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Protecting Your Intellectual Property From Trading Risks

Running a business has its risks – the ultimate being the entity going out of business and having to shut up shop. The recent recession increased such a risk for many businesses with some being unable to cope with the economic pressures and consequently becoming insolvent.

When a business becomes insolvent and is subsequently liquidated, the assets of the entity are seized and sold with the view to pay creditors. Intellectual property assets are no exception and assets such as domain names, trademarks and copyrights as well as concepts relating to branding are often lost in the process as well. More often than not, such intellectual property assets are irreplaceable. It is therefore important that time and effort is invested in protecting such assets in the event that a company is put into liquidation.



Separating assets into two or more legal entities as a means of protection has been common practice for some time, with business owners transferring their houses and other personal assets into trusts. However with intellectual property, while it is possible to register legal ownership rights in a trust (provided that ownership is recorded in the joint names of the trustees and not in the name of the trust itself) problems can arise relating to sub-licensing due to consent issues from co-owners. Additionally, the Intellectual Property Office of New Zealand is adopting a stricter interpretation of intellectual property laws that prohibits trusts from owning intellectual property.

The separation of assets through the use of limited liability companies is therefore a more suitable vehicle for the purposes of intellectual property asset protection. Separate ownership using companies requires the establishment of two or more registered

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companies where one company, Company A, owns the intellectual property and the other company, Company B, acquires a licence from Company A to sub-licence the intellectual property to clients.

All ownership of the intellectual property assets are vested in Company A, and Company B at no stage actually owns the intellectual property. In the event that Company B becomes insolvent, its creditors are not able to lay claim to the intellectual property assets by virtue of it being owned by a separate legal entity, Company A. This model is particularly suited to software companies as they don't sell their

products, but rather license them by granting a customer non-exclusive rights to use the software. The actual software remains the property of the original owner. The separate-ownership model can also be tailored to suit most business genres.

Although appropriate licences and insurance policies are worthy components of risk management, many policies do not guard against insolvency of a company or bankruptcy. As a consequence, while some effort may be required in setting up an appropriate structure, separating valuable intellectual property could be well worth the time and money.

The Unit Titles Act 2010

The Unit Titles Act 2010 (the '2010 Act') came into force on 20 June 2011 and replaced the Unit Titles Act 1972. The 2010 Act contains material changes from its predecessor and is now the principal authority pertaining to the establishment and management of developments such as apartment blocks, multi-layered commercial spaces and flats.

The key changes included in the 2010 Act are discussed below.

All common property in an establishment is now owned by the Body Corporate. Previously, ownership of common property was jointly vested in all unit owners. The change now allows the Body Corporate to more effectively promote the benefit of the development as a whole by representing all unit owners in relation to the improvement and maintenance of common property.



Responsibility for the maintenance of building elements and infrastructure affecting more than one unit now lies with the Body Corporate. This means for example, that the Body Corporate will be responsible for repairing a leak from a top floor apartment to a unit below (provided the leak is not attributable to the recklessness or negligence of the unit owner and/or occupier.) Previously, the obligation to remedy the leak would have fallen solely on the owner of the top floor apartment.

Minor alterations to individual units are now more feasible as the 2010 Act allows for increased flexibility relating to re-developments. Obtaining the consent of a body corporate is no longer required to

carry out additions or structural alterations to units, provided the modifications do not materially affect the common property or the property of another owner.

The subdivision of principal units is also possible under the 2010 Act, allowing for the creation of a separate unit title development within the principal title known as a subsidiary. This is known as a layered development and allows for multiple use of a building – such as where a building has car parking, shopping complexes and apartments all within its confines.

The 2010 Act also allows for the creation of separate Bodies Corporate that govern subsidiary units, which are also part of the Head Body Corporate responsible for overall management of the development.

Unanimous consent of the Body Corporate is no longer required under the 2010 Act and a 75% majority is sufficient for decisions to be made. This change has been welcomed by many as it means decisions will less likely be held up by difficult owners.

Bodies Corporate are also required to develop long term maintenance plans in advance, giving owners the opportunity to pay regular instalments over time. This is to avoid owners having to pay large one off special levies for work required on common property such as lifts.

The 2010 Act seems to attempt to be more flexible and pragmatic. To some extent the 2010 Act may give unit title owners more certainty and therefore promote unit titles as a form of land ownership.

Crimes Amendment Bill No. 2 – Protection of Children

The Crimes Amendment Bill (no. 2) (the 'Bill') was introduced to Parliament by the Minister of Justice on 12 April 2011. Among other issues contained in the Bill, one of the major areas of proposed change

relates to the protection of children. The Bill seeks to significantly alter the current legislation as it pertains to child abuse and imposes greater expectations on

adults who are in contact with children and vulnerable adults alike.

Duty to Protect

One of the most significant changes contained in the Bill is the imposition of a legal duty on those who live with a child and those who know or ought to know that the child is at risk of death, grievous bodily harm, or sexual assault. That legal duty requires those people to take reasonable steps to protect the child from that risk. Failure to take such steps will result in an offence that is punishable by imprisonment for a maximum of 10 years. Specifically, a parent or person over the age of 18 may be found liable if he or she is:



- A member of the same household as the victim,
- A person who does not live in the same household but is so closely connected with it that they are regarded as a member of it,
- A staff member of a hospital, institution, or residence where the victim lives.

Another significant provision in the Bill provides that all parents are under the same obligation to protect their children regardless of the parent's age. This means that a parent who is under the age of 18 is still liable to the same extent as a parent over the age of 18. It is hoped that extending such responsibilities to teenage parents will prompt young

parents to seek help earlier in situations where they are unable to cope with the pressures of parenthood.

Sexual Grooming

The offence of sexual grooming is also expanded to include instances where an offender is communicating with an undercover police officer while believing them to be a person under the age of 16.

Penalties

The maximum penalty for cruelty to a child (which includes neglect and ill treatment) has been increased from five years imprisonment to 10 years imprisonment. The scope of the Bill in this regard is expanded to include vulnerable adults as well as children. It places an obligation on parents and caregivers to protect children and vulnerable adults from injury as well as providing necessities that extend above and beyond the necessities of life.

Conclusion

The provisions of the Bill depart from the existing regime by creating a positive obligation on all adults who are living with a child or have substantial contact with a child to act, in cases where it is called for, to prevent harm that might otherwise occur.

Violent deaths of toddlers such as that of Nia Glassie and the Kahui twins are tragic warnings that urgent action is required by all adults in preserving the safety of a vulnerable child. The Bill is an attempt at strengthening the obligation on those who should take action not to turn a blind eye, as the law will no longer do the same.

Alcohol Reform Bill

Introduction

The Alcohol Reform Bill (the 'Bill'), if passed by Parliament, will repeal and replace the Sale of Liquor Act 1989. While many of the provisions of the Sale of Liquor Act 1989 are carried over, the Bill proposes a major revamp of our primary liquor laws. Some of the significant and more controversial areas of change include the minimum age for the purchase and consumption of alcohol, maximum trading hours for suppliers of alcohol, local alcohol policies, and applications for licences. In addition, the Bill proposes to replace the current Liquor Licensing Authority with the Alcohol Regulatory and Licensing Authority. The proposed name for the Bill is, "Sale and Supply of Alcohol Act". It will amend parts of the Summary Offences Act 1981, the Children, Young Persons and their Families Act 1989 and Local Government Act 2002, among others.



increasing toll that intoxication and excessive drinking is having on the nation's level of health. The Bill resultantly is drafted to facilitate and encourage a safer and more responsible drinking culture, especially among young people.

Age

The Bill proposes a 'split-age' approach in relation to the purchase of alcohol. It proposes to increase the minimum age for purchase of alcohol from off-licensed premises to 20 years of age or over while the age restriction on purchase of alcohol from on-licensed premises remains unchanged at 18 years. Off-licensed premises include establishments such as supermarkets, grocery stores and bottle shops. On-licensed premises include cafés, bars, restaurants and entertainment venues.

Trading Hours

The Bill also prescribes maximum trading hours for liquor suppliers. Default trading hours are set between 8am to 4am on the following day for on-licensed premises and between 7am to 11pm for off-

The Bill is in response to the Law Commission's Report published last year titled "Alcohol in Our Lives; Curbing the Harm". The report recognised the

licensed premises. However, newly introduced Local Authority Policies (LAP) may impose more lenient or stringent trading hours than the prescribed default trading hours in the Bill.

Local Authority Policies (LAP)

The Bill empowers local communities to cater specifically to the needs of their community by adopting local alcohol policies. LAPs allow local communities to have more say on the concentration, location and trading hours of alcohol outlets in the community.

Advertising

Currently, the Alcohol Industry is allowed to regulate

its own advertising. The Bill seeks to change this by strengthening advertising controls relating to liquor and alcoholic products. For example, promotions that involve free distribution of alcoholic products will be deemed to be unacceptable.

Conclusion

The new Bill undoubtedly presents some challenges as the Government tries to balance the interests of its citizens while trying to maintain a sustainable liquor industry within which manufacturers and retailers are not prejudiced. The Select Committee is due to report back to Parliament by the end of August 2011.

Snippets

Weddings and Wills



Death and Wills! This generally is not a typical topic of conversation when you are preparing for your wedding. But due consideration should be given to documents such as

Wills and Contracting Out Agreements (i.e. Pre-Nuptial Agreements) as marriage imposes significant obligations in relation to property division and the allocation of assets.

If a person dies intestate (without leaving a Will), the allocation of their assets is determined by legislation such as the Property (Relationships) Act 1976 and may be divided differently to the way the person had envisioned it would be. The advent of a new marriage also automatically invalidates all Wills that were made prior to the date of the marriage.

A review of a person's estate planning should also be undertaken prior to marriage as it too will be significantly affected. Consideration must be given to those who will benefit from a person's estate and legacy (a gift of personal property or money to a beneficiary of a Will). Failure to execute the requisite documents to reflect one's wishes can have negative consequences for all concerned.

Stop Press

The Taxation (Tax Administration and Remedial Matters) bill was passed by Parliament and when it receives Royal assent, it will abolish gift duty from 1 October 2011.

The legislation will be studied when available and a future newsletter will deal with the ramifications of the abolition of gift duty.

Dog Tails

The big excitement is that Pearl, with her extended family, is travelling to the United States to attend Belinda's (Pearl's niece) wedding in Savannah on 9 September. The weather is expected to be fine and 40°C.

Tony and Pam spent three weeks in May touring the gold mining towns in Victoria, Australia. They are looking forward to the Rhododendron Festival in New Plymouth at the end of October. Tony received an early father's day and birthday present from daughter Amanda – an iPad2 on the basis his existing iPad was given to Pamela, who expressed interest in I-books.

Glenys and Pearl have purchased bicycles from the Tour Company with whom they booked to ride the

Otago Rail trail and plan more cycling tours in the summer months.

Sadly, we are shortly to lose Sue Dean from our staff who is joining her partner Ross in Christchurch until the end of the year when they will be returning to live in Australia.

If you have any questions about the newsletter items please contact us, we are here to help:

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