

## “KiwiSaver

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## Trans Tasman Superannuation Portability

It is envisaged the new arrangements will take effect in the second half of next year.

Key facts about the Super portability changes

- The transfer of retirement savings between the two countries will be exempt from entry and exit taxes. Under current tax laws, transferring savings from Australia to New Zealand may be regarded as a taxable dividend.
- KiwiSaver members moving from New Zealand to Australia will be able to retain any member tax credits if they transfer to an Australian scheme.

- KiwiSaver members will not be able to withdraw money transferred from Australia to help them buy their first home, but they can use the interest earned on those savings for this purpose.
- Retirement savings transferred from Australia into a New Zealand KiwiSaver scheme can be withdrawn when members reach the age of 60 as long as they have retired - as set out under Australian scheme rules. KiwiSaver savings transferred to Australian schemes can be withdrawn when members reach 65 - as set out in New Zealand KiwiSaver rules.

## British Shops To Stop Taking Cheques

Another nail in the coffin of the cheque. They will not be accepted in British shops from 30 June 2011. Britain's 40-year old cheque guarantee card scheme ends then and retailers will refuse payments. Guaranteed cheque use

in Britain has fallen 70% in five years. Surely the trend will eventually reach New Zealand. Electronic transactions are already cheaper than cheques.

## Tougher Rules For Directors

Recent judgement in Australia provides important guidelines on the scope and content of the duties of executive officers and directors. Non executive Directors of the building products company were disqualified for five years from managing a company and were fined \$A30,000 each. Because non-executive directors have rarely been charged with failing to do their jobs properly, this case breaks new ground by tying non-executive directors to misleading and deceptive conduct by management almost as tightly as it ties the executive managers. The judge rejected arguments that the Directors were entitled to rely on recommendations made to them by company executives, and expert reports provided to them.

So from now on when a Director knows or shouldn't know that something is wrong, and doesn't act on that, they are culpable. Directors were in the US on the day of the fatal board meeting, they were nevertheless charged because they did not expressly abstain.

While Directors are permitted to delegate to others the day-to-day management of the company, they are expected to take a diligent and intelligent interest in information presented to them relating to strategic company decisions and the disclosure of market sensitive information.

Directors are expected to exercise independent-judgement in considering those matters are not entitled to rely on solely on the recommendations made by company executives or other officers of the company.

“We wish

our clients,

colleagues

and friends

a Merry

Christmas and

a Happy New

Year!”



## Trusts - Economic Times and Challenges to Trustees

The current economic environment and recent trust law developments bring fresh challenges to the use of trusts. Decisions made by trustees and administrators are being closely scrutinised more than before. Trustees must have integrity in the real world and minimise the chance of being considered a 'sham'.

The tone of the Courts at present is that someone will be held accountable as an individual. The following 'Do's and Don'ts' identify some of the ways to mitigate risks for trust administrators, trustees, trust beneficiaries and creditors. More and more solicitors are saying they see growing litigation ahead from beneficiaries.

• Settlers must dispose of assets to the trustees. If the settlor/s still has control over the trust then you probably don't have a trust.

• Ideally, the majority of trustees should be independent - people who aren't beneficiaries. There are valid reasons why settlers remain as trustees (e.g. family knowledge) but they must only remain as advisory trustees and there must be evidence of fiduciary control - that the settlers have relinquished control of the trust.

• The Courts, if asked to decide, will use Public Trust and Guardian Trust as independent trustees. This is the standard they set.

• A trust must have a bank account with the initial trust settlement paid into it. Without the initial settlement gift there may be no trust.

• Wills should distribute directly to a trust. Set this up now, no matter how young you are.

• The trust deed is pivotal in spelling out how the trust should operate. Some current deeds tend to be too informal.

• Clauses saying debts cannot be called up within a certain amount of time don't work. These cannot be considered to be arms length transactions.

- When transferring assets into a trust, inform interested parties. This can save you from creditors using the grounds of secrecy in the future. Don't rely on what the settlor/s tells you - investigate!
- Make sure the Trust Deed has clauses limiting the liability of trustees to the assets of the trust.

• Don't leave money in a trading trust if it is not needed, distribute it to the beneficiaries. Distributions made when solvent cannot be challenged, those made when insolvent, can be.

• Make sure trusts you may distribute to have different trustees from the 'head' trust. The Courts are looking for knowledge, i.e. if you knowingly use trust funds for a purpose this is unlawful under the trust deed.

• Ensure the wording of minutes is correct. Check the trust deed. Do decisions have to be in writing? Do they have to be signed by all trustees?

• If investing, trustees must be able to explain why an investment portfolio was decided upon.

• If, as a trustee, you use an advisor, you must constantly monitor the advisor. Doing nothing is a recipe for being sued.

• Valuation of assets going into a trust must be at arms length. Property relationship rules only apply to a 50/50 split, otherwise gift duty needs to be considered. Tax consequences (which rest with the final owner) need to be taken into account when valuing assets for property relationship splits.

• Don't bother trying to challenge the new associated party tax rules and property investment. Hold investment properties in a separate entity from trading properties and ensure the investment properties are kept for at least 10 years from the date of acquisition or date of work when of more of a minor nature.

## Credit Card Fees

Under new rules, retailers will for the first time have the right to charge customers a surcharge for using a credit card. Banks will also have to be more transparent about the fees they charge retailers. The Commerce Commission says its created a market where none existed before.

## One Who Couldn't Hide!

Inland Revenue recently came into information that a taxpayer had a credit card in a tax haven that New Zealand does not have an information exchange agreement with. Unsurprisingly, Inland Revenue required the taxpayer to explain

much more transparent about the fees they charge retailers. The Commerce Commission says its created a market where none existed before.

details of the card and all transactions made with the card. When a client asks - "how will they find out"? The answer must be - "who knows - but the odds are they will!"

## 10 Things You Need To Know About Carbon

"Your company needs to beat competitors in two areas: reducing exposure to climate-related risks and finding business opportunities within those risks" - Harvard Business Review, Jonathan Lash and Fred Wellington

### 1. Carbon is complicated

Carbon is going to have a big impact on your business and that means you are going to need some simple answers to navigate the new, complex minefield.

### 2. It is all about energy

Whatever you do, one equation is true: the more energy you use, the more carbon you emit and creating carbon is about to start costing you money; no matter how big your business. Energy is not just your electricity; it is embedded in all the goods and services you use.

### 3. Emissions trading is inevitable

For the first time, big energy users will be required to pay for their pollution, so there are two options: reduce your energy usage or have increased costs.

### 4. Be smart

By reducing your energy emissions now, you can say you did it voluntarily for the greater good and increase your brand reputation.

### 5. For SMEs, it is all about supply chain

If you want to do business with the top end of town, environmental credentials are a must have because when a big business wants to build environmentalism into their brand they will choose to deal with companies who share their values.

### 6. Government care about supply chain too

There is a trend that eco-friendly, sustainable businesses are becoming the preferred supplier to

central and local governments.

### 7. First movers will gain a strategic advantage

A few years ago, Westpac in Australia created a TV advert claiming the position of Australia's most environmentally friendly bank. A few years on and its competitors have matched if not exceeded Westpac's credentials, but Westpac owns the reputation because they were first. The same will happen in your business space.

### 8. Carbon is a saving not a cost

Some say that emissions trading causes energy prices to go up, so reducing your energy usage and emissions will save you money.

### 9. Returns can be immediate

Reducing your energy usage and emissions may require an investment, but the benefits are immediate as your costs are reduced. This is as well as avoiding the additional costs that would have been incurred when emissions trading is introduced.

### 10. Doing nothing will cost more than doing something

At the moment, dealing with your carbon is cheap, as time goes on this will change. Carbon trading will make a lot of companies scramble to reduce their energy usage and emissions in a short space of time and, as with anything, when demand is high the price is driven up.



## Giving Personal Guarantees

With thanks to Michael Burrows, Burrows and Company, Barristers and Solicitors

In recent months, and in response to the global economic situation, we have noticed a marked increase in the number of requests for personal guarantees as a means of securing both personal and business lending. The current economic conditions have also meant an increase in guarantees being called up, where the principal debtor (often a company over which the guarantor has a measure of control) is unable to fulfil its obligations in respect of the debt.

### What is a Guarantee?

A guarantee is an enforceable promise to pay a creditor if the principal debtor fails to do so in accordance with its obligations. Guarantees generally impose on the guarantor the same obligations in respect of the debt as the principal debtor has assumed.

Guarantees can be limited to a certain maximum amount, and if this is the case the documents will say so. However, it is common for guarantors to be asked to sign an "all obligations" guarantee, which means that there is no upper limit to the sums that can be claimed from the guarantor. This can be convenient for borrowers if further lending is likely to be required, as the lending can be increased without executing new guarantees. However, in some cases, this approach can lead to greater obligations being imposed than were anticipated by the guarantor. This is especially so where the guarantor does not have a very close relationship, with or a significant level of control over the principal debtor.

### Does a Guarantee have to be in a Specific Form?

Guarantees are required to be in writing and must be signed by the guarantor in order to be enforceable against the guarantor. If the promise to pay is not in writing, it is likely to be an indemnity rather than a guarantee, the obligations of which are potentially wider but perhaps more difficult to enforce where not recorded in writing.

Under the Credit Contracts and Consumer Finance Act 2003, certain disclosure is also required to be made to the guarantor upon signing a guarantee. Essentially, this involves the disclosure of the primary lending documentation as between the principal debtor and the creditor and of the guarantee documentation.

### Should I Give a Guarantee?

Guarantees are a necessary means of securing debt in some cases or of securing significant levels of debt (often in addition to the giving of a mortgage). To that extent, it will often be

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necessary for guarantees to be given in order to secure the type or level of lending that is sought.

However, there are some circumstances in which it would be unwise to give a guarantee. Guarantees effectively break down any barriers that may have been erected between an individual and their liabilities assumed through companies or trusts. It therefore needs to be assessed whether the giving of guarantees will have a particular unintended effect in your specific case.

In short, you should always obtain legal advice before signing a guarantee and it is likely that the lender will insist upon this.

### Limiting the Risks

As noted above, a common situation in which personal guarantees will be sought is in securing lending to a company. In this case, the lender will often request personal guarantees from all directors.

In small companies with one or two directors, the risks associated with giving a personal guarantee can be limited by the actions of the director in controlling the debts of the company and managing the level of debt that the company takes on. This situation also limits the chance for debt to be increased without the knowledge of the director, or for the guarantee to be called up without advance warning.

Another common situation in which guarantees are sought is from trustees of a trust where the trust is the principal debtor. In this case, the lender will generally agree to a limitation of the guarantees sought in the case of independent trustees, but not for trustees who are also beneficiaries.

### Discharging a Guarantee

A very common misconception is that a guarantee is automatically discharged upon the repayment of the principal debt. This is incorrect. A guarantee generally relates to the debts of a particular debtor not of a particular debt. This means that if some time in the future that debtor takes on new lending with the same creditor, the guarantor could be held liable for repayment of the new debt. This is not widely appreciated by guarantors and can have some unexpected consequences many years down the track.

If you wish to have your guarantee discharged, it is critical that you obtain the consent of the creditor in writing to the discharge of your obligations. The form of the consent is often important in cases where the creditor does seek to call up an old guarantee, and it is wise to obtain legal input on the form of discharge sought to ensure that your expectations are met.