

Commercial eSpeaking

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This Spring edition is the final issue of *Commercial eSpeaking* for 2019. We hope you enjoy reading these articles, and find them interesting and useful.

To talk further with us on any of the topics in this e-newsletter, or on any other legal matter, please get in touch. Our contact details are to the right.



Are restraint of trade clauses worth the bother?

Have an expertly-drafted agreement

Restraint of trade clauses are common in the sale and purchase of a business and in some employment agreements. They offer protection to a buyer who has acquired a business, prevent the seller from directly competing with the buyer, and protect an employer's business interests when key employees leave. Are they difficult to enforce?

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Are restraint of trade clauses worth the bother?

Have an expertly-drafted agreement

Restraint of trade clauses are common in the sale and purchase of a business and in some employment agreements. In a business context, they offer protection to a buyer who has acquired a business and prevent the seller from directly competing against the buyer. A restraint provision in an employment context is designed to protect the employer's business interests when key employees leave. There's a general perception that these clauses are difficult to enforce, so why bother?

Non-competition restraint – sale of a business

The purpose of a non-competition restraint in regard to the sale of a business is to ensure that the purchaser is able to retain the benefits of the business they have purchased including existing

and potential customers. It prevents the seller from establishing, working for or being involved in a similar business. Non-competition restraints are routinely used in the sale and purchase of businesses.

Non-competition restraint – employment agreement

The first consideration before inserting a restraint of trade clause in an employment agreement is to decide whether or not you, as the employer, have a proprietary right (be it trade connections or trade secrets) which might be considered reasonable to protect. The effect of a restraint in an employment agreement is to prevent your employee from working for a competitor or opening a competing business immediately after their employment ends. Due to the restriction placed on any employee's livelihood, the necessity for the restraint (which will benefit you as their employer) must be balanced against

your employee's right to earn an income (a restriction for your employee).

Is the restraint reasonable?

In determining whether a restraint of trade is reasonable, the courts will consider the following factors:

- » Do you as an employer have a proprietary interest (trade or customer connections) capable of protection?
- » Is it reasonable that your employee be restrained from the specified activities?
- » Is the period of the restraint reasonable?
- » Are the geographical limits of the restraint reasonable?
- » What compensation was given to your employee in exchange for them agreeing to be restrained after the end of their employment?

The larger the geographical area and the longer the time restriction, the more likely a restraint of trade will be considered unreasonable.

Is it enforceable?

Absolutely – if the restraint of trade clause has been carefully and correctly drafted according to the specific circumstances of the employment environment and relationship. If it is unnecessarily restrictive, it is more likely it will be unenforceable. The courts have considerable power to delete the restraint, modify it to make it reasonable or deem it unenforceable.

There are also a number of alternative ways you can protect your business, including non-solicitation, confidentiality, intellectual property and confidential information – perhaps articles for another day! ■

Employing people with a past

How the clean slate legislation works

Employing staff is never a simple process. Finding people with the right skills and personality to fit into your team can be challenging. Today's employers go through a rigorous process when recruiting; most believe it's better to put time into getting the right person than to have to deal with the consequences if things don't work out.

One aspect of all staff recruitment is background checks on applicants. This is more important in some roles than others.

It's standard to ask prospective employees to submit forms, and provide CVs and evidence of qualifications. Many employers also include a question regarding past criminal convictions, but this is not a surefire way of getting the full picture of an applicant's background. Job applicants are not required to declare convictions in certain situations as they are 'clean-slated'.

Being 'clean-slated'

The Clean Slate Act or clean slate scheme, more formally and correctly known as the Criminal Records (Clean Slate) Act 2004, became law almost 15 years ago. Its purpose was to limit the effects of historic criminal convictions on a person's future.

The Clean Slate Act limits the effect of convictions if certain criteria are satisfied.

If it has been seven years since someone was convicted, they are considered to have no criminal record in certain situations.

For anyone to be 'clean-slated', they must have:

- » No convictions within the last seven years
- » Never been sentenced to a custodial sentence
- » Never been convicted of a specified offence such as sexual offending against young children
- » Paid any fine, compensation, reparation or other monetary penalty ordered by a court following a criminal case
- » Never been indefinitely banned from driving, and
- » Never been held in hospital by the court in a criminal case due to their mental state.

Those who meet the above criteria are entitled, when completing a job application, to state they have no criminal convictions. Section 14 of the Clean Slate Act expressly states that when asked, a person can state they have no criminal record if they are eligible under the legislation.

The application of the Clean Slate Act is automatic (there is no application

process) and, once 'clean-slated', a criminal record will show a clear history.

Employers should be aware that it is an offence to require someone to declare convictions that have been subject to the Clean Slate Act. Any person who disregards the effect of the scheme and requests disclosure of 'clean slate' convictions can be fined up to \$10,000.

Obviously, employers are entitled to ask candidates to declare a conviction that is not subject to the Clean Slate Act.

One difficulty that can arise for employers is if the role requires their employee to travel overseas. Immigration authorities in other jurisdictions are not required to adhere to New Zealand law and can ask for all convictions to be declared. Visas may be declined if there is a criminal conviction, however minor.

Exceptions

There are a number of exceptions in the clean slate regime. Anyone eligible under the Clean Slate Act to have conviction/s 'removed', must still declare all convictions if applying for a job in a national security role as a police employee, prison or probation officer or security officer, or as a judge, Justice of the Peace or community magistrate.

Employers who are concerned about previous criminal offences should

remember it is not an offence for employers to carry out background checks on google and social media. Information about a prospective employee's past can often be found through these channels. Job applicants can't escape the reach of the internet.

The clean slate legislation was established to allow people to have a second chance. In the majority of jobs, historic convictions from over seven years ago are not a barrier to employment, and people have moved on from their mistakes of the past. ■



Business briefs

Eminem – importance of IP indemnities in agreements

The Court of Appeal¹ has ruled that the National Party must pay Eight Mile Style, the production company of prominent rapper Eminem, damages of \$225,000 for breaching the copyright of Eminem's song 'Lose Yourself'. This decision highlights the importance of including intellectual property (IP) indemnity clauses in a contract.

An IP indemnity is designed to protect against loss for a breach of another's IP rights. In this case, the National Party had bought the track 'Eminem Esque' to use in its 2014 election campaign advertisements. It relied on assurances from the licensor that it was not breaching copyright. The court found that using the track was, indeed, a breach of copyright.

A well-drafted IP indemnity clause in the agreement between the National Party and the licensor may have enabled the National Party to seek to recover its loss from the licensor. ■

Mainzeal directors' appeal denied

A recent application by the directors of Mainzeal to have their damages and costs reduced has been denied by the High Court².

In 2018, Mainzeal's directors were found to be in breach of their duties under the Companies Act 1993, relating to their dealing with the company's debts and its insolvency. The appeal by the directors was to have the amount of damages reduced, arguing that the losses by the company were overestimated at the starting point. In the same claim, the liquidator also counter-claimed that the losses were underestimated when measured by the judge. The judge accepted both claims as being valid, but ultimately determined that the two claims cancelled each other out; the appeal was dismissed.

The directors remain liable for approximately \$6 million each, as well as one director who is liable for \$18 million. The directors have appealed to the Court of Appeal.

If you are a director, it's important to know and understand your obligations and

responsibilities to the company and to shareholders. ■

Federated Farmers wants tougher labelling of plant-based products

Innovation has seen a number of plant-based meat alternatives grow in popularity. These plant-based products often use terms such as 'milk', 'patty' or 'steak' to label their products. European authorities are currently looking at whether such terms should be restricted to use with animal-based products only. There is a similar movement in Australia to prevent almond and soy-based products being labelled as 'milk'.

Here in New Zealand, Federated Farmers has indicated that it may push the government to follow suit, depending on the success of similar movements overseas.

HELL Pizza found itself in hot water with consumers after failing to disclose to customers that its 'Burger Pizza' used plant-based meat alternative, Beyond Meat, in its toppings. Such cases raise questions under the Fair Trading Act 1986,



1 *New Zealand National Party v Eight Mile Style, LLC* [2018] NZCA 596.

2 *Mainzeal Property and Construction Ltd (in liq) v Yan* [2019] NZHC 1637.

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which prohibits 'misleading or deceptive conduct' in trade.

The success of overseas movements may have ramifications for local producers of plant-based products wanting to export their goods. It may also influence our government to toughen its stance on the labelling of plant-based products. ■

New regulations impose licensing regime for insolvency practitioners

The Insolvency Practitioners Regulation Act 2019 and the Insolvency Practitioners Regulation (Amendments) Act 2019 were passed in June and introduce new regulations and duties for insolvency practitioners to come into force in stages over the next year.

The Regulations will require all practitioners to obtain a licence and meet minimum standards as set out by the Registrar of Companies. Those who are already accredited under CAANZ or RITANZ will be provisionally considered 'Licensed Practitioners' when the licensing regime comes into force by June 2020. All practitioners

will then have until October 2020 to apply for a licence from an accredited body.

If a practitioner accepts an appointment as liquidator for an insolvent company, but does not have a licence, they will be committing an offence and could be liable for a fine of up to \$75,000. Additionally, if practitioners do not report serious problems about an insolvent company, including offences committed by shareholders, directors and the company itself, the practitioner could be liable for a fine of up to \$10,000.

The Regulations also disqualify directors, creditors, auditors and/or receivers of the insolvent company (or a related company) from being appointed as its liquidator. An exception applies where a practitioner has only provided professional services to a company regarding solvency.

These are just some of the changes that the Regulations are designed to make over the next year in an attempt to improve regulation of the industry. Practitioners have limited time to get up to speed with the changes to comply with the new regime. ■

