# Current Legal Issues in Finance/Investment Sector

## Reckless Trading

Reckless trading is the term afforded to directors' responsibility in trading while insolvent. This is a nightmare area for directors as their decisions are always viewed with the benefit of hindsight and it is often the case that hindsight will reveal insolvency and business risks which might not have been apparent at the time.

The Companies Act specifically legislates against reckless trading imposing personal liability for directors. The claim currently in the Courts against Jenny Shipley highlights the risks for directors. Ms Shipley was a director of failed Mainzeal. She is personally being sued for over $47m for losses suffered by creditors allegedly as a result of decisions by directors of Mainzeal to continue to trade whilst the company was insolvent.

Putting Mainzeal aside, many directors will feel their responsibility for the company demands that they carry on and explore all avenues to trade out of insolvency. That is precarious to say the least. Another who is being sued along these lines is the Queenstown Mayor Jim Boult who had been a director of Stonewood Homes, indeed I could give you a long list. Beware.

## Takeovers Act

Under current law, a company is subject to the Takeovers Act if it has 50 or more shareholders and 50 or more share parcels. This is to change (assuming the present Bill to do so is passed) to include an additional requirement, namely that the company also be "medium sized". A company will be "medium sized" if it has total assets of at least $30m or total revenue of at least $15m for the most recently completed accounting period of the company and its subsidiaries.

## Tax Working Group – Capital Gains Tax

The TWG has issued its preliminary report, expressly deferring its views on whether or not New Zealand should introduce a capital gains tax.

Personally I find the report partly disappointing and partly gratifying. It is disappointing because it is evident that the TWG has not grasped that economically capital gains and income streams are one and the same. They are both amounts that come in; different treatment of one in contrast to the other is a tax fiction that results in two people who receive the same amount into their respective households in a year, being attributed wildly different tax outcomes. Economically there is no sense in that at all.

Specifically, the TWG has presented two options. One is a targeted taxation of specific (identified) capital assets. The other is a risk free rate of return method (RFRM). The TWG do encompass the idea of a broad brush capital gains tax, but do not appear convinced of its merits and seemingly are not pursuing that.

In my mind the TWG is wrong to pursue these two options (if in fact that is what they are doing). Response from taxpayers to a targeted GST regime can be expected to result in investment in assets that fall outside the scope of the regime (referred to as a horizontal investment shift). A RFRM will require market valuations each year, the pain of which can be expected to drive investment overseas. Nor does it adhere to the fundamental principle in any capital gains (ie big ticket) regime of ensuring there is cash to meet the tax liability. If there is to be a capital gains tax regime it needs to be broad brush and low rate, in my view.

The TWG report is gratifying in that the TWG recommend against introducing a wealth tax or a land tax. Moreover, they also recommend no change in the company tax rate, retention of the dividend imputation regime and loss carry forward rules, all of which I see as positive.

As to tax changes in the housing sector, don’t expect anything too significant there.

Don't hesitate to contact me for further information.