



Welcome to the spring edition of *Commercial eSpeaking*. We have articles for you covering a wide range of business issues; we hope you find them interesting and useful.

To find out more on any of the topics covered in this e-newsletter, please contact us – our details are above.



FATCA

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When the court makes a decision that an individual or business is owed a debt, it issues a judgment order telling the debtor that they must pay the creditor. However, often creditors are left wondering what happens if the debtor doesn't pay. Find out how the court can assist you in recovering an undisputed civil debt.

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FATCA came into effect in New Zealand on 1 July 2014 – with little fanfare at the time. From 1 April 2017, however, the compliance obligations of the FATCA

regime are now live. The FATCA regime classifies all entities (companies, trusts, associations and partnerships) as either a 'financial institution', an 'active non-financial foreign entity' (active NFFE) or a 'passive non-financial foreign entity' (passive NFFE).

The reason for FATCA

The ultimate goal of the FATCA regime is to find US offshore persons or entities who have been avoiding their US tax obligations. This is done by gathering information on any US persons or entities

controlled by US persons holding accounts outside of the US.

A 'US controlling person' is someone who exercises control of an entity. Potentially it includes a settlor or protector of a trust, a trustee, a beneficiary of a trust, and a director or shareholder of a company.

Criteria for FATCA

It's important that any entity in New Zealand determines whether it is a financial institution, an active NFFE or a passive NFFE under the FATCA regime. If the entity is determined to be a financial institution it must register with the US

Inland Revenue Service (IRS) and complete reporting obligations. Both types of NFFEs may also have reporting obligations.

The criteria for classifying an entity under the FATCA regime are complex and some entities (such as family trusts with a portfolio managed by a sharebroker) could find they are unexpectedly treated as financial institutions.

A financial institution is required to complete due diligence on any accounts maintained by them to ascertain whether the account holder shows any 'US indicia.' US indicia includes US citizenship or residency, a US mailing address or

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How to Recover Undisputed Debts



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Collecting civil debt

The process of collecting civil debt if the debtor doesn't pay is called 'civil enforcement'. A creditor can only initiate civil enforcement where a court or tribunal has ordered a debtor to pay a civil debt. The court doesn't enforce judgment orders automatically; a creditor must select the appropriate enforcement actions and manage the process independently, or with the assistance of a lawyer. When you make an enforcement application, you can claim interest on civil debt that's more than \$3,000. If your order is more than six years old, you may need the court's approval before taking enforcement action.

You must know a debtor's correct address before the court can take some enforcement actions on your behalf. If you don't have the debtor's address, you can:

- » Try to find the address yourself
- » Make a confidential address information request with the Ministry of Justice, or
- » Enquire with a government agency under the Official Information Act 1982.

Enforcement process

There are a number of ways that the court can help you to enforce a civil debt. These include:

- » *Assess the debtor's finances on paper:* a financial statement for the debtor can be completed by you or by the debtor, if you have sufficient information about the debtor. This can be useful if the debtor doesn't have a phone, English is not their first language or they cannot attend a hearing
- » *Assess the debtor's finances over the phone:* if you have the debtor's telephone number, you can apply for a registrar to telephone the debtor to ascertain their ability to pay. This can be useful if you don't have the debtor's address, you don't want to

Business Briefs

Employment (Pay Equity and Equal Pay) Bill – What could this mean for your business and your employees?

Business owners and employers should be aware that there is new employment legislation on the horizon.

The Employment (Pay Equity and Equal Pay) Bill is now in the Select Committee stage. If the Bill is passed into law in its current form, it will replace the Equal Pay Act 1972 and amend the Employment Relations Act 2000. The Bill provides a process and principles to assess and resolve pay equity claims.

The Bill focuses on work which has historically been performed by women and whether, in the circumstances, there are reasonable grounds to believe that the work has been undervalued.

If one of your employees makes a pay equity claim the Bill requires you to consider whether the claim has merit. The following applies:

- » Where the claim has merit, the parties will enter into a prescribed bargaining process to assess the nature of, and remuneration for, the work in a gender neutral manner

- » Where you as their employer don't accept that the claim has merit you must notify your employee in writing with your reasons, and
- » Where resolution can't be reached, the dispute resolution provisions in the Employment Relations Act 2000 apply.

Given the uncertainties relating to the upcoming general election, we anticipate that if the Bill (in some form) is going to be passed into law, it will be a number of months away. We will keep you posted. ■

Contract and Commercial Law Act 2017 now in force – Make sure your business documents comply

Most businesses use standard form documents such as terms of trade, or terms and conditions, in their daily operations. These documents often contain clauses relating to one or more of the 11 statutes which have been replaced by the Contracts and Commercial Law Act 2017. This Act came into force on 1 September 2017.

This new legislation doesn't alter the law on contracts and commercial dealings, but it combines a number of statutes which deal with – amongst other things – the

sale and carriage of goods, contracts, and electronic transactions.

Make sure your standard form documents are reviewed to ensure that they align with the new Act. If you would like us to review your business documentation to ensure it's up-to-date, please be in touch. ■

Security cameras – When does surveillance become an invasion of privacy?

The use of closed circuit television (CCTV) and/or security cameras are useful security tools for businesses to deter unwanted behaviour and identify wrongdoers. When you're deciding whether to install and use CCTV and/or security cameras to protect your business, you must be aware of your obligations under the Privacy Act 1993.

The Act contains 12 privacy principles around the collection, use and disclosure of personal information. Personal information must be collected and used for lawful purposes, and usually can't be disclosed to third parties without that person's consent. To find out more about the 12 privacy principles, go [here](#).

To comply with these privacy principles you must make sure that your employees and members of the public are aware that



CCTV and/or security cameras are operating, who owns/operates them, why they are operating and the purpose the information has been collected for. You can do this by displaying signage which can be easily seen before people enter the filmed area.

You must have a clearly defined reason for collecting personal information and only collect information for that purpose. CCTV and/or security cameras must not be operated in a manner that is unlawful, unfair or unreasonably intrusive.

Signage may not prevent individuals from complaining to the Privacy Commissioner if they feel their rights under the Act have been breached. However, if you're looking to install CCTV and/or security cameras around your business premises, it will go some way to ensuring you have taken reasonable steps to comply with the Act. ■

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telephone number and any instructions to forward funds to a US account.

The financial institution is then required to report accounts showing US indicia to the New Zealand IRD which will, in turn, report to the IRS. There are penalties (including a fine of up to \$50,000) if a financial institution does not comply with its FATCA reporting obligations.

Even active NFFEs may have FATCA obligations enforced on them. For example, most law firms with a trust account will elect to be active NFFEs and they will now be required to obtain certificates from any individual or entity placing funds on interest bearing deposit. The certificates require the person or entity to advise whether the person or someone with 'control' of the entity, ie: trustees, directors, shareholders, settlors of trusts and so on, is a US citizen or resident. This data will then be provided to the law firm's bank (being a financial institution) that will, in turn, advise our Inland Revenue of any customers showing US indicia.

GATCA sign-up for New Zealand

New Zealand has also signed up to a global tax reporting system (or GATCA) with

101 other countries. The first exchanges of information under that regime are expected to take place in late 2018.

Interestingly, while the USA has forced many countries to sign up to the FATCA regime due to the potential penalties if a country does not implement the regime, it has not yet signed up to the GATCA regime. This means that while New Zealand must provide information to the US, to date, the US has not agreed to collect and provide that same data back to New Zealand authorities.

Tax evasion has become unpopular globally. New Zealand entities have obligations to report to the US and, in the near future, will be required to report to many other countries.

For now, it's important all entities take steps to determine their status under the FATCA regime and what reporting obligations they may have. In the near future, those reporting obligations will extend to many more countries than the US.

If you're unsure how to deal with the FATCA regime and/or how to fulfil your obligations, please contact us for some help. ■

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How to Recover Undisputed Debts

attend a hearing or the debtor has not completed a financial statement, or

- » *Summon the debtor to a financial assessment hearing:* if you have an address for the debtor, you can apply for a hearing to ascertain the debtor's financial situation. You can serve a summons to the hearing on the debtor, or request a court-appointed bailiff to do so. If service is unable to be completed, you must provide a new address for the debtor. Where service is completed, but the debtor fails to attend the hearing, a warrant for the debtor's arrest may be issued.

Enforcement actions

You can make multiple applications to enforce civil debt:

- » If you know who pays the debtor (salary, wages or benefit), you can apply for an attachment order, which tells an employer or Work and Income to transfer money from the debtor's wages or benefit to you. This arrangement can be set up either at a hearing if the parties agree, or after the judgment order has been made
- » For a debtor who has valuable assets, you can apply to the court for a warrant to seize property. You must provide

evidence that the debtor owns the property

- » If someone else owes the debtor money, you can apply to the court for garnishee proceedings to have that money paid to you instead, and/or
- » For a debtor that owns property, you can apply for a charging order to make it difficult for them to sell that property until the debt is paid.

Fees

There are fees associated with civil enforcement. You can, however, add the cost of fees to the amount owed by the debtor to be recovered when the debt is paid. A list of current fees can be found [here](#).

Forms

You must complete an application form for each debtor. A list of civil enforcement forms can be found [here](#).

The process of enforcing civil debt can be time-consuming, and a debtor can throw up many roadblocks to prevent you from getting your money. If you're having problems recovering a debt, we're happy to guide you. ■