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NEWSLETTER

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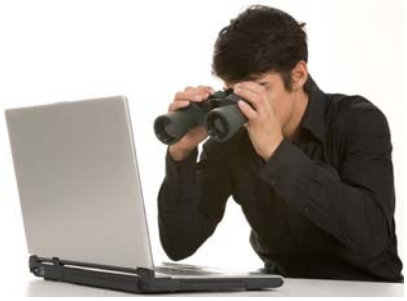
INSIDE THIS EDITION

BIG BROTHER IS WATCHING – INTELLIGENCE DEVELOPMENTS

The Dotcom saga has shone a light on the operation of our Government Communications Security Bureau ('GCSB'), and the law that governs it. Proposed changes in the Government Communications Security Bureau and Related Legislation Amendment Bill ('the Amendment Bill') illustrate the complicated balance between the protection of individual rights, and the need for New Zealand's intelligence operation to evolve in light of the changing international and domestic security environment.

The Government Communications Security Bureau Act 2003 (GCSB Act 2003) established the GCSB's three primary functions:

- Information assurance and cyber security,
- Foreign intelligence, and
- Co-operation with and assistance to other entities.



These three core functions are to remain at the heart of the GCSB's operation under the Amendment Bill, but with some substantial tweaking.

This tweaking involves responses to some of the elements of contention in the Dotcom saga – the GCSB's collaboration with the New Zealand Police, and the fact that Dotcom's status as a permanent resident meant he should not have had his communications intercepted, as New Zealanders are protected from such intelligence gathering under the GCSB Act 2003. Recent developments have seen some of the initial proposals amended, at the request of United Future Party leader Hon. Peter Dunne. As a result of these changes, Mr Dunne now supports the Amendment Bill, and it appears to have the single vote-majority required for it to pass into

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legislation. Key proposed changes include:

- The granting of clear legal authority to the GCSB to assist the NZ Defence Force, NZ Police and the NZSIS - and the power to enact specific legislation to add any other agencies to this list, and
- Provision for monitoring of New Zealanders – a New Zealander's communications could be gathered should they relate to any of these GCSB functions:
  - Information assurance,
  - Cyber security, or
  - GCSB cooperation with any of the other entities listed above.

The Amendment Bill also includes changes that would place checks on the extension of the GCSB's powers:

- Independent review of the GCSB would be carried out in 2015, followed by a new review every five to seven years,
- Any application for a warrant for the interception of communication of private New Zealand citizens or residents would need to be determined by both the Minister responsible for the GCSB (traditionally the Prime Minister) and the Commissioner of Security Warrants. Furthermore, the Inspector-General of Intelligence and Security (IGIS) would have to be informed when a warrant relating to a New Zealander is put on the register of warrants,
- When the GCSB is involved in the assistance of another entity, it would be constrained by the legal framework under which the other entity operates, and
- The Inspector-General of Intelligence and Security (IGIS) would be granted greater powers in terms of examination and reporting on the operation of our intelligence agencies.

While the Amendment Bill has seen a considerable amount of public opposition, the Government now has the majority it requires for it to pass. The question to be answered is whether the Government will make further changes to it, in order to secure a larger majority of Parliament's vote.

GOING INTO BUSINESS - AN OVERVIEW OF WHY YOU NEED A SHAREHOLDERS' AGREEMENT

A Shareholders' Agreement is a contract between the shareholders of a company. While it is not compulsory, a Shareholders' Agreement is good way to provide some certainty in a business relationship, and can be as detailed or as simple as you would like. Without one, you risk a dispute at some point down the track when each shareholder has a different idea of who can do what, when they can do it and how it is done. Like a pre-nuptial agreement – you do not really need one, until you need one (at which time it is too late). Shareholders' Agreements are also popular because unlike a Constitution, they are not registered with the Companies Office, so they are not publicly available.

Typically a Shareholders' Agreement is signed at the outset of a business arrangement, but it is never too late - they can be entered into at any time with the agreement of the shareholders. It will usually record (amongst other things):

- the nature of the business,
- how it will be run,
- decision making mechanisms,
- how many directors there will be and how they are appointed,
- the role, rights and responsibilities each shareholder has,
- how capital contributions or financing will be arranged & secured, and
- exit strategy - what happens if one shareholder wants to sell (or if some other change or event affects a shareholder).

ARE YOU COMPATIBLE WITH THE OTHER SHAREHOLDERS?

Perhaps the most important role of a Shareholders' Agreement is to ensure the parties are on the same page from the outset. When preparing the agreement the parties will need to consider how the business will operate. Can you agree on the role each party will have, who will provide security for company finance or what should happen if one party does not meet their obligations? If you cannot agree now, you will find it hard to agree later.

WHAT ARE MY SHARES WORTH?

The Companies Act does not prescribe how shares should be valued if one party wants out, and it is not always as simple as you may think. It can be notoriously hard to agree on a timeframe, process, and the value of the shares when one party is exiting the company. Many Shareholders' Agreements will record the agreed process for when one party wants to sell their shares, reducing uncertainty and the risk of dispute.

HOW MUCH CONTROL WILL EACH PARTY HAVE?

Shareholders own the company, while the directors manage the company. A Shareholders' Agreement can record who can appoint directors, and what decisions the directors can make without reference to the shareholders. You might agree for example that some decisions need the approval of all shareholders, while others need a majority of shareholders, or can be made unilaterally by just one director.

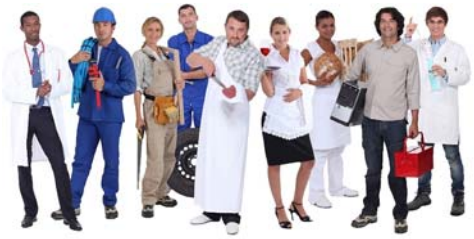
REMOVING A SHAREHOLDER / DIRECTOR

Your Shareholders' Agreement might record different circumstances in which a shareholder or director can be removed. For example, if a shareholder or director has breached an essential term of the Shareholders' Agreement, acted dishonestly or in a way that is detrimental to the business, they can be removed. This can be easier than relying on the provisions of the Companies Act, which can be limited.

THE EMPLOYMENT RELATIONS AMENDMENT BILL – AN OVERVIEW

On 26 April 2013, the National Government introduced amendments to New Zealand employment legislation by introduction of the Employment Relations Amendment Bill ('the Bill'). The changes generally follow those which National campaigned on before its re-election in 2011, with the notable inclusion of amendments to Employment Relations Authority ('the Authority') processes.

There are numerous proposed amendments in the Bill, some of which are outlined below.



TIMEFRAMES FOR AUTHORITY DETERMINATIONS

The Bill proposes to provide clearer guidance to the Authority, to give certainty and to speed up delivery of its determinations. The Bill provides that at the conclusion of a hearing, an oral determination will be required of the relevant Authority member, including the member's preliminary findings. A written record of the determination is to be provided within three months of the hearing, except in exceptional circumstances.

This change is presented as an opportunity for parties to consider their respective positions at the conclusion of a hearing, including whether or not the best solution to an issue would be for the parties to settle it amongst themselves.

REST AND MEAL BREAKS

At present, the Employment Relations Act 2000 ('ERA') outlines rigid guidelines for employers with regard to employees' rest and meal breaks. Depending on the nature and operation of a business, this can pose difficulties, as the current prescribed law may be impractical for some industries or businesses.

In an attempt to provide employers greater flexibility, the Bill would allow an employer to place restrictions on an employee's breaks where it is reasonable and necessary with regard to the nature of an employee's work, in return for reasonable employee compensation. For example, it is inconvenient for air traffic controllers to take regular breaks given the constant arrivals and departures of aircraft while they are on duty. Under the Bill, their breaks could be reduced, with compensation such as additional paid leave.

CHANGES TO PART 6A OF THE ERA

Part 6A of the ERA is aimed at protecting vulnerable employees such as workers in the cleaning and food catering sectors, by imposing additional obligations on their employers. These obligations can at times be costly and unclear. The Bill outlines amendments that seek to provide clarity and to alter the obligations of the employers when Part 6A of the ERA is applicable.

Currently, where a business is being restructured, vulnerable employees may elect to transfer to a new employer. Under the Bill an employee would need to notify the outgoing employer within five working days of their desire to transfer to the new employer.

The process at present for incoming and outgoing employers with regard to accrued employment entitlements is not clear. The Bill recognises the need for negotiation between the outgoing and incoming employer as to who pays what. There is also the inclusion of practical requirements for the provision of information on transferring employees, such as records regarding wages and holidays.

A key component of the Part 6A amendments is the proposed exemption for small businesses from some aspects of Part 6A – significantly, businesses employing 19 or fewer employees will not be required to employ employees affected by the restructuring, eliminating those employees' current right to elect to transfer.

The submissions on the Bill have displayed a diverse range of reactions to its proposals, and the Select Committee report, due by 5 December 2013, will be keenly anticipated.

ESTATE PLANNING – RESIDENTIAL CARE LOANS

One of the most vexing questions that we face as we get older is how we will provide for ourselves into our retirement. This necessarily includes planning to ensure that we have sufficient funds to meet our costs in the event that we are placed into long-term residential care or a rest home. In order to determine how much we will have to contribute to the costs of long term residential care, we need to be aware of the maximum asset threshold, above which we will no longer be eligible for a residential care subsidy ('the Subsidy').

THE SUBSIDY

The threshold is reassessed on 1 July each year. From 1 July 2013 the threshold has been set at $215,132 for single people or for couples who are both in residential care. For a couple where only one of whom is in residential care the threshold is $117,811, when the value of the home and car is excluded, or where combined total assets exceeds $215,132. Couples can only elect to have their assets excluded from the assessment where it is the principal residence of either a dependent child or the spouse or partner, who is not in residential care.

In assessing the eligibility for the Subsidy, Work and Income New Zealand ('WINZ') may include in your assets any gifts that you have made of more than $6,000 per annum over the preceding five years. WINZ may also include in your assets any one off gifts of over $27,000 per couple made prior to the five year period immediately preceding the application being made.

For those people who have assets above the maximum threshold and accordingly do not qualify for the Subsidy, WINZ offer a residential care loan scheme ('the Loan').

THE LOAN

The Loan is interest free and secured by a caveat registered over the borrower's home. This caveat prevents the property being sold until the debt owed to WINZ has been repaid in full.

You can apply for a reassessment of your eligibility for the Subsidy when your assets have decreased below that maximum threshold for the Subsidy.

The Loan can be drawn down at the rate of the maximum contribution towards residential care costs. From 1 July 2013 the maximum contribution ranges from $819 to $900 per week depending on where you reside. This equates to between $42,588 and $46,800 for each 12 month period spent in residential care, while you remain ineligible for the Subsidy.

The Loan has to be repaid either within six months of the death of the borrower or when the home is sold, whichever comes first.

Given the modest threshold above which a person is not eligible for the Subsidy and the high weekly costs of the maximum contribution it is imperative that planning for retirement and asset protection begins as early as possible.

SNIPPETS

IS YOUR WILL VALID? DON'T GET CAUGHT OUT

The Wills Act 2007 sets out what you need to do to make a valid Will. The requirements are not complicated, but they are strict. Amongst other things, your Will must be dated, and be signed by the will-maker in the presence of two witnesses, who must also sign the Will. Each party must initial each page. Your witnesses must not benefit from the Will.

What many people do not realise is that a perfectly valid Will is rendered invalid if you get married or enter into a civil union, unless the Will specifically states that it is made in contemplation of that marriage or civil union (Section 16, Wills Act 2007). Similarly, if a Will is made during a marriage or civil union and then the relationship is legally dissolved, some parts of your Will may then be invalid (Section19, Wills Act 2007).

ROYAL PARDON

In New Zealand, a person who has been convicted of a crime and used all of their rights of appeal has one last avenue of relief. The Royal Prerogative of Mercy ('RPM') is considered an important constitutional safeguard in the criminal justice system that allows the Governor-General as the representative of the Queen to grant a royal pardon, reduce a sentence, or refer a case back to the courts for reconsideration.

While applications reported in the media are for serious crimes such as Scott Watson's murder conviction, the avenue is not limited to such serious convictions.

The RPM is aimed at preventing miscarriages of justice, particularly when all appeals are exhausted. A key requirement when applying for a Royal Pardon (or other act of mercy) is that there is some new information or evidence that has not been before the courts and is significant enough to raise serious doubts about a conviction or sentence.

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