums

Many building contracts will be drafted with progress payments falling due throughout the building process and with the final payment being due on "practical completion". Practical completion is usually when the job is mostly completed, except for minor cosmetic works, and before the Council issues their Code Compliance Certificate (CCC). A CCC confirms the works have been completed in accordance with the building consent.

To protect your position as owner, we recommend at a minimum that the contract is checked and amended in two ways. Firstly, the progress payments should only be enough to cover the work that had been completed up to the date of that payment. Secondly, the final payment should not be paid until after the Council has issued their CCC. This is because the final inspection can determine that more work is required before the CCC is provided. If your builder has already been paid in full, they can be reluctant (or slow) in completing that final work for you.

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.

If you have any questions about the newsletter items, please contact me, I am here to help.