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Welcome to the Spring/Summer issue of Commercial eSpeaking*. We hope you find the articles both useful and of interest to you. If you would like specific business or commercial topics covered in future editions, please get in touch with us. The next issue (the 21st[h]) will be published in February next year.*

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If you require any further information on any of the topics covered in Commercial e.Speaking*, then don't hesitate to contact us. If you do not want to receive this newsletter, please* unsubscribe.

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Dragging copyright law into the digital era
Copyright ownership vs public's right to access

The Copyright (New Technologies) Amendment Act 2008 came into force in New Zealand on 12 April 2008. It clarifies the Copyright Act 1994's digital technology provisions by providing a technology neutral framework in an attempt to balance the competing interests of copyright owners with the public's access rights to copyright works.

Significantly, the amendment creates a new, technology-neutral category of 'communication works' which extends the protection previously afforded only to signals that carried programme content in broadcasts and cable programs. There are also new exceptions for the format-shifting of sound recordings and timeshifting for private and domestic use. The owner of a legitimately acquired sound recording can now copy the recording to another device/s owned by that person for personal or household use.

However, the amendment fails to give similar rights to those who, for example, copy from a purchased DVD to their video iPod. There appears to be little justification for failing to grant a similar exception in respect of the format shifting of these and other forms of media that have now become commonplace, and which are saved to an increasingly wide range of devices. Furthermore, the copyright owner retains the ability to limit or exclude format shifting through contract on the basis that they have paid a fair price levied for that right.

For ISPs

As the amendment limits the circumstances in which Internet Service Providers (ISPs) might face liability for copyright infringement, ISPs can now take advantage of a limited exception to infringement under the amendment where the ISP is merely providing the physical facilities to allow a communication to take place, such as by providing storage and caching, as opposed to actually knowing (or ought to have known) or authorising any infringement. However, ISPs are required to delete or prevent access to material when they are made aware, through a proscribed form of notice, that the material is likely to infringe copyright (also known as the 'notice and take down' obligation). The limitations under the amendment will not prevent copyright owners from seeking injunctive relief against ISPs.

Attempting to stem copyright piracy

The amendment's toughening up of the provisions designed to prevent the circumvention of technological protection measures (TPMs) is part of a deliberate reaction to the increased impact of copyright piracy in New Zealand. The amendment has expanded the Act's prohibition against the making, importing, hiring and selling of devices, services or information designed to circumvent 'copy protection' to include devices, services or information that circumvent all economic rights provided to copyright holders. At the same time the extension of the prohibition on the parallel importation of films within nine months from their international release date (that expired on 31 October 2008) for a further five years seeks to encourage investment in New Zealand's rapidly growing film production, distribution and exhibition industries as well as protecting cinema ticket sales.

The rapid advancement of new technologies has demanded that copyright law respond accordingly. The new amendment is New Zealand's first step in rising to this challenge.

Property Developers and the Securities Act - Compliance required

Property developers and sub-dividers who sell interests in land involving schemes of unit ownership, along with company or other incorporated structures, or income pooling schemes, must be aware of the need to comply with the Securities Act 1978, unless the scheme can be brought within permitted exemptions.

The Securities Act captures:

- Offers of securities to the public, and
- Securities that include a right or interest to participate in property, both real and personal

However the Act does *not* apply where the purchaser gets a specific title to the land that comprises all the interest unless the interest forms part of a contributory scheme, and does not entitle the holder to a right in respect of a specified part of the land for which a separate title can be issued.

Contributory scheme

A contributory scheme is one involving the investment of money in return for an interest in property which can be used together with any other interest in property *except* where the number of investors is five or less and neither the scheme manager nor an associate manages any other such scheme.

Where the Securities Act does apply, a prospectus and investment statement will be required unless:

- One of the other exemptions under the Securities Act can be invoked, such as
  - Offers only to eligible persons, ie: 'wealthy', 'experienced in investing money' or in the 'industry or business relating to the particular security', and
  - Offers only to close business associates of the issuer, habitual investors, or to those people who have to pay at least $500,000 for the securities.
- The Securities Act (Real Property Developments) Exemption Notice 2007 can be invoked. This exemption allows a developer to sell a property which has the benefit of communal facilities without the necessity for a prospectus or investment statement. The communal facilities (amenities plus utilities such as roads, drainage, waste water, power and related services) have to be owned by an incorporated society or company ('the specified entity'). Before signing up a purchaser, the developer has to provide the purchaser with various documents including the constitution of and management agreement for the specified entity, a transfer deed relating to the communal facilities, all material instruments relating to the facilities, staged development information (where applicable) and levies.

  The deposit paid by the purchaser must be held in a specified trust account until the agreement becomes unconditional.
- The Securities Act (Real Property Proportionate Ownership Schemes) Exemption Notice 2002 as amended 2007 can be invoked for collective investments in property, for example, schemes for campers buying up coastal camping grounds. Again there is no need for a registered prospectus and investment statement, and further advantages are:
  - A nominee can take title on behalf of all investors, and
  - The offeror can be a lawyer, a trustee company or real estate agent.

  The exemption extends to undivided property schemes, undivided unit title schemes and unit title pooled schemes. The offeror must produce a statement which includes all relevant and audited financial information, and a valuation report and other incidental requirements.

The Securities Act details the harsh consequences of a breach in compliance. Our recommendation is to do it right the first time.

Planning on a Company Restructuring – Do it now!

The June 2008 issue of Commercial eSpeaking *contained an article about proposed changes to the definition of ‘associated persons’ and how that relates to taxation issues for land transactions. The proposed change of the ‘associated persons’ definition has far broader implications than just land transactions. This article highlights a number of issues that the expanded definition will have on timing for re-structuring companies.*

Although the proposed changes to the associated persons regime have received considerable publicity in respect of their impact on land dealers, developers and builders, less publicised but equally significant is the proposal to replace the relatively narrow definition of ‘related person’ in the dividend rules with the wider ‘associated persons’ definitions.

Under the dividend rules, a company can distribute capital gains tax free in the course of liquidation. The definition of capital gain excludes capital gains realised in a transaction with a ‘related person’, except where the company is a close company and the gain is realised in a transaction with a related person other than a company in the course of liquidation. A related person gain is potentially taxable as dividend on liquidation.

The present definition of related person is relatively narrow and therefore easy to structure a non-related purchasing entity to avoid a potential dividend problem.

It is proposed that the new definition of associated persons will replace the related person definition for the 2009/10 and later income years which means from 1 April 2009 for most taxpayers.

Given the wide-reaching impact of the associated persons rules, it will be virtually impossible to break the definition in a group context owing to the introduction of an aggregation rule deeming a person to hold interests in a company held by associated persons and a tri-partite test which provides that if A is associated with B and B is associated with C, then A and C are associated.

Although it may be possible to deal with the related person issue under the Qualifying Companies regime, this can often require lead-in time if the vendor company is not already in the regime or it could result in capital gains being distributed to trust beneficiaries which may not be desirable from an estate planning or asset protection perspective.

Where companies are looking to restructure and that restructure will involve the sale of capital assets to potentially related persons at a gain, we strongly recommend that the restructure be tackled now under the existing narrow related person definition to avoid a lot of headaches.

Common situations where related person capital gains could arise include:

- Company A and Company B (unrelated) merge by selling their businesses at market value to Newco which is owned 50% each by Company A and Company B or their shareholders.
- Company C sells its business to Company D in return for cash and a 25% shareholding in Company D.
- Company X owned by Mum and Dad or their trust sells its business to Company Y owned by their son or his trust.
- Company Z owned by an individual sells a building to a trust which includes relatives of the individual within its beneficiaries.

We can currently break the related person definition in the above scenarios but will not be able to once the proposed changes take effect, so act now!

This article was written by Graeme Carruthers of tax specialists, nsaTax which focuses on assisting lawyers and accountants on solving tax and related commercial problems. Graeme is a director of nsaTax and deals with all areas of taxation including offshore investments, domestic and cross border structures, tax residency, land transactions and complex GST issues. He is a member of the New Zealand Institute of Chartered Accountants and has more than 20 years taxation experience.

Business Briefs

No discrimination allowed to KiwiSaver employees

The amendment last month to the Employment Relations Act 2000, by virtue of the Employment Relations (Breaks and Infant Feeding) Amendment Bill 2008, has been the source of much public debate. Employers can no longer pay employee A less than employee B just because employee A is a KiwiSaver member.

The amendment applies to employment agreements entered into after 2 September 2008 or any variation to an employment agreement made after that date (such as a pay increase or a change to a term or condition). Therefore employers who (following enabling legislation at the end of last year) implemented the 'total remuneration approach' to their staff remuneration arrangements, will be affected if they make any change to employment agreements. The total remuneration approach is where the employer factors in compulsory employer contributions for KiwiSaver members into an employee's total remuneration package.

Any employer who has adopted the total remuneration approach should take care when amending employment agreements or entering into new ones to avoid being caught out by the amendment. Employees may now bring a personal grievance against their employer if they can prove they have been adversely affected by being paid less than other non-KiwiSaver members.

Employers may also be in for more KiwiSaver changes with the National Party's announcement of its KiwiSaver policy if it becomes the government in November.

Financial Advisers Act 2008

The Financial Advisers Act 2008 was recently enacted and will come into effect on dates to be appointed by Order in Council. Under the Act, the extent of a financial adviser's obligations (including conduct and disclosure obligations) will depend to a large degree on the complexity of products in relation to which the financial adviser provides advice on or makes investment transactions. Less complex products such as consumer credit contracts or some insurance products and bank term deposits are classified as 'category 2 products'. More complex products such as securities (other than category 2 products) or futures contracts are classified as 'category 1 products'.

Individuals who are both authorised by the Securities Commission under the Act and registered under the Financial Service Providers (Registration and Dispute Resolution) Act 2008 may provide financial advice or make investment transactions in the course of business in relation to both category 1 and category 2 products. These people may also provide financial planning services. Individuals who are registered but not authorised may provide financial advice or make investment transactions in the course of business in relation to category 2 products.

Employees or agents (whether registered in their own name or not) of an entity to which the Securities Commission has granted 'qualifying financial entity' (QFE) status may, in the course of the QFE's business, provide financial advice or make investment transactions in relation to category 2 products. Employees of a QFE may also give financial advice, or make investment transactions in relation to category 1 products of which the QFE is the issuer.

The Act also establishes the office of Commissioner for Financial Advisers who is required to be a member of the Securities Commission and will have primary responsibility for the oversight of financial advisers under the Act (a significant change from the 'co-regulatory' model set out in the original Financial Advisers Bill).

Companies (Minority Buy-out Rights) Amendment Act 2008

The Companies (Minority Buy-out Rights) Amendment Act 2008 received royal assent on 16 September 2008 and also came into force on that date. This Act amends the Companies Act 1993 and is intended to help clarify the minority buy-out provisions where dissenting minority shareholders have opposed certain fundamental changes to a company that have been passed by a special resolution. In particular, the Act clarifies how shares are to be valued in a minority buy-out situation, including the date at which the shares are to be valued. If the value of shares cannot be agreed by the company and a dissenting minority shareholder, the price is to be determined by arbitration. The clarification provided by this Act is welcomed.