Commercial eSpeaking

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Welcome to the Spring edition of *Commercial eSpeaking*.

We hope you find the articles in this e-newsletter are both interesting and useful.

To talk further with us on any of these topics, or indeed any other legal matter, please don't hesitate to contact us. Our details are on the top right.

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Voidable transactions

Liquidator can claw back payments

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Most people in business know there is a substantial risk of not being paid by a company that goes into liquidation unless they have a secured debt. However, a payment made by a company before it goes into liquidation may also be at risk of being clawed back.

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Seeking ways to respect and incorporate differences into business practices

In recent years, there has been a growing recognition of the importance of incorporating – and (more importantly) the desire to incorporate – Tikanga Māori into commercial contracts.

To some extent, this shift is due to the growing appreciation that contracts should not only be robust and enforceable, but also culturally inclusive and reflective of our collective New Zealand heritage.

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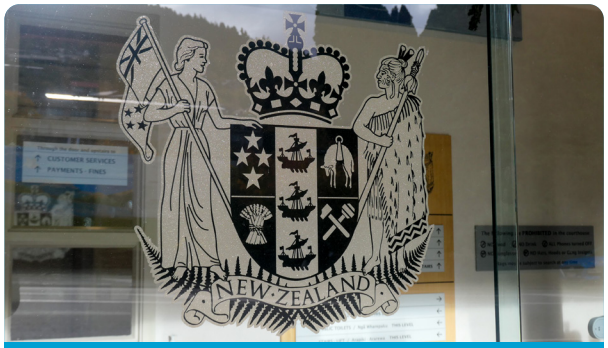

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The number of companies going into liquidation in New Zealand is on the rise after a Covid lull. According to Centrix,[1] 642 companies were placed into liquidation during the second quarter of 2024. This represents a year-on-year increase of 19%.

Most people in business know there is a substantial risk of not being paid by a company that goes into liquidation unless they have a secured debt. However, a payment made by a company before it goes into liquidation may also be at risk.

The liquidator can 'claw back' a payment made by the company to a creditor up to six months before the company was placed into liquidation by its shareholders or liquidation proceedings were filed in the High Court.[2] The liquidator may claw back the payment if it was made at a time when the company could not pay its debts, and the payment enabled the creditor to receive more than they would have received in the liquidation. Such a payment is known as a 'voidable transaction.'

Pari passu rule

If a company has insufficient assets to meet all its debts, its available assets should be divided between its creditors in proportion to the debts they are owed. This is known as the pari passu rule.

There are several limits on the liquidator's power to unwind voidable transactions. These are intended to strike a balance between upholding the pari passu rule and the conflicting objective of encouraging businesses to continue to trade out of their difficulties when facing financial problems.

Running account exception

The running account exception is one significant limitation on the liquidator's power to claw back voidable transactions. It requires the liquidator to consider the net effect of a series of transactions between a creditor and the company, and to treat this as a single transaction.

In practice, if a company has a trading account with your business before it goes into liquidation, then any amount your business receives during the six months prior to liquidation that exceeds the value of any goods or services supplied during this period may be treated as a voidable transaction. For example, suppose your business supplies $10,000 worth of goods to a company during the six months before it is placed into liquidation, and you receive payments totalling $15,000 during the same period. Of that $15,000, $5,000 of the money you received went towards the debt that existed before the start of the six-month period. In that case, it is possible that a payment of $5,000 to your business was a voidable transaction, but the rest is safe.

The effect of the running account exception is that your business can keep any payment received for any goods or services supplied during the six months before liquidation.

Section 296 defence

This section[3] contains a 'good faith' defence available to creditors facing a claim to repay a voidable transaction. This statutory defence has three elements that must be satisfied:

1. The creditor must have acted in good faith
2. There was no reason for them to suspect the company was insolvent, and
3. They gave something of value for the payment or changed their position due to the payment. The value does not have to be provided at the same time as the payment.

The claw back procedure

The Companies Act sets out the procedure a liquidator must follow when seeking to claw back a payment.

If the liquidator cannot resolve the issues through correspondence with the creditors, the liquidator may issue a formal notice to set aside the transaction. The recipient has 20 working days to respond to the notice. If they do not respond, the payment automatically becomes a voidable transaction at the end of this period and must be paid back. If the recipient does respond, then the liquidator may still apply to the court to set aside the payment.

It is difficult to fully protect your business from claw backs for voidable transactions. One option is to seek a security or personal guarantee at the start of any trading relationship. You should talk with us before continuing to trade with a company you suspect may have financial difficulties, or if you are contacted by liquidators seeking to claw back a payment. +

1 **Centrix August 2024 Credit Indicator Report**.
2 Section 292, Companies Act 1993.
3 Section 296, Companies Act 1993.

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Embracing Tikanga Māori in your commercial contracts

Seeking ways to respect and incorporate differences into business practices

In recent years, there has been a growing recognition of the importance of incorporating – and (more importantly) the desire to incorporate – Tikanga Māori into commercial contracts.

To some extent, this shift is due to the growing appreciation that contracts should not only be robust and enforceable, but also culturally inclusive and reflective of our collective New Zealand heritage. Many people, however, particularly those not brought up in Te Ao Māori (the Māori culture), can find this daunting and maybe a little scary.

What is Tikanga Māori?

Tikanga Māori refers to Māori customs, values and practices. The word 'Tikanga' comes from the word 'tika' that means 'correct' or 'right'; essentially, it is the 'right way' to do things.

In the context of commercial contracts, Tikanga can cover a range of concepts, from the way you manage relationships, to how you carry out your obligations. However, Tikanga is not a one-size-fits-all concept; its meaning and application can vary depending on the region, the iwi (tribe) and the parties involved.

For non-Māori businesspeople who are used to clear, documented processes, this can be challenging, especially if you are worried about putting a foot wrong. Integrating Tikanga into commercial contracts, however, generally just involves the careful blending of Māori and Pākehā perspectives to create agreements that are long-term, community-focused and ethically grounded. Tikanga acknowledges the differences between Māori and Pākehā approaches but also actively seeks ways to respect and incorporate these differences into commercial practices.

Why incorporate Tikanga Māori?

There are several reasons we should consider incorporating Tikanga Māori elements into our contracts. These include:

- **Relationships**: As Tikanga Māori places a high priority on relationships, emphasising trust, mutual respect and reciprocity, incorporating these values into contracts can help to strengthen the bonds between businesses and Māori partners, which can ensure longer-term, sustainable partnerships
- **Cultural competence and respect**: Incorporating Tikanga Māori into contracts can help to show your business' commitment to understand and respect Māori culture. This may not only enhance your reputation, but also help build trust within Māori communities and stakeholders
- **Enhanced dispute resolution**: Tikanga Māori offers alternative dispute resolution methods, focused more on restoring harmony and balance than penalising/default mechanisms. This can lead to more agreeable and lasting solutions if there is disagreement, and
- **Alignment with Te Tiriti o Waitangi**: One of the aims of Te Tiriti o Waitangi (Treaty of Waitangi) is to preserve the partnership between Māori and the Crown. Incorporating Tikanga Māori into contracts may help to demonstrate your commitment in upholding these values.

Looking ahead

If any of the above resonates with you, consider doing some of the following in your business:

- **Think longer time frames**: In Te Ao Māori (the Māori worldview), time is often considered in generations rather than years. Māori organisations frequently plan with a longer-term perspective, focusing on the wellbeing of future generations rather than immediate short-term gains. This longer-term approach means that your contracts should ideally consider the broader implications, looking beyond the immediate benefits and considering longer-term issues such as community goals and sustainability, and
- **Focus on relationships**: We tend to concentrate on our own individual obligations and financial outcomes when negotiating contracts. In a Tikanga Māori approach, however, the focus is more on relationships – both between the parties and with the wider community. This means that contracts should seek to prioritise, among other things, mutual respect, collective responsibility and the ongoing relationship between the parties.

You could consider including provisions that acknowledge the importance of whakapapa (genealogy) and manaakitanga (hospitality and respect), seeking to ensure that the contract strengthens, rather than undermines, relationships:

- **Consult with experts**: Engage with Māori advisors, legal professionals or kaumātua (elders) while preparing your contracts. Their insights can ensure that the incorporation of Tikanga Māori is both authentic and appropriate in the context
- **Use Te Reo Māori**: Where relevant and appropriate, consider including Te Reo Māori (Māori language) as part of the contract – whether as bilingual clauses or simply incorporating Te Reo Māori alongside the English words – as we have done in this article, and

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Business briefs

Companies Act reforms announced

The government has announced a suite of changes to the Companies Act 1993 aiming to improve fairness and the ease of doing business in New Zealand. The reform is expected to take place in two phases.

Phase One: The first phase focuses on the modernisation and simplification of the Act to better reflect a more evolved business and technological landscape.

Specific proposed changes include:

- Providing a process for reducing the share capital of a company that does not require court approval
- Amending the definition of 'major transaction' to exclude transactions relating to the capital structure of a company and clarify that a series of related transactions are captured by the definition
- Adding additional types of transactions that can be approved by unanimous shareholder consent
- Allowing companies to mingle unclaimed dividends with other funds after two years
- Assigning unique identifiers to directors to prevent 'phoenixing' (where a new company is registered to take over an insolvent or unsuccessful one), and
- Allowing directors and shareholders to have their residential addresses removed from the Companies Register, resolving safety and privacy concerns.

Further insolvency law amendments are also being proposed, including extended claw back periods, preference for long service leave and greater honouring of gift cards.

Phase Two: The second phase will involve a Law Commission review of directors' duties and related issues such as director liability, sanctions and enforcement.

The bill introducing Phase One is expected to be introduced in early 2025 and Phase Two will closely follow.

Siouxsie Wiles employment decision

In July, the Employment Court ruled that the University of Auckland had breached its health and safety, and good faith obligations to Associate Professor Siouxsie Wiles.[4]

Dr Wiles was prominent in the media during the Covid pandemic, communicating complex Covid information in an understandable way to the public. Dr Wiles received harassment and abuse, both online and offline, from those who disagreed with her. She sought help from the university, but was told that it was not part of her academic duties and that she should minimise further public statements until a security audit had been completed.

Although the university was commended for the actions it did take, ultimately, those actions were insufficient.

The Employment Court was critical of the university's delay in responding to safety concerns and the university's misplaced focus on Dr Wiles' outside activities. The court found that the onus was on the university to obtain the right health and safety advice, and proactively put a plan in place. By failing to do so, the university was not acting in good faith and was breaching its contractual obligations to be a good employer.

This ruling serves as a good reminder that employers, especially those in the public sector or that engage with the public, should consider health and safety risks in relation to employees' work-related activities, including where those activities pose a risk of harassment. Employers may also be responsible for work related activities occurring outside of an employee's work premises and normal working hours.

New bill to improve consumer data rights

Parliament is currently considering the Customer and Product Data Bill – a bill designed to increase consumer control over their data. It is currently with the select committee. If passed, the legislation will create an obligation for businesses that possess customer data to provide, on request, that data to those customers and certain third parties.

The bill will help consumers access their data to compare services and change providers, making it easier for new or smaller businesses in an industry to compete with the 'big players.' The bill introduces hefty fines for non-compliance, including a fine of up to $50,000 for failing to respond to a data request and a fine of up to $5 million for making an unauthorised data request.

Initially, the bill will only apply to the banking, electricity, and telecommunications sectors.

Changes to insurance industry coming

The Contracts of Insurance Bill, that awaits its second reading, will make significant changes to the rights of policyholders and insurers to promote confidence in the insurance market and ensure that insurers operate fairly. The bill proposes several changes to insurance contracts legislation, including:

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4 *Wiles v University of Auckland* [2024] NZEmpC 123.

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Embracing Tikanga Māori in your commercial contracts

+ **Tweak your disputes clauses**: Standard commercial contracts often include formal arbitration or court processes as dispute resolution mechanisms. Māori dispute resolution, however, leans more towards consensus and the restoration of harmony, as well as the concept of kanohi ki te kanohi (face-to-face) discussions rather than battling it out through lawyers or email. Incorporating these processes into contracts can help ensure that disputes are resolved in a manner consistent with Tikanga.

Using Tikanga Māori principles is advantageous

Incorporating Tikanga Māori principles into commercial contracts is a growing practice in this country. Doing so can result in agreements that are not only legally robust, but also culturally inclusive and ethically grounded. This approach can be beneficial to all parties, enhancing the relationship and supporting longer-term, sustainable partnerships.

Whaowhia te kete mātauranga:
Fill the basket with knowledge. +

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Business briefs

+ **Disclosure duties**: The bill draws a distinction between consumer policyholders (where the insurance contract is for personal, domestic or household purposes) and non-consumer policyholders. Consumer policyholders will have a duty to take reasonable care not to make a misrepresentation to the insurer.

  Non-consumer policyholders will have a duty to make a fair representation of the risk. This shifts the burden on insurers to ask the right questions to reveal all the information they need
+ **Unfair contract terms**: The bill removes the existing exception for standard form insurance contracts from the unfair contract term provisions in the Fair Trading Act 1986. In other words, the unfair contract terms regime will apply more widely to insurance contracts, meaning insurers must make sure that the provisions of their insurance contracts are fair.

  There are still some exceptions in insurance contracts that will not be subject to the unfair contract terms regime, including event, subject or risk insured, sum insured, the basis for settling claims, excess, and exclusions or limited liability in certain circumstances, and
+ **Proportionate remedies**: Insurers will no longer be able to avoid an insurance contract for any failure or misrepresentation of a policyholder. Instead, insurers will have proportionate remedies based on how it would have responded if it had known the relevant information, such as reducing the amount paid on a claim.

Uber appeal dismissed: drivers are employees

In 2022, the Employment Court made a landmark ruling against Uber when it found four Uber drivers were employees and not independent contractors.[5] Uber appealed the decision, and the Court of Appeal issued its decision in August.[6] The Court of Appeal criticised the Employment Court's approach, stating that the first step should be to look at the parties' agreement governing the relationship, rather than whether the individual is vulnerable or suffering from an imbalance of power. Ultimately, however, the focus should still be on the parties' mutual rights and obligations, interpreted objectively.

Despite these criticisms, the Court of Appeal still dismissed the appeal affirming the finding that Uber drivers are employees. This means Uber must provide the drivers with employee benefits, including minimum wage, leave entitlements and holiday pay.

The decision only applies to the four Uber drivers, but it has implications for all businesses that engage contractors, particularly for those operating in the gig economy. It is a timely reminder for businesses that rely on contractor workforces to ensure their contracts accurately reflect the nature of the relationship with their workers.

The Workplace Relations and Safety Minister Brooke van Velden has indicated that the coalition government intends to amend the Employment Relations Act in 2025 to increase certainty and clarity for contractors and businesses regarding employment status of workers. The changes will provide a four part gateway test which, if met, would mean a worker is a contractor. More information on the government's announcement can be found **here**.

If you would like to know more about how any of the items in Business briefs may affect you and your business, please don't hesitate to contact us. +

5 *E Tū Inc v Rasier OperaAons BV* [2022] NZEmpC 192.
6 *Rasier OperaAons BV v E Tū Inc* [2024] NZCA 403.

The next edition of *Commercial eSpeaking* will be published in **early 2025**.