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*Welcome to the first issue of Commercial eSpeaking for 2009. We hope you find the articles both useful and of interest to you. Please let us know if you would like a specific issue covered in this newsletter. The next issue will be published in June.*

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## Business Briefs

### Credit Control in Troubled Times

In tough economic times it is crucial for businesses to manage debtors effectively. Strategies include:

- Before granting credit, carry out credit and general checks, eg: credit information agencies such as Baycorp, the Government Insolvency and Trustee website at [www.insolvency.govt.nz](http://www.insolvency.govt.nz), the Official Gazette at <http://online.gazette.govt.nz>, Google, etc
- Obtain credit references from third parties if possible
- Obtain personal guarantees or other security (exporters should obtain payment before sending goods, or insist on payment via letters of credit from reputable international banks)
- Ensure that terms of trade provide for timely payment, the grant of security interests under the Personal Property Securities Act 1999 and strong enforcement mechanisms for defaulting debtors
- Register security interests on the Personal Property Securities Register
- Make sure that the chances of a debtor disputing a debt are minimised by being clear as to pricing, what is being provided, what will be payable and when. If the debtor has a required purchase order or supply chain approval process – use it
- Invoice promptly
- Pro-actively chase up debtors and be alert to any unusual payment delays or other factors which might indicate non-payment risk, as well as
- Seeking advice before agreeing to compromises or payment plans, as priority and security can be adversely affected if not implemented correctly.

### Changes to KiwiSaver

Some changes have been made to the KiwiSaver regime. Effective from 15 December 2008 these are:

- Repeal of the amendments made by the previous government to the Employment Relations Act 2000 in September 2008 that prevented employers from paying/treating comparable employees differently due to an employee's status as a KiwiSaver member, and
- Amendment of the KiwiSaver Act 2006 to clarify that an no employee can have their gross taxable pay reduced as a consequence of joining KiwiSaver, except in certain circumstances where the term of the employment agreement between the employee and employer accounts for the amount of compulsory employer contributions allowing employees and employers to adopt a 'total remuneration' arrangement.

From 1 April, the following changes come into effect:

- The minimum employee contribution rate will be 2% of the employee's gross salary or wages, rather than the current 4%
- The minimum compulsory employer contribution rate will be capped at 2% of an employee's gross salary or wages and will not increase in subsequent years
- Employers will not receive any tax credits for their contributions to an employee's KiwiSaver scheme
- The maximum employer contribution that may be exempted from employer contribution tax will be reduced from 4% to 2% of an employee's gross salary or wages (to the extent matched by employee contributions), and
- The \$40 per annum fee subsidy will cease, except for limited transitional payments.

## Suppliers and Lessors Beware

### Possession is now 10/10<sup>ths</sup> of the law

*Have you recently leased or supplied goods on credit to a lessee or customer without registering a security on the Personal Property Securities Register (PPSR)? If so you could lose your goods to another creditor of your customer or lessee. We point out below why any business should have well drafted terms of trade and why all such securities should be registered on the PPSR.*

Suppliers and lessors of goods need to be aware of the potentially devastating effects the Personal Property Securities Act 1999 (PPSA) may have on them if they fail to register a security over their goods. In a tough economic climate any business needs well drafted terms of trade, and should register a security over your goods to protect your business from not being paid when goods are supplied or leased on credit.

#### Why register?

You may remember the well publicised outcry from suppliers last November who lost their goods when Eon (an upmarket Auckland homeware store) 'went bust'. In the case of a lessor, in 2004 Portacom (a lessor of portable buildings) lost several buildings to a bank attempting to recover its losses from the defaulting customer.

Before the PPSA came into force suppliers and lessors were usually ranked above secured creditors such as banks if they had good terms of trade. This is now not the case. You can no longer rely on just having a good contract with your customer. Good terms of trade such as retention of title clauses are still important, however, this is not enough. You also need to register a security over your goods on the PPSR. Failing to register a security over goods means that your customers', or your lessees', creditors may end up taking your goods if they are not paid in full. If there is not enough pie to go around your goods may be sold and you may not be able to do anything about it.

#### 10/10<sup>ths</sup> of the law

When it comes to the PPSA, possession is now '10/10<sup>ths</sup>' of the law if you have failed to register a security over your goods. Under the PPSA the courts will not care if you are the owner of goods, they are concerned about whether you have complied with the legislation. The courts will be unsympathetic if you have failed to comply, particularly as it only costs \$3 to register a security over your goods.

Get your lawyer to check your customer contracts to ensure that they are up to scratch and that you have registered a security over your goods. Registering a security is not daunting. Your lawyer can help you, or you can do it yourself by going to [www.ppsr.govt.nz/cms](http://www.ppsr.govt.nz/cms)

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#### Employment Agreement Probationary Clauses

The somewhat controversial 90-day probationary period was passed into law in December. In summary, the position regarding probationary clauses is:

- Until 1 March 2009, the Employment Relations Act 2000 allows an employer to include a probationary clause in an employment agreement if the clause is in writing and the agreement is signed by both parties. However to dismiss an employee at the expiry of that period, an employer must have a genuine reason to dismiss and follow a correct process otherwise there is a risk of a claim of unjustified dismissal. From 1 March 2009, employers who have fewer than 20 employees may specify in writing in the employment agreement that a 90-day probationary period will apply. If the employee signs that agreement and the employer gives the required notice to dismiss before the end of the probationary period, then the employee will not be able to later make a claim of unjustified dismissal. However, an employee is not prevented from raising a personal grievance on other grounds such as discrimination. Employees whose employment is terminated after 90 days will not face a stand down period before being able to claim the unemployment benefit.
- From 1 March 2009, employers who have more than 20 employees may still include a probationary clause as per the situation before 1 March 2009 above. However they will need to ensure that they follow the correct process and have a good reason to dismiss the employee at the end of the specified probationary period otherwise they could risk an allegation of unjustified dismissal.

## New Zealand ISP Copyright Liability – New provision in force from 1 March

*A new section (s92A) of the Copyright Act 1994 means that Internet Services Providers (ISPs) must remove material that infringes copyright when a copyright holder issues an infringement notice, otherwise they will face secondary liability as a publisher of copyrighted material. The owners of websites are obviously concerned at this threat of impending termination and have argued that such a provision breaches natural justice by assuming guilt before innocence and quells free expression.*

Coming into force on 1 March, s92A provides that an ISP must adopt *and reasonably implement* a policy that provides for termination *in appropriate circumstances* of a subscriber's account who is a *repeat infringer* (our emphasis). This section was part of a broad range of reforms to clarify ISP liability. These reforms provide that an ISP can escape secondary liability if they merely provide the physical, storing or caching facilities of copyright infringement if the ISP does not have knowledge of such infringement and when such knowledge is acquired, it prevents access to such material.

What this all means is that ISPs can terminate a subscriber's account on the mere accusation by way of an infringement notice made by the copyright holder. This can be seen as concerning, because in *Solid Energy New Zealand Ltd v Mountier*<sup>1</sup>, Save Happy Valley Coalition made a mock report about Solid Energy's activities with which copyright infringement was unclear. Had s92A been in force, the Save Happy Valley website would have been terminated even though in the end most of the report did not breach copyright.

### Concerns of internet subscribers

From the beginning of March an ISP can, at a moment's notice, terminate the account of the subscriber even without a good faith belief or evidence that the material infringes copyright. Moreover, the ISP has a motive to take down the material as they lose the immunity from liability if they refuse.

While defamatory/private statements online require an injunction for removal, these sections provide that online copyrighted material does not. So put simply, s92A amounts to a permanent injunction (not interim). One commentator, Malla Pollack, Associate Professor of Law at the Florida Coastal School of Law, has argued, "The copyright holder has chosen to bypass the courts and should be penalised for . . . self-help." Furthermore, she declared that, "Privatisation of copyright enforcement is not appropriate."<sup>2</sup>

It is patently clear, therefore, that the legislation is not perfect, the repeat infringer definition is problematic, the position of a cyber café owner is unclear, and the section will probably be abused for trade competition.

### The international position

While the changes follow international trends, the New Zealand reform is overly simplistic. For example, the US provides that a subscriber, on receiving an infringement notice, may send a counter-notice back. If no correspondence is received within 10-14 working days then the material can be returned. Similarly, in Japan there are notice-and-take-down procedures for flagrant copyright infringements and when such infringement is unclear, a seven day notice is given before take down is initiated. The New Zealand legislation has no such provisions.

### Conclusion

The reality is that the policy that the ISPs adopt must be able to differentiate between satirical copyrighted material and blatantly copyrighted material. Unfortunately, ISPs are not the judiciary. Section 92A may well become, as Paul Litterick opines, "A quick and dirty way of censoring criticism, without having to go to the trouble of court action."<sup>3</sup>

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1 26/7/07, Chisholm J, HC Christchurch

2 Malla Pollack, 'Rebalancing Section 512 to Protect Fair Users from Herds of Mice' (2006) 22 Santa Clara Computer and High Technology Law Journal 547, at p.575-576

3 Steven Price, 'New notice-and-takedown regime for ISPs', (April 10 2008): <http://www.medialawjournal.co.nz/>

## Rest Breaks and Infant Feeding at Workplaces – New provisions come into force on 1 April

*Employers should now be aware of two new provisions within the Employment Relations Act 2000 that will come into force on Wednesday, 1 April. One provision relates to providing employees with minimum rest and meal breaks, while the other relates to providing employees with infant feeding facilities.*

### Rest breaks

It had become evident that some New Zealand workers were being expected to work lengthy periods without breaks which was thought to be both unreasonable and unsafe.

The entitlements that will be required from 1 April depend upon the length of the work period for the particular employee on the day concerned. As to be expected employees and employers are welcome to agree to enhanced entitlements. The minimum entitlements will be:

- An employee working more than two hours but not more than four hours must be provided with one 10 minute paid rest break
- An employee working more than four hours but not more than six hours must be provided with one 10 minute paid rest break and one 30 minute meal break
- An employee working for more than six hours but not more than eight hours must be provided with two 10 minute paid rest breaks and one 30 minute meal break, and
- For those employees working for more than eight hours, their employer must provide the breaks as though the employee was working an eight hour day and, in addition, the number of breaks one would be entitled to for those extra hours worked. For example, an 11 hour day would attract breaks for an eight hour day plus a three hour day. Therefore they would receive two x 10 minute paid rest breaks, 1 x 30 minute minimum meal break (eight hour threshold), and one 10 minute rest break (three hour threshold).

As far as it is reasonable and practicable the breaks must be distributed evenly through the work period, for example if a work day is five hours long then the 10 minute break would occur one third of the way into the day and the meal break at the two-thirds mark. The employer and employee may however agree to the way the breaks will be distributed.

### Infant Feeding

An employer must now ensure, so far as is reasonable and practicable in the circumstances, that appropriate facilities in the workplace are available to an employee to breastfeed or express breast milk. The employee must also be provided appropriate breaks to carry this out in addition to the rest/meal breaks referred to above, although the parties may agree to the same break being taken for the purposes of both. The breastfeeding breaks need not be paid however, unless the employer and employee agree otherwise.

Employers must be aware of these new provisions within the Employment Relations Act 2000 as penalties could be severe. Individuals could be fined as much as \$5,000 for breaches, and companies could face a fine of up to \$10,000.