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Happy New Year. We hope that 2016 has started off well for you and that your business prospers in the year ahead.

If you'd like to talk further about any of the topics covered in this edition of *Commercial eSpeaking*, or indeed any business matter, please be in touch with us – our contact details are above.

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Creditors of Insolvent Companies

The *Fences & Kerbs* case may help you

As we approach the first anniversary of the Supreme Court's decision in what is known as the *Fences & Kerbs* case¹ where three appeals were heard and ruled on together by the Supreme Court, we revisit the significance of the decision for creditors of insolvent companies and voidable transactions.

Allied Concrete Ltd, Fences & Kerbs Ltd and Hiway Stabilizers NZ Ltd each had a debtor (two of which were the same) to which they had been supplying goods and services, on the basis of a running account. Each debtor company had a liquidator who was seeking to claw back payments made to the three different companies while the relevant debtor was insolvent under the clawback provisions of the Companies Act 1993.

Sections 292–296 of the Act allow liquidators to claw back payments made by insolvent companies to individual creditors, up to two years before the date of a debtor company's liquidation. The purpose of such provisions is to prevent debtor companies from preferring one creditor over another. The Supreme Court, however, acknowledged the importance of protecting individual creditors who unknowingly have traded with, and been paid by, an insolvent company.

The defence

Section 296(3) of the Companies Act was amended in 2006 to provide a defence to the recovery of voidable transactions by liquidators of debtor companies. In order to rely on the defence a creditor has to prove that when they received payment from a debtor company:

- » They acted in good faith
- » A reasonable person in their position would not have suspected, and did not have grounds to suspect, that the company they received the money from was or could become insolvent, and
- » The creditor gave value for the payment or they altered their position in the reasonably-held belief that the payment was valid and would not be set aside.

The meaning of value

The focus of this case was on s296(3)(c) the last of the three elements of s296(3). Specifically whether 'value' meant 'new value' given at or after the time a creditor received payment from a debtor company or whether it could also include value given prior to the receipt of payment when the debt was created.

The Court of Appeal decision held that 'new value' had to have been given by a creditor, which meant that one-off suppliers were left particularly vulnerable to the clawback provisions as they would not be able to show 'new value' if payment was received after the goods or services were supplied (on-credit). The result of the Court of Appeal's decision was that organisations in the construction industry in particular were left vulnerable to the clawback provisions.

To the relief of many, the Supreme Court held that there was no intention for s296(3)(c) to apply only in circumstances where 'new value' was given and that value given earlier to payment would suffice. The Supreme Court held that it was important that creditors not be dissuaded from providing goods or services to companies on-credit. The Supreme Court also felt that it was important to protect creditors who had unknowingly traded with insolvent companies. The Supreme Court's decision has provided much-needed commercial certainty and the decision shows a judicial step-away from solely focusing on the *pari passu* approach (where each creditor is of equal ranking) to debts owed to creditors.

Protecting your business

From a practical perspective, it's important to be aware that in order to depend on the s296(3)(c) defence you must be able to show that at the time you received payment you did so in good faith and that you did not, nor did you have any reason to suspect, that the company was or could possibly become insolvent. The threshold for the defence, therefore, is still quite high. In order to protect your company from a potential clawback, keep well informed about the companies with which you choose to do business.

If you find your business in the general pool of creditors of a company that has been put in liquidation, the *Fences & Kerbs* case could have a negative effect on your position as there are less resources for a liquidator to pool from to pay off a company's debts.

One of the more effective ways to protect your interests is to make yourself a secured creditor. If you would like to secure any of your interests or if you have any questions as to how the outcome of the *Fences & Kerbs* case may affect your business, please get in touch with us and we can arrange a time discuss your options with you. ■

¹ *Allied Concrete Limited v Meltzer* (SC 51/2013); *Fences & Kerbs Limited v Farrell* (SC 80/2013); *Hiway Stabilizers New Zealand Limited v Meltzer* (SC 81/2013) [2015] NZSC 7

New Health and Safety at Work Act 2015

Significant changes for organisations with volunteers

In last year's Spring edition we included an article on the proposed reform of New Zealand's health and safety law. The new law will come into force on Monday, 4 April this year. Despite some of the originally proposed changes being watered down in the final stages of drafting the new Act there will still be significant effects for you, your business or your organisation. This article looks specifically at implications for organisations with volunteers.

If you engage volunteers in your business or organisation then the new Act may have particular significance for you. The Act acknowledges that volunteers are an integral part of New Zealand communities and one of its main aims is to make sure that this won't be compromised. The Act does this by distinguishing between casual volunteers and volunteer workers. If you, or an organisation you are part of, rely on volunteers then establishing where they fit under the new law will be critical.

Volunteer-only organisation

A purely volunteer organisation where volunteers work together for community purposes (ie: not for profit) and which does not have any employees is known as a 'volunteer association'. A volunteer association is not what the new Act deems to be a Person Conducting a Business or Undertaking (PCBU) so the Act will not apply to it. PCBUs, so far as is reasonably practicable, have the primary duty to ensure the health and safety of its workers as well as others who may also come into contact with it.

A PCBU

A volunteer organisation, which may only have one paid employee, is deemed to be a PCBU and under the Act will need to meet the primary duty to the extent of what is within its influence and control. This will involve identifying, minimising and/or eliminating risks and hazards in the workplace. The new legislation will also impose substantial duties on 'officers' of PCBUs to be proactive when it comes to matters of health and safety, and on workers to promote the health and safety of themselves and others around them.

Volunteers vs volunteer workers

There is, however, a further distinction depending on whether the organisation has casual volunteers or volunteer workers. Volunteer workers are people who regularly work for an organisation with its knowledge and consent on an ongoing basis, and will usually be an important part to the organisation's operations. If you have these types of volunteers in your organisation then the Act will apply and your organisation will meet the criteria of a PCBU. You will need to ensure that they receive appropriate training, supervision and instruction in order to work safely, as with any other regular worker.

As referred to above, the new Act however maintains the law under the current legislation by excluding from the definition of 'volunteer worker' those volunteers who carry out particular activities. People volunteering for the following activities will not be volunteer workers:

- » Participation in a fundraising activity
- » Providing care for another person in the volunteer's home
- » Assistance with activities for an educational institution outside the premises of the educational institution, and/or
- » Assistance with sports or recreation for an educational institute, sports or recreation club.

Therefore if your organisation engages only with volunteers who carry out one of the activities listed above then it would not be a PCBU.

Next steps

With the legislation coming into force in two months' time, if you're involved with an organisation with volunteers, you will need to look into how your volunteers are treated under the new Act. You should firstly review whether your organisation operates strictly as a volunteer association or meets the criteria of a PCBU. Secondly, you should consider how your volunteers are treated, are they engaged sporadically or is it on a more regular basis? Thirdly, do your volunteers carry out one of the activities specifically excluded from the Act? By addressing these questions you'll be able to determine whether or not the new law will apply. Penalties for failing to maintain a safe workplace will be significantly higher than under the current law so this is an important exercise.

If you're unsure on how to proceed or would like more advice on not only volunteers but also on the wider implications of the new Health and Safety at Work Act, please don't hesitate to be in touch with us. ■

Business Briefs

Employment law changes: are you up-to-date?

As noted in last year's Spring edition, the government has introduced the Employment Standards Legislation Bill to Parliament. The Bill is working its way through the House, and is scheduled to become law on Friday, 1 April 2016. The legislation introduces important amendments to employment law; we've picked out two highlights:

- » **Zero hours contracts.** The Bill addresses widespread concerns with zero hours contracts. The current position is that a zero hours contract contains a provision that your employee is required to be available to accept any work offered, but you as the employer have no obligation to offer work to your employee. The Bill makes such a provision unenforceable, unless the contract also provides for the payment of compensation to your employee for being available for work.
- » **Parental leave.** The Bill includes significant amendments to the parental leave regime. Broadly, a wider range of employees will benefit. Employees will now be able to resign yet still receive parental leave payments (incidentally the maximum entitlement to parental leave pay will increase from 16 weeks to 18 weeks from 1 April 2016) and the threshold for benefitting from unpaid leave will change.

The Select Committee is expected to release its report on the Bill on 12 February 2016 (which will be helpful because there are a few gaps in the current wording). This will not leave you long to make any required changes to your employment practices; so keep an eye on developments over the coming weeks so you can act quickly before the proposals become law.

Update on financial markets overhaul

The Financial Markets Conduct Act 2013 is in the process of completely overhauling New Zealand's financial markets laws. We are currently approaching the end of the transition period in which our existing capital markets and financial services legislation, most notably the Securities Act 1978, is being phased out and replaced by the new Act. The Act is supported by regulations which set out the more detailed aspects of the new laws.

In November 2015, the Financial Markets Conduct Amendment Regulations 2015 were published, which supplement and amend the existing regulations. In many cases, the amendment regulations aim to deal with practical issues which were identified as the previous regulations were implemented.

Two key changes include new provisions relating to:

1. Simplified disclosure requirements for offers of certain debt and equity securities, and
2. New prescribed disclosure requirements for offers of financial products which will, or may, convert into other financial products.

If you are involved in financial markets (including issuing shares in a small business), we recommend that you seek advice on how the new laws may affect you.

The government continues to receive submissions and is expected to publish a further update later in 2016.

Incorporated societies reform ahead

There are more than 23,500 incorporated societies in New Zealand that are currently governed by the Incorporated Societies Act 1908. This legislation is now out-of-date in a number of key respects: it doesn't provide clear direction on the rights, duties and obligations of those running societies; and it lacks procedures for dealing with conflicts of interests and disputes within societies.

The Ministry of Business, Innovation and Employment has issued an exposure draft for new legislation to replace the 1908 Act. Amongst other things, the exposure draft:

- » Prohibits societies being carried on for the financial gain of members
- » Requires societies to maintain a minimum of 10 members
- » Provides greater clarity around the governance of societies
- » Sets minimum requirements for constitutions, requires dispute resolution procedures to be included in constitutions, and provides standard constitutional provisions for use by societies
- » Provides for charitable societies to be incorporated under the new statute only (rather than under the Charitable Trusts Act 1957), and
- » Gives the court new enforcement powers.

If you are involved with an incorporated society, further information is available [here](#). If you'd like to make a submission on these proposed changes, the deadline is 30 June 2016. If you'd like any guidance with your submission, please be in touch. ■