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Welcome to the Autumn issue of Commercial e.Speaking. We hope you find the articles both useful and of interest to you. If you would like to see specific business or commercial topics covered in future issues, please get in touch with us. Topics covered in this issue are:

Funds Loaned to Companies

Keep the funds protected

Ambush Marketing

The Major Events Management Bill

The Small Business Expo

A 'must go' event for business owners

Business Briefs

Enforcing restraints of trade in employment agreements – Kiwibank buying a slice of HSBC's mortgage book – Takeover loophole targeted

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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Funds Loaned to Companies

- Keep the funds protected

Funds placed into companies (ie: closely held rather than listed on the NZX) are usually treated as shareholder loans or current accounts rather than share capital. In addition, in order to assist company liquidity, many shareholders choose to leave credits in their current accounts for crediting of salaries and dividends. If the company becomes insolvent, unless these shareholders' loans and current accounts are legally protected then the shareholders will be lining up with other unsecured creditors and may not recoup their funds. This can leave shareholders at considerable financial risk. This article recommends effective methods to protect shareholder funds.

Register on the PPSR

The most effective way to protect the shareholder advances and current accounts is to register a General Security Agreement under the Personal Property Securities Act 1999. This form of security replaced the former debenture securities that were used prior to the Act coming into force. It cannot be used for securities over land.

Registration of the security on the Personal Property Securities Register (PPSR) is a straightforward procedure and requires a financing statement stating what collateral is secured. Most registrants would opt for all present and after acquired property of the company. However the ability to do so may be limited by suppliers and financiers also wanting the same security. In retail and manufacturing businesses it is common for suppliers to take a security over their stock to enable them to recover that stock in the event of non-payment or receivership/liquidation. This security process replaced the former Romalpa clause that gave title to goods only when paid in full.

Most suppliers are content with a security over the goods they sell. However, financiers are likely to want an all encompassing security which may require the shareholders to take a subordinated security which gives priority to the financier to a set sum. This is still better than no security at all.

To ensure the security is valid, registration on the PPSR is required. Once the security is 'perfected' (the term for registered) then all following security interests will rank behind it except where the shareholders grant priority.

If the company becomes insolvent, the security holders get priority over unsecured creditors. However, first priority is given to wages owing to employees and to the Inland Revenue Department.

Mortgage over land

Another way to protect shareholder funds is by mortgage over land. Financiers generally register a priority sum (ie: maximum amount they are secured for) in mortgages well in excess of the amount borrowed, primarily to allow interest that accrues in the event of default to be recoverable with the principal. It is also a deterrent to the borrower raising funds elsewhere as the priority sum will generally be at least the total value of the land and improvements. In the event that financiers do not require a priority sum for lending that uses all the equity in the land and improvements, then a second mortgage can be registered to protect advances. In case of receivership or liquidation, this will give priority over unsecured creditors.

Ambush Marketing

- The Major Events Management Bill

It is anticipated that the Major Events Management Bill will be enacted later this year. The intention of this proposed legislation is to provide for a clear, predictable and fair regime for dealing with ambush marketing in relation to high profile events such as the 2011 Rugby World Cup.

What is ambush marketing?

'Ambush marketing' describes the actions of companies or advertisers that seek to capture the benefits of large events (such as the captive market of spectators entering the venue or viewing television footage of an event and/or the crowd featuring their brand) without the authorisation of the event organisers.

Ambush by association involves an advertiser misleading the public into thinking that the ambush marketer is an authorised partner or somehow associated with the event.

Ambush by association occurred at the Sydney 2000 Olympic Games at which Ansett was the official airline sponsor. Prior to the Games, however, Qantas ran an extensive advertising campaign and sponsored individual athletes such as Ian Thorpe who featured on billboards around Sydney along with the slogan 'Share the Spirit'. A 2000 poll showed that Qantas had a higher recognition as a 'sponsor' of the Sydney Olympics than Ansett, notwithstanding it was not actually a sponsor of the event.

Ambush by intrusion occurs when an event is used to provide the ambush marketer's brand with exposure or publicity to which it is not entitled, by intruding on the attention of an audience gathered solely for the event. Such an example is giving away supporter flags (bearing the ambush marketer's brand) outside a venue for members of the crowd to wave during the event.

What constitutes 'association'?

Essentially the Bill prohibits any person from making any representation in a way that is likely to suggest to a reasonable person that there is an association between the major event and any good, service or brand. It will be presumed that such an association exists where any of the protected major event words, or emblems are used.

Possible unintended consequences

Due to the broad definition of 'association' there is a risk that if a business runs a promotion involving a major event, it could fall foul of the proposed legislation. For example a local plumbing firm which announced a draw whereby two of the firm's customers who had work done in a particular month were to win Rugby World Cup tickets would breach the Bill as it is currently worded, notwithstanding that a reasonable person would not consider such promotion to hold out the local plumbing firm as associated with the event organiser behind the Rugby World Cup. Package deals which include, say, airfares, accommodation and event tickets would similarly breach the Bill as it is currently worded.


Ambush marketing is a real concern to sponsors given the significant investment involved, and many require a regime of protection to be in place before committing to sponsorship of a major event. The government has already given assurances to the IRB and ICC that ambush marketing protections will be in place for the 2011 Rugby World Cup and the 2015 Cricket World Cup. It is believed that the availability of ambush marketing protection will be a significant marketing advantage for New Zealand when bidding for future events.

The Small Business Expo – A ‘must go’ event for business owners

If you're looking for concrete advice on how to run your business more effectively and profitably, then head along to the Small Business Expos in Auckland, Wellington and Christchurch. Major sponsors include apnfinda, Vero, Vodafone, OGGI and NewstalkZB.

Auckland
ASB Showgrounds, Greenlane


Wednesday 30th May 2007
Thursday 31st May 2007
Friday 1st June 2007



Find out more, [click here.](#)

Wellington
TSB Arena, Queen's Wharf

Wednesday 18th July 2007
Thursday 19th July 2007
Friday 20th July 2007



Find out more, [click here.](#)

Christchurch
Christchurch Convention Centre

Wednesday 29th August 2007
Thursday 30th August 2007
Friday 31st August 2007



Find out more, [click here.](#)

“The Small Business Expo is the largest event for business in New Zealand,” says Sarah Trotman, a small business sector specialist and the organiser behind the highly successful Expo. “Ninety-six per cent of all New Zealand’s businesses employ 19 people or less, classifying them as small to medium-sized enterprises. These enterprises account for nearly 40% of New Zealand’s total value-added output and employ 30% of all employees. SMEs are diverse, innovative and exciting and we’ve designed the Small Business Expos to help the owners of these businesses get inspired, maximise profits, improve employee satisfaction and reduce stress.”

Attendees at the two previous Small Business Expos have commented on the wide range of products and services on offer from The National Bank Seminar Series expert speakers, who provide specialised advice on a range of topics including marketing finance, trademarks, intellectual property, ecommerce and human resources to MYOB’s comprehensive range of accounting software and OfficeMax’s office products.

Sarah says, “Over the past two years, over half of our attendees did business with exhibitors while at the Expo and, of those who didn’t do business there and then, around two thirds said they planned to do business with exhibitors in the future. The whole Expo environment is designed to be as relaxing as possible for a business owner to take a few hours, a whole day or even all three days to work on their business rather than in it.”

Visit www.businessexpo.co.nz for full details of what’s on at this year’s Small Business Expo.

Business Briefs

Enforcing restraints of trade in employment agreements

There have been two recent cases where employers have successfully obtained interim injunctions:

Fuel Espresso Ltd v Hsieh 9/3/07, CA88/07

There was a successful appeal by Fuel Espresso against the Employment Court decision refusing to grant an interim injunction to enforce a restraint of trade in Hsieh's employment contract. The restraint clause prevented Hsieh from working in similar competing businesses within a 100 metre radius, or setting up similar competing business within a 5 kilometre radius of Fuel Espresso's operation. Hsieh resigned from Fuel Espresso on 7 January 2007 and started work as barista at a competing coffee cart on 15 January 2007. The Employment Court refused Fuel Espresso's application for an interim injunction on the grounds that the restraint of trade clause was unenforceable for want of consideration.

The Court of Appeal decided that competition within 70 metres from Fuel Espresso's operation was clearly within the restraint of trade radius and that the Employment Court was wrong to find that extra consideration was required to enforce the restraint since it was accepted that mutual promises could act as consideration for each other. The higher court decided the restraint of trade was reasonable and ordered Hsieh to cease work for the competitor until after 7 April 2007.

Mike Pero (New Zealand) Ltd v Exact Solutions Ltd 17/4/07, Miller J, HC Wellington CIV-2007-442-66

Successful application by Mike Pero and its franchisee Freedom Business Developments (FBD) for an interim injunction restraining Exact Solutions and its principal, Mr Webb, from offering mortgage broking or related services within a 15 kilometre radius of FBD's offices. Mr Webb began work as a loan writer for FBD with the intention of becoming a sub-franchisee. Mr Webb undertook training with the Mike Pero franchisor and then worked for FBD for four weeks before resigning and buying a franchise with a competitor brand. There was disagreement between the parties as to whether Mr Webb or his company, Exact Solutions, entered the contract for service which contained the restraint of trade clause.

The High Court held that Mr Webb gained knowledge of the Mike Pero business model and FBD's customers and that Mike Pero had established a successful business model entitling it to protect its investment by means of restraint of trade. There was an arguable case either or both Mr Webb and Exact Solutions entered into the relevant contract with FBD. The interim injunction was granted.

Kiwibank buying a slice of HSBC's mortgage book

Kiwibank will buy a \$720 million share of Hong Kong Shanghai Banking Corporation's mortgage book, taking its total home loan portfolio to over \$4 billion. It is expected to use the local debt market to fund the transaction.

The deal will see financial services company AMP partner Kiwibank to sell new mortgages.

Kiwibank is to acquire about 6000 loans and manage them under the AMP brand, while AMP's adviser network will act as a distribution channel for new AMP-branded but Kiwibank-funded mortgages.

Takeover loophole targeted

The government has asked the Takeovers Panel to investigate a Companies Act loophole. A move to close the loophole last year through supplementary papers to the Business Law Reform Bill failed.

The Minister of Commerce, Lianne Dalziel, said she had asked the Takeovers Panel to look at the issue of schemes of arrangements and amalgamations being used in ways that might not align with the Takeovers Code, such as takeovers without the regulatory level of shareholder support.