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DOWNIE STEWART
BARRISTERS & SOLICITORS

Fineprint

INSIDE:

Financial Advisers Act 2008

The financial adviser sector has come under a great deal of public scrutiny in the last few years following the collapse of many finance companies. As a result regulatory reform of financial advisers and financial services providers was initiated. The resultant Financial Advisers Act 2008 introduces stringent standards for the financial planning and financial adviser professions. This article gives an overview of the legislation, operative provisions of which will start to come into force at the end of 2010.

The Financial Advisers Act 2008 (FAA) brings in compulsory registration and/or authorisation for all financial advisers. The Securities Commission is the agency responsible for the enforcement of this legislation.

Financial advisers are expected to be authorised and registered if they sell or advise on Category 1 products such as securities, an estate or interest in land and futures contracts. This authorisation must be renewed annually, with financial advisers presenting evidence of continuing education and training being undertaken.

A security is a right to participate in any capital, assets, earnings or royalties or any interest or right to be paid money that is to be deposited or lent. Company shares, superannuation schemes, unit trusts and life insurance with an investment element fall into this category.

People advising on Category 2 products need only be registered with the Registrar of Companies for providing advice on call debt securities, bank term deposits, insurance products including term insurance and consumer credit contracts.

Dispute resolution

Each financial services provider and each financial adviser must belong to an approved dispute resolution service under the Financial Service Providers (Registration and Dispute Resolution) Act 2008. Disputes may be resolved by a direct approach to the financial services provider; alternatively there may be a direct referral to the approved dispute resolution service. A Commissioner of Financial Advisers has been appointed who will be responsible for investigating all complaints, determining breaches of the FAA and imposing penalties.

Duty of care

Section 33 of the FAA states that a financial adviser, when performing their service, must exercise the care, diligence and skill that a reasonable financial adviser would exercise in the same circumstances,

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taking into consideration the nature and requirements of their client. This is a subjective test depending on the circumstances of each situation in which financial advice is given. Company directors face a similar test of care, diligence and skill under the Companies Act 1993.

Code of Conduct

The draft Code of Conduct was issued by the Securities Commission's Code Committee on 31 March 2010. It introduces 21 standards of conduct for client care, competence and skills. Whilst complying with these standards, all financial advisers must also satisfy the duty of care responsibility referred to above. It is expected the Code of Conduct will be finalised by July 2010.

Financial planning service

A financial planning service is defined as a service that analyses an Individual's current financial situation, identifies his or her goals and develops financial options for realising those goals. Providing a financial planning service requires an adviser to be authorised under the Act.

Qualifying Financial Entities (QFEs)

Where there are two or more financial advisers providing advice on Category 2 financial products their organisation could be registered as a Qualifying Financial Entity (QFE) by the Securities Commission. Prior to a QFE registration, an organisation must provide an Adviser Business Statement to the Securities Commission by 31 July 2010. The statement should list all QFE directors, advisers and nominated representatives. A QFE could provide advice on all Category 2 products and only Category 1 products issued by the QFE itself.

QFE directors may be interviewed by the Commission prior to registration and future renewals.

Disclosure obligations

All financial advisers, both Categories 1 and 2 and those providing a financial planning service, must comply with the FAA's disclosure obligations. Financial advisers must disclose, amongst other things, their relevant experience, any criminal convictions or insolvency, fees and remuneration, material interests and relationships, indemnity insurance arrangements, dispute resolution arrangements and any matters required to be disclosed as part of the authorisation process for Category 1 advisers. If clients have any concerns about disclosure they should clarify these with their financial adviser.

Disclosure statements must be provided to a client before giving any financial advice.

Complaints

Complaints about a financial advisor may be made to the Securities Commission. The Commission must investigate all complaints except when the complaint is vexatious or not sufficiently serious. Complaints will be referred to the Disciplinary Committee chaired by the Commissioner. The Commissioner for Financial Advisers may also initiate a complaint.

Offences

The following penalties apply under the Act:

- A person who performs a financial adviser service without being registered is liable to a fine of $5,000 for an individual and $10,000 for an entity
- A person performing a financial adviser service without being authorised, that only an authorised financial adviser may perform, is liable to a fine of $10,000 for an individual and $50,000 for an entity
- A person breaching disclosure obligations under the FAA is liable to a fine of $100,000 for an individual and $300,000 for an entity, and
- A person who knowingly or recklessly engages in misleading or deceiving conduct in relation to the performance of a financial adviser service is liable for a fine of $100,000.

Exemptions

Lawyers, chartered accountants, real estate agents, tax agents and registered valuers are given a limited exemption from registration and authorisation as long as any financial advice they provide is a *necessary incident* of their own professional practice; this advice would need to comply with their individual profession's codes of practice. The exemption limits these professions from commenting on the merits of one investment over the other.

There are other professions advising on land such as engineers, architects, surveyors and rural land consultants who have not been granted a similar exemption. This is an anomaly in the Act that needs further consideration.

Educational qualifications

The draft code of conduct specifies that all Category 1 financial advisers and those providing financial planning services must obtain the National Certificate in Financial Services (Financial Advice) Level 5 awarded by the ETITO (Electro Technology Industry Training Organisation). The ETITO is the tertiary education provider for the financial services sector. There are five unit standards to be completed by every financial adviser providing advice on Category 1 products or providing financial planning services.

Consumer benefits

The registration and authorisation process will clearly improve accountability of financial adviser services thus benefitting New Zealand consumers. The Securities Commission has powers to enforce severe penalties, and cancel registration and authorisation of financial advisers for any malpractices and breaches of the Code of Conduct or the Act. Disclosure statements must clarify whether a financial adviser is independent (or not) and if fees or remuneration/commission are paid by the product provider.

Competence, skills and client care standards have been defined by the Code of Conduct, therefore all financial advice on Category 1 products and/or a financial planning service must be provided by qualified financial advisers in compliance with the Code. Product providers, being registered as QFEs, will be responsible for the advice provided by their employees and agents or nominated representatives. Those advising on Category 2 products must be registered with the Registrar of Companies and belong to an approved dispute resolution agency.

Any other professions giving advice on financial products or providing a financial planning service must meet the requisite qualifications and standards of care specified by the Code.

In these challenging times the FAA should assist the public in obtaining financial advice. They should be reassured by the more stringent registration and authorisation requirements for financial advisers. They will also be able to have a justifiable grievance investigated by the regulatory authority.

All Category 1 financial advisers must be authorised by 1 June 2011, and all financial services providers including financial advisers must be registered by 1 July 2011.

The Major Events Manag

CARE NEEDED WITH ACTIVITIES THAT ARE NOT BY AUTHORISED SPONSORS

With the Rugby World Cup 2011 only 18 months away, many businesses are thinking about how they can leverage off this event. The prudent answer is 'very carefully' bearing in mind the provisions of the Major Events Management Act 2007 (MEMA).

MEMA is intended to provide for a clear, predictable and fair regime for dealing with ambush marketing in relation to major events.

'Ambush marketing' describes the actions of companies or advertisers who seek to capture the benefits enjoyed by sponsors without the authorisation of the event organiser; for example, in relation to the Rugby World Cup. MEMA specifically deals with two forms of ambush marketing:

- *By association:* where an advertiser misleads the public into thinking that it is an authorised partner or somehow associated with the event. For example, this occurred at the 2000 Sydney Olympic Games when Ansett was the official airline sponsor, but Qantas (which sponsored swimmer Ian Thorpe) ran a concurrent and aggressive advertising campaign), and
- *By intrusion:* where an event is used by an unauthorised business to draw attention to its brand from an audience gathered solely for the major event. An example is advertising in a restricted area around a venue or giving away supporter flags, bearing the unauthorised business's brand, outside a venue for members of the crowd to wave during the event.

Ambush marketing activities by association include offering, giving away or selling a ticket to the event in connection with the promotion of goods or services.

So how could this affect, say, a New Zealand plumbing supply company which offers its customers a draw to win tickets to the Rugby World Cup? Arguably, such activities would be in breach of the Act.

Other protections

MEMA also provides for protection of words and emblems that could denote a connection with a major event, whether or not they are eligible for registration under the Trade Marks Act 2002 and/or actually registered.

In relation to the Rugby World Cup, the words 'Rugby World Cup', 'World Cup 2011', 'World in Union', 'Rugby New Zealand 2011' and 'Webb Ellis Cup' are protected, as are the associated Rugby World Cup and IRB logos.

Returning to our example, using the words 'Rugby World Cup' to promote the ticket giveaway, or showing pictures of the tickets, may leave our plumbing company in contravention of the Act.

What is a 'grandfather clause'?

Have you ever heard the term 'grandfather clause' but had no idea what it means? A grandfather clause is an exception that allows an old rule to continue to some existing situations whilst a new rule will apply for all new situations. Usually the exemption is for a limited time.

An example of this is, say, a 'grandfathered factory'. A factory may be exempt from new laws around carbon emissions, however if the factory was expanded or altered it would then be required to comply with those new provisions.

According to Wikipedia, the term originated in the late 19th century when legislation and constitutional amendments passed by a number of US Southern states created new restrictions on voting, but exempted those whose ancestors had the right to vote before the Civil War. The existence of slaves prior to the Civil War effectively excluded African Americans while allowing poor and illiterate whites to vote. Wikipedia adds that although the original grandfather clauses were ruled unconstitutional by the US Supreme Court in 1915, the term grandfather clause still remains in use.

Subdivision Nigh

A SOLUTION?

When property developers undertake a subdivision they must vest land with their local authority in order to build roads. However, local authorities will not accept land which has covenants or easements on it; as a result land for roads must be free of all encumbrances. This article looks at potential pitfalls in property development and how a developer can avoid them.

Setting the scene

A developer (we will call him Developer Dan – DD) buys a large section of land to keep for a land bank. The land is part of a farm which has been broken into large lots and purchased by a number of developers, some of whom have started to subdivide. Originally DD had only four owners adjoining his land; this soon becomes hundreds of owners.

Developer Dan subdivides his land and then discovers that the road lots have covenants against them. DD is faced with a problem; he needs the owners' approval in the adjoining subdivisions to remove the covenants from the roads.

However, DD now has approximately 400 neighbours. Normally it is easy to identify the owners, but in this case, very little housing has

ement Act

Border protection measures equivalent to those under the Trade Marks Act 2002 are available to restrict materials bearing protected major event words or emblems from being imported without the authority of the event organiser.

What CAN be done?

All is not lost for business opportunities around major events. The following activities will not amount to an infringement as long as they are carried out in accordance with honest commercial practices:

- The use by a person of their own real name or address
- The use of a person's legal or trade name or an existing registered trade mark
- Existing businesses and organisations continuing to carry out their current activities. For example, if you currently produce and sell casual shirts printed with 'NZ' and a picture of a rugby ball you would not infringe, as opposed to if you specifically produced and sold shirts printed with 'RWC 2011' which would infringe
- The use of words or emblems which indicate the kind, quality, quantity, value, geographical origin, time of production of goods or of rendering of services, or other characteristics of goods or services. For example, a rugby ball with a sign at a point of sale stating 'Rugby Ball. Made in New Zealand'.
- The use of representations that are necessary to indicate the intended purpose of a product or service. For example, an advertisement for 'New Zealand Rugby Tours' would not infringe as opposed to 'NZ Rugby World Cup Tours' which would, and
- The editorial use of names, words or emblems, such as for current affairs, criticism or review.

It is not entirely clear whether our hypothetical plumbing promotion would fall within any of these exceptions. The promotion would need to be quite clearly worded to ensure that it did. Further information and examples can be found on the Ministry of Economic Development's website:
www.med.govt.nz/upload/70086/MEMA_Guide.pdf

Take care

In summary, if your business is thinking of running a promotion around or incorporating the Rugby World Cup theme or indeed any other major event such as the 2010 World Rowing Championships to be held at Lake Karapiro, you must ensure that your promotion falls within the above exceptions … or you could end up in the sin bin.

tmare

gone up due to the recession and DD does not know how to contact these owners.

Complicating the issue even further, is that buyers of DD's lots have sunset clauses in their agreements; so if title has not been issued by a specific date the purchasers are entitled to quit the contract.

What can our developer do?

The sooner a developer grapples with the problem of unwanted subdivision covenants, the more straightforward the process will be. To continue the subdivision project, DD should apply to the court to have an easement or covenant extinguished.

The law requires an application be served on the local authority unless otherwise directed by the court and on any other person/s the court requires.

However, DD's problem is that he cannot find out where the owners live. He knows who they are but not *where* they reside. The steps DD will need to take are to apply to the court to:

- Dispense with service of the application, and
- Extinguish land covenants on the road lots.

To assist his application and affidavits proceeding readily through the court system, DD should ensure documentation is drafted clearly and concisely.

It should be noted that the court is usually more concerned with any detrimental effects the owners of the adjoining subdivision might suffer, rather than lost opportunities to a developer.

The first hurdle for DD is to satisfy the court that service is not required. If the court is not satisfied that service is not required he will have to take further steps to locate the adjoining owners. Once that has been granted the next step is to convince the court that it should grant the application to extinguish the covenant/s. The court must be persuaded that the application is reasonable and that no substantial harm will befall any of the adjoining owners. It is highly unlikely that any developer such as DD would want to dedicate roading with the council to establish, say, a cattery on the road lot. DD should give the court an undertaking that he will not establish the very thing the covenant prohibits. The more safeguards that can be offered will help ensure that the application will proceed smoothly.

Conclusion

Subdividing property has pitfalls for the unwary; DD's scenario is one of them. However, like most situations, it can be avoided if good advice is sought right at the outset.

DD's scenario could have been avoided if he had made appropriate enquiries at the time he bought the land. He could potentially have obtained the consent much earlier on from the four owners quite easily. Instead DD ended up having to go through the court to remove covenants on road lots – a very expensive procedure in both time and money.

A Note about Notaries

WHAT IS A NOTARY PUBLIC?

You may have heard the term or may have seen it on a lawyer's letterhead, but unless you have had cause to engage one, the role of a Notary Public may be a matter to which you have not given much thought. However, with the ever-increasing globalisation of business and our Kiwi love for travel you are likely to hear more of Notaries Public in both business and personal contexts.

A Notary Public (or Notary) is an officer of a distinct branch of the legal profession; not every lawyer is a Notary Public. Notaries have a separate, distinct and additional qualification and it is a role steeped in tradition. In fact, Notaries spoken with by *Fineprint* were proud to point out that in New Zealand they are still appointed by England's Archbishop of Canterbury.

Why use a Notary Public?

If you need to have documents accepted overseas, there may be a requirement to have them authenticated by a Notary. In most instances, you will be told by the relevant foreign authority, entity or overseas lawyer you are dealing with that you need specific documents 'notarised' and also if any further authentication of the documents is required by government authorities.

This contrasts with the situation in New Zealand where if you want documents (for use in New Zealand) authenticated or your signature witnessed, you can get those certified by a lawyer, Justice of the Peace or court officer.

Using a Notary Public

Fineprint talked with several Notaries who said that their main role is in relation to foreign transactions. You may need to talk with a Notary if you want documentation certified to:

- Open a foreign bank account
- Provide 'notarised' copies of qualifications when applying for work overseas
- Complete property transactions overseas
- Adopt a child from a foreign country
- Deal with matters to be heard in overseas courts
- Sign certain overseas contracts
- Sign certain export documents such as some customs documentation and certificates of origin regarding goods, and
- Verify dishonoured New Zealand payments for imported goods.

What does a Notary Public do?

The Notaries we talked with explained that their main tasks were to:

- Verify a person's identity and signature; usually this is done by checking a person's passport
- Certify that a document is a true copy
- Mark a document as being verified with the Notary's signature and seal to verify his or her presence at the time the document was signed, and
- When required, arranging for notarised documents to be further authenticated by appropriate government authorities.

The role of the Notary Public is not likely to diminish as Kiwis continue to do more business with foreign parties and in overseas jurisdictions. When you need the services of a Notary Public please contact us and we can discuss your needs further.

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Postscript

Calculating the new 15% GST

Remember when GST was an easy 10%? Calculating the GST component from the inclusive price was a simple division by 11. When it rose to 12.5%, that wasn't so difficult either, dividing by 9 was a cinch.

However, now that we're looking at GST at 15% from the beginning of October, how do we calculate that GST exclusive price? Not so easy as it happens.

To calculate the GST exclusive price, you will need to divide by 23 then multiply by 20. An alternate for the pointy-headers is to multiply the GST inclusive price by 0.8695652.

To compensate for the 2.5% rise in GST and the offset of the new personal tax rates, the May Budget increased National Superannuation and student allowances by 2.02% from 1 October 2010.

New website for young employees

A website providing guidance for young people about their rights and responsibilities when they enter the workforce was launched in late May by the Minister of Labour, the Hon Kate Wilkinson.

"My First Job provides information on common issues young people experience in the workplace including pay, hours of work holidays and leave," says Ms Wilkinson. "It also has advice on what to do when things go wrong, including where to seek assistance and how parents can support their child if they have employment problems."

Ms Wilkinson says the website was developed so that young people could find the information they need through a medium they are familiar with, and in a form they can easily understand. Look for **www.dol.govt.nz/myfirstjob**

Government review of personal grievance process

The government has signalled that changes to employment law may be on the way. In March the Department of Labour released a discussion document on the personal grievance process and sought submissions from the public; these closed on 31 March. Topics on which the Department sought submissions included the role of employment advocates, 'no win, no fee' arrangements, extending the 90-day trial period and the costs of resolving personal grievances. The final report based on the review will be provided to the Minister of Labour this month and it is expected it will be released to the public shortly.

Companies Office website upgrade

In 1996 the New Zealand Companies Office scored a world first by being the first on-line business registry service in the world. Fifteen years later, in late June, the Companies Office website was replaced with a new purpose-built platform called 'Enterprise', see **www.companies.govt.nz.** Important changes include a new way to log on, a new system replacing company keys, new reminder dates for annual returns, less information to enter in your annual return, a change to uploading constitutions and new timeframes for incorporating companies.

The Financial Services Providers Register is also held in a new Companies Office sponsored website, **www.fspr.govt.nz**. All financial advisers, financial service providers, money changers and credit providers must be registered before 1 December 2010.

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