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Welcome to the early Spring issue of Commercial e.Speaking. We hope you find the articles both useful and of interest to you. If you have any specific business or commercial topics that you would like to see covered in future issues, please get in touch with us.

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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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Protection with Powers of Attorney

- An important task for directors and trustees

Company directors and people appointed as trustees should be aware of the importance of ensuring they have an attorney to act on their behalf for signing documents for companies and trusts. This appointment is additional to personal Enduring Powers of Attorney for property, and for personal care and welfare.

Enduring Powers of Attorney

The Protection of Personal Property Rights Act 1988 (PPPR Act) enables anyone of sound mind (the 'donor') to complete an Enduring Power of Attorney (EPA) appointing an attorney and a substitute to act if and when they become mentally incapable of looking after their own personal care and welfare. This allows the attorney to authorise, for example, the donor's medical care, residential care and life support decisions.

An EPA can also be completed appointing one or more attorneys to act jointly or severally in relation to personal property. This can be used at any time unless the donor has placed a revocation on the appointment should the donor become mentally incapable, which is really when it is needed the most. This appointment allows the attorney/s to sign anything that the donor would sign, and can be used to deal with such matters as bank accounts, buying and selling property, and virtually anything else the donor can do - with the exception of the donor's directorships and trusteeships.

Directors

S181 of the Companies Act 1993 allows for the company, subject to its constitution, to appoint one or more people as its attorney - either generally or in relation to a specified matter; this can be used at any time.

The appointment is made by a Deed of Delegation and Power of Attorney (DDPA). This is particularly important for companies with a sole director. Having a DDPA is equally important in family companies where all directors may be absent from New Zealand at the same time. The appointed attorney has full powers to bind the company in contract or deal with other enforceable obligations of the company.

Trustees

S31 of the Trustee Act 1956 allows a trustee ('donor') to appoint an attorney to act for them if they are absent from time to time from New Zealand, or in the event they become temporarily incapable of performing their trustee duties by reason of physical infirmity. The appointment is made by DDPA.

A DDPA can only be used in either of the circumstances described above. It is deemed revoked once the donor returns to New Zealand or has recovered from physical infirmity. The attorney has the same powers, authorities and discretion as the donor trustee.

The personal liability of the donor trustee applies to the attorney. However the attorney is protected against actions against them by a beneficiary for anything done whilst acting under the DDPA, using the defence of acting in good faith and without negligence.

By being proactive and completing the full suite of Powers of Attorney that are applicable to your situation, you will save money and a great deal of anxiety should the need arise for the use of the protective mechanisms of a DDPA and the two EPAs.

Assault from the Bridgehead

- The value of registered intellectual property rights in interim injunction proceedings

The judgment in *Leisureworld Ltd v Elite Fitness Equipment Ltd*¹ in July this year is the latest in a number of recent decisions confirming that, where an application for an interim injunction is founded upon alleged infringement of a registered intellectual property right (such as a registered trade mark, patent or design), the court will most likely find that the balance of convenience favours the granting of an injunction, on the basis that the owner has a *prima facie* right to exploit the monopoly created by the registration; this is the so-called 'bridgehead' argument. This will be the case even where the defendant has raised significant doubt as to the validity of the registration, or can show that it will suffer significant harm if an injunction is granted.

The reference to a bridgehead comes from a comment in *Aktiebolaget Hassle & Anor v Novartis New Zealand Limited*², a case concerning infringement of a registered patent. Despite a strong argument that the patent was invalid, the equivalent UK patent having already been overturned, and recognising the significant losses likely to be suffered by Novartis if injuncted, the court nonetheless found that the balance of convenience and the overall justice favoured the granting of an injunction. Justice Potter commented:

'[A] patent confers a monopoly during its currency, the benefit of which runs over to the post-patent period because of the strong market position usually developed during the monopoly period. . . . Premature interference with the monopoly . . . will also impact on the ability of the proprietor to create or confirm its own market after the expiry of the patent (the 'bridgehead' opportunity).'

In *Leisureworld* (para 109), reference to the 'public interest in enforcing the monopoly rights created by the Trade Marks Act, pending resolution of substantive proceedings', removes any doubt that may have existed as to whether the same argument would succeed in respect of rights that do not expire after a finite period.

The same is not usually true for unregistered intellectual property rights such as copyright, passing off, or a breach of the Fair Trading Act 1986. In such cases the plaintiff bears the burden of proving that it has a right to a monopoly, hence the bridgehead argument loses force in the face of any challenge to the validity of that right.

There is considerable advantage for a litigant to have a registered (as opposed to common law) intellectual property right as the basis of the legal proceeding. In particular, registration may dispense with the issue as to whether there is a serious question to be tried, and greatly increase the prospects of obtaining interim relief, which in intellectual property cases is more often than not determinative of the proceeding.

¹ 21/7/06, Heath J, HC Auckland, CIV 206-404-3499

² 1/5/06, Potter J, HC Auckland, CP51-SW/03

Reform for Financial Intermediaries

- Submissions due 1 September

The Ministry of Economic Development has released a discussion document reporting on the regulation of financial intermediaries and suggested options for its reform. A financial intermediary is defined in the discussion document as being an individual or business that markets financial products or provides advice to members of the public.

Why the reform?

The reform is promoted as being beneficial because at present:

- There is a lack of consistent domestic standards, which means it is difficult for consumers to compare financial intermediaries;
- Consumers in many instances have limited information and as a result their ability to evaluate their financial intermediaries may be restricted; and
- Consumers are frequently not able to verify the information provided by financial intermediaries.

What is proposed?

The discussion document sets up proposed options for reform, which are analysed by their cost and purported benefits. The options include:

1. Financial intermediaries being co-regulated by 'approved professional bodies', the Securities Commission and the Minister of Economic Development working together. It is proposed the Securities Commission would have the power to make prohibition orders, corrective orders, disclosure orders and temporary banning orders but submissions on the type of powers required are sought.
2. New definitions of key terms and the classes of financial intermediaries are suggested to enable the new legislation to apply effectively. Terms being reviewed include 'financial product', 'financial advice' and the classification of the types of 'financial intermediary'. The proposed classes that financial intermediaries are to be divided into will depend on the level and type of service they provide. The proposed classes are, 'information/execution only', 'product marketer' and 'high-level intermediary'.
3. Setting conduct standards for financial intermediaries. Conduct standards would impose minimum standards of behaviour and statutory duties of care, as well as imposing a strict liability standard not to engage in conduct that is deceptive or misleading, or likely to mislead or deceive.
4. Changing disclosure requirements based on the class into which a financial intermediary falls.

The discussion document emphasises that there is no restriction on the legal form of a financial intermediary. This means that a financial intermediary may be a natural person, a company, partnership or any other form of entity. The effect of this is that under the proposed co-regulatory model there may have to be some differences in obligations imposed on financial intermediaries depending on whether or not the entity is an individual or another type of entity. A level of discretion will be needed by the co-regulatory bodies to address these issues.

Where to from here?

Submissions are open until Friday, 1 September 2006. For a copy of the discussion document, look at http://www.med.govt.nz/templates/MultipageDocumentPage_____20651.aspx

We encourage you to contact us either to discuss making a submission or to talk about the impact the proposed regulations may have on you or your business.

Business Briefs

Share Scam Warning

The Securities Commission is warning about a new version of unsolicited investment offers from overseas. The investment offer is meant to get victims to send money before the 'services' are delivered and to prove their authenticity the 'brokers' often refer people to fake regulators' websites.

These websites use .gov.us in their addresses. All United States Federal websites have website addresses ending with .gov. A website ending with .gov.us is likely to be a fake agency.

Recent Fair Trading Prosecutions

Some recent Commerce Commission prosecutions include:

- Telecom Mobile was fined more than \$45,000 for failing to honour an offer to credit some customers whose accounts were coming up for expiry. A direct marketing campaign had led people to believe they would get a credit of between \$50 and \$250. The offer only applied when new mobile phones were purchased. Telecom Mobile instructed its call centre staff to honour customers' interpretation of the offer, but did not tell other staff, resulting in 2,500 customers being misled.
- Auckland car dealer, Quinton Marchione, claimed his customers were not protected by the Fair Trading Act because they had bought their cars on 'tender'. Mr Marchione made customers sign a form waiving their rights under the Consumer Guarantees Act or Fair Trading Act as they were buying on an 'as is where is' and 'tender' basis. Mr Marchione was found guilty on 32 charges of breaching the Fair Trading Act by misleading consumers about their rights and remedies and was fined \$48,000.

Return of Westpac New Zealand

The Westpac New Zealand Bill has recently been considered by the Finance Select Committee. The proposed legislation would establish Westpac New Zealand Limited and will ensure all the New Zealand assets, liabilities and obligations of the current trading entity will transfer to the new company without any changes. Around NZ\$30 billion of assets are involved.

Feeling Over Regulated?

Business NZ has published *Regulation Perspectives*, maintaining that more than 2,000 regulations have come into force since 1999, with much of this regulatory control affecting business. The publication suggests a more light handed approach rather than governments giving in to the desire to be seen to be 'doing something' in response to the crisis of the moment. Business NZ's report can be found at <http://www.businessnz.org.nz/>.