



Estate and Taxation Planning Council New Zealand Inc

19 May 2004

Dear Member

This is the second Estate and Tax Planning Council Newsletter for the year. Your Executive have set dates for the next two breakfast seminars, the AGM, and the Christmas function (with the venue already booked!) so please put these dates in your diaries and give us your support. Your Executive meet on the second Wednesday of each month and we welcome input and feedback from our members. Indeed, if you have any material or articles for this Newsletter, or any matters that you would like discussed, please do contact us.

Rule 13 of our Constitution gives your Executive the ability to set up a "Division" of the Council to promote the aims and objectives of the Council in a more specifically local way than the Council itself can do. I am happy to report that Graeme Lindsay (ex President of the Council) is endeavouring to set up a Canterbury Division of the Council in Christchurch. They are expected to hold their first meeting in early June. We will keep you posted as to their progress.

Gary Morgan
President

Next Seminar

Our next breakfast seminar for 2004 is on the topic of " Divorce can seriously damage your clients wealth" with Barrister Geoff Harrison as our guest presenter.

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| Date | Wednesday 16 June |
| Time | 7.15am for a 7.30am start |
| Venue | Romfords, Tamaki Drive, Mission Bay |

Geoff specialises in Family Law and is regular contributor and presenter for the New Zealand Law Society on issues relating to divorce and relationship property. Please put this date in your diaries, further details of his presentation will be e-mailed to you next week.

Council Web Page

The Council set up it's own web page about three years ago with the aim of improving communications with members. As with all web pages, this is an ongoing project. We are happy to announce that the web page is currently being re-designed to make it easier to follow and more attractive to visit, whilst at the same time being more cost effective to administer.

As I'm sure you know, we currently have a password protected membership list available on the current site, but to date only six members have requested the password. Therefore your Executive is proposing to remove the password protection, and simply list the current membership on the new web site. However as this will be public domain, only the member's name and firm will be listed, no other details. If anybody has an objection to this change please contact Gary Fitzpatrick before May 26th at: <mailto:gfitzpatrick@nzqt.co.nz>

We plan to have the revised web page up and running before the end of May.

Last Seminar

In late March Phil Hobson from Marsh presented members of the Council with a seminar on the topic of "The liability implications of e-mail". Marsh is part of Marsh Inc., a subsidiary of Marsh McLennan Companies, and has been providing insurance and risk services in New Zealand since 1958.

Here are some of the points that Phil raised in his address.

- Email usage is to increase by 100% in the next 4 years – if you are already receiving 20+ emails per day your daily workload may prove impossible to manage.
- 1.2 billion email boxes will exist worldwide by 2005.
- In June 2001 79% of all NZ business used email. Some businesses continue to rely on fax, however those that do not use email now will at some stage need to be brought out of the "dark ages" due to the increasing reliance on email.
- One of the most common uses of email is for contact with business partners

Email used as a communication tool:

- Easy to use, but can cause confusion.
- Simple access: can now be done anywhere in the world, no longer restricted by the need for a phone jack, as it can be done via mobile and Bluetooth technology.
- Information sharing process is accelerated but conversely it kills the need to hold meetings, and breaks down physical contact communication.
- Collaboration of technology.
- Problems arise from receiving virus'

What is Identity Theft?

Identity theft is defined as the use of digital/electronic fraud and deception to obtain your personal information including bank account/credit card details and passwords. Such theft ranges from simple eftpos scams to more complex sham websites.

Those targeted are the technologically challenged. The Westpac sham here in NZ last year involved Chinese gangs. While their English was poor, including spelling and grammatical errors, they nonetheless managed to fool Westpac bank customers who identified the Bank's logo and believed they were doing as the bank had asked. In this instance the bank is unable to provide protection to its customers if they give their details to an identity thief.

Cost

The related cost of identity theft in the US alone is estimated at \$1.2 billion. There are 750,000 cases of theft each year. Not a week goes by where the news doesn't highlight new web scams somewhere in the world.

There is technology available to combat such scams, including digital certification. However, despite the vast sums of money invested in developing this technology and the relative low-cost to the consumer, the public has not picked up on such protective measures.

How to steal someone's identity

Phishing (pronounced fishing). Fraudster's masquerade as legitimate by using the proper company logos and email addresses. The email user is deceived into believing the fraudster they are dealing with is the authorised company.

Once they have access to your computer or passwords, if provided, they unlock your details and have free reign. It appears that the sums involved are not vast, but smaller unnoticeable amounts i.e. \$20. In most instances, due to the relatively small value of the sums involved, it is not cost-effective to track down the fraudsters. Only when vast sums are taken is it worth the time and effort to engage in the complex process of identification.

The Parties

Fraudsters include sophisticated gang involvement, fellow disgruntled employees, and third-world scamsters. This new type of theft involves no violence or pain but the gains are higher and the trail they leave harder to follow.

Implications

Identity theft is a means of acquiring and spreading malicious codes and private information.

Legal implications arising from identity theft include:

- Employer liability to employees (Privacy Act 1993 s6). As the employer you are expected to keep all employee details confidential.
- Confirming or instigating contract by electronic means retailers are being conned
- Consequential loss
- The speed of scams is accelerating, and is becoming even harder to detect.

Potential issues arising from Financial Transaction Reporting Act

There is no real case law in NZ relating to acting on instructions received by email. Issues arising are governed by the Electronic Transaction Act 2002, however it is difficult for general public to come to terms with it, as the bodies involved do not know the full impact or application at the moment. Very new area of law.

There are defined rules on dispatch of emails; receipt and electronic signatures.

The key principal is "functional equivalence" email has the same rules and regulations as a letter in that it is up to a recipient to prove that they did not receive the letter.

A current case in Australia involves an accountant's computer filtering system, which cut out important information received by a client who was requesting advice. The advice was prepared on the information received by the accountant (i.e. the truncated version). The client relied on the accountant's advice and subsequently suffered losses. The fault lies with the accountant and their filtering system as the client sent the correct information in the first instance.

Issues will arise in the future where losses are suffered as instructions are sent by email but not received or responded to (as the professional handling the matter may not have checked their email). If you are not able to read all emails each day forward them to someone who has the ability to receive the emails and respond

ADIS Guidelines State:

- Minimum content suggestion.
- Use of confidentiality warning - might work but are still no guarantee.
- Private email use from company email address will have the company string attached.
- Continue to receive instructions by way of email but treat the email in the same way you would a letter.

Apply conditions to email use/Risk management:

- End personal use of emails from company addresses – link this condition in the employment contract.
- Confirm email instructions by telephone.
- Apply checks and balances used with new clients as you would if receiving instructions by fax, letter or other form.
- Develop a firm rule regarding undertakings.
- When attaching documents - use embedded Adobe "PDF" documents and ensure that the words "draft only" are included on the document before it is made into a PDF. Sending instructions by word documents, which can be easily changed is not smart. It is no longer difficult to convert word documents to PDF, and should be done every time.
- When receiving attachments send out an email requesting information on the content of the attachment.

Phil cannot see us roll back email technology and abandon its use altogether. He says email is an acceptable means of business communication and will remain as an easy, fast and effective communicative tool. Email users will simply need to implement stringent rules and management techniques.

Malicious code regularly infects a network through email

A larger issue related to the relative ease of access to business computer networks via e-mail is attacks by hackers, or via a distributed denial of service. This may result in downtime and website and network unavailability. At stake is lost income; business relationship or contractual obligations, damaged reputation with customers. There will also be the extra expense and time involved in removing the virus from computer equipment.

Avoiding this potential service disruption again comes down to risk management, and putting in place acceptable user protocol relating to how to use email, and to establish effective protective programmes and technology (i.e. digital certification) on business computers.

Managing the threat created by e-mail will continue to be a crucial business issue in the future and it is vital that we are all aware of the risks. Given the complexity of the issue, professional advice may be helpful. Phil and the team at Marsh have specific expertise in this area, so feel free to contact him with questions.

Should you wish to contact Phil email him at: Phil.j.hobson@marsh.com

Or view the Marsh website <http://www.marsh.com>

MARSH

Feature Article – "Trading Trusts & Tax Avoidance" by Iain Craig

The final judgment in the dentist trading trust case (case W33 (2004) 21 NZTC 11,321) was recently released. In the decision Judge Barber was not prepared to reopen his conclusion in the interim decision in case V20 (2002) 20NZTC 10,233 that an arrangement existed which had tax avoidance as one of its purposes or effects. Consequently the only question to be addressed was whether the resulting tax avoidance (read tax savings) in the 1996 income year was more than merely incidental.

The facts of the case relate to a dentist who restructured his dental practice from a partnership with another dentist, into a trading trust with a corporate trustee in order to protect his business and assets from certain liabilities of his partner. Judge Barber accepts the restructure was predominantly for asset protection motives, but found that the restructure constituted an arrangement, which had tax avoidance as one of its purposes or effects.

In his interim decision (case V20) he held that in relation to the 1995 year, the quantum of the savings meant that the tax avoidance was "merely incidental" but requested further submissions in respect of the 1996-year.

The final decision follows those further submissions and he concludes that tax avoidance could not be merely incidental in the 1996 year as it was achieved by the setting of an artificially low salary of \$80,000 when \$120,000 would have been an appropriate market salary. He states that if the salary had been fixed at \$120,000 per annum, "all pretence or artifice would have been removed from the arrangement".

Importantly Judge Barber considers that it is not necessary to reconstruct the transaction to such an extent as to "annihilate" the new structure providing some endorsement that a trading trust can be an appropriate vehicle for operating a business.

The judgement also endorses the ability of a taxpayer to restructure their business affairs for commercial purposes and serves as a reminder that all dealings with associate parties in the trading trust structure should be on an arms length basis.

At the point of restructure, and for subsequent income years that follow care will be required to ensure any identifiable tax savings are merely incidental to the purpose or effect of that restructure.

Iain Craig is a Tax Partner with BDO Spicers and can be contacted on (09) 373-9612, or e-mail: iain.craig@akl.bdospicers.com

Our thanks go to Iain for providing this "Feature Article" for our Newsletter.

2004 Programme

The Executive has set out the following activities for this year, so please mark the following dates in your diaries.

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| 7 July | Annual General Meeting to be held at the offices of Simpson and Grierson around 5.30pm. |
| 25 August | Breakfast Seminar / Speaker |
| 17 November | Early evening Christmas Function at the Auckland Club, with a special guest speaker |