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THIS**

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Partner's Corner

It's been a busy few months here at Smith & Partners, as we settle in to winter with a well established team.

As the economy begins to pick up and you start to think about taking on new staff, we urge you to ensure that you have sound employment agreements in place with all your employees. We've had to act on behalf of several clients recently who have found themselves on the wrong side of the law when dealing with employee disputes due to not having agreements in place. You can read more about this in the newsletter, or contact our employment specialist, Elizabeth Briggs, for further advice.

The recent tragedies around the country have been a timely reminder that we all need to have our affairs in order. If you don't have a will, or it was last updated more than five years ago, please feel free to contact us for an obligation-free consultation.

For those of you with Trusts, or if you have been considering transferring your assets into a Trust, the recent changes to gifting laws abolish gift duty and permit gifting of unlimited amounts. Some of the considerations that will come into play are discussed here in the newsletter.

Thanks again for your support, and we hope you enjoy learning a little more about some of the recent law changes.

Keep warm this winter and we hope to see you soon!

Issues with Forgiving Trust Debt

With gift duty to be abolished as of 1 October 2011, you may be considering making a one off forgiveness of debt for the amount owed to you by your trust. The following issues should be considered before any such gift is made:

- The debt is an asset for the lenders and often it is used as a means by which to control the trust. Clients need to understand that once the debt is forgiven, they may lose the most effective way to control the trust. This can particularly apply to loans by parents to trusts for their children.
- It is often easier for disappointed beneficiaries to establish a claim against wills/estates than against the trustees of a discretionary trust. Many clients will be wanting to extinguish the debt so that potential claimants against the estate are not able to access the debt back, which is an asset of the estate. Any clients wanting to exclude a person inheriting from their estate will most likely see the abolition of gift duty as an opportunity to make a one off gift to a trust, and control the inheritance "from the grave".
- Relationship property claims often focus on the debt back from the family trust. If there is no debt back, Property Relationship Act claims against the trust are that much harder.
- A one-off forgiveness of debt will not give rise to any added advantages in terms of entitlements to rest-home subsidies or other WINZ benefits. The rules only allow a certain level of gifts for the five years preceding the application (currently \$6,000 p.a), and for periods beyond that at only \$27,000 per year. If there is a one off gift, all but the annual exemption amounts will be clawed back in the calculation. This suggests it may well be appropriate to continue with a regular gifting programme if WINZ considerations are going to be relevant to the client in the future.
- There will still be income tax implications with a gift to a party not involving natural love and affection, e.g. a company.

For further advice on the implications for your trust, or to find out whether setting up a trust is right for you, contact one of our partners:

Peter Smith, email pws@smithpartners.co.nz or ph 837 6882
Wade Hansen, email wrh@smithpartners.co.nz or ph 837 6885
Greg Muller, email gpm@smithpartners.co.nz or ph 837 6844

In a Seashell: The Marine and Coastal Area (Takutai Moana) Act 2011

On 24 March 2011, the Marine and Coastal Area (Takutai Moana) Act 2011 (the 'Act') was enacted to repeal and replace the Foreshore and Seabed Act 2004.

The call for change has been motivated by an independent Ministerial Review of the Foreshore and Seabed Act 2004, which deemed the 2004 Act unfair, as it failed to recognise the rights of all New Zealanders and was discriminatory against Maori. The new Act is the product of approximately two years of consultation between the Attorney General, on behalf of the Government, and iwi groups. According to the Attorney General Hon. Christopher Finlayson, the new Act is a "just and durable resolution to the issue, and recognises the rights of all New Zealanders in the common marine and coastal area."



"Marine and coastal area" is defined in section nine of the Act and broadly encapsulates the area that is bounded by the line of mean high-water springs and the outer limits of the territorial sea. It also includes the beds of rivers, airspace, subsoil, bedrock and other matter that are part of the coastal marine area.

The new Act repeals the 2004 Act as it grants courts the jurisdiction to recognise customary rights where such rights can be proven under the Act. However, the granting of a customary title under the Act is distinguished from a private

(fee simple) title, as the land comprised under a customary title is subject to public access and cannot be sold.

In summary, the Act:

- applies to the area formerly known as the foreshore and seabed, which will be known in the future as the marine and coastal area,
- creates a common space in the marine and coastal area (the common marine and coastal area) which allows the interests and rights of all New Zealanders in the marine and coastal area to be recognised in law,
- does not affect existing private titles in the marine and coastal area,
- guarantees and, in some cases, extends existing rights for navigation, ports, fishing and aquaculture,
- provides tests for applicant groups to meet, to demonstrate customary marine title in areas where they have had exclusive use and occupation since 1840 without substantial interruption.
 - This recognition will include the right to go to the High Court (or negotiate an out-of-court settlement with the Crown) to seek customary marine title for areas with which groups such as iwi and hapu have a longstanding and exclusive history of use and occupation.
 - Similar to private (fee simple) title, customary marine title gives rights to: permit activities requiring a resource consent, some conservation activities, protection of wahi tapu (sacred areas), ownership of taonga tuturu (Maori objects) found in that space, and ownership of non-Crown minerals. It also gives the customary title holder the right to create a planning document setting out objectives and policies for the area.
 - Groups such as iwi, hapu and whanau will also be able to gain recognition and protection for longstanding customary rights that continue to be exercised. Their association with the common marine and coastal area in their rohe (home territory of a specific iwi) will also be recognised through a right to participate in conservation processes, which formalises existing best practice in coastal management.

Consumer Law Update

A Consumer Law Reform Bill (the 'Bill') will be introduced to Parliament later this year to update and simplify consumer law. This is in recognition of the fact that the laws covering layby sales, door to door sales, unsolicited goods and services, and the regulations for auctioneers have not been reviewed for some time.

The Ministry of Consumer Affairs (the 'Ministry') released a detailed discussion paper on Consumer Law Reform in June 2010. Extensive consultation has taken place since that time and, together with submissions received, has resulted in five additional papers being produced by the Ministry.

The Bill will reform the Consumer Guarantees Act, the Weights and Measures Act, the Layby Sales Act, the Fair Trading Act, the Door to Door Sales Act, the Auctioneers Act and the Unsolicited Goods and Services Act. Each Act has been reviewed taking into consideration:

- its history, original purpose and ongoing relevance, and
- any gaps in the law, and the effectiveness and overall enforceability of the Act.

It is beyond the scope of this article to describe all of the reforms proposed, however, listed below are some that may be of interest:



- The Fair Trading Act will be amended to update and simplify consumer law related to layby sales, unsolicited goods and services, door to door sales, and the regulation of auctioneers. It is proposed that infringement notices for minor breaches of the Fair Trading Act will be issued by the Commerce Commission.
- The Consumer Guarantees Act will be amended to require greater disclosure to consumers on express warranties and provide consumers who take up cover under express warranties a statutory cooling off period.
- Changes will be introduced to product safety protections. The Minister will be empowered to issue Government Product Safety Statements that will provide some guidance on acceptable product safety. Notification of product safety recalls will be mandatory and recalls will be published on the Ministry website. Goods that are recalled may be required by the Ministry to be destroyed and a supplier may be asked by the Ministry to stop selling a product if it has been implicated in a serious incident.
- The law related to auctions will be updated. The Consumer Guarantees Act "acceptable quality" provisions will apply to goods sold by auction, online, and to those

- sold by tender. The Auctioneers Act will be repealed and minimum standards will be set for the registration of auctioneers and the conduct of auctions.
- Unsubstantiated claims will be prohibited under the Fair Trading Act. The Ministry anticipates this measure will assist the Commerce Commission in enforcing the Fair Trading Act as well as assisting consumer confidence and good market conduct.
- The jurisdiction of the Disputes Tribunal will be extended to cover complaints about deceptive and misleading conduct and to provide for the full range of remedies available under the Fair Trading Act.

To keep up to date with the Bill and the proposed changes readers may wish to visit the Ministry website: www.consumeraffairs.govt.nz.

If you require any advice, or have any questions in regards to the update to this law, please contact:
Jason Carruthers by email jnc@smithpartners.co.nz & phone at 09 837 6830
or Samantha Curtis by email at srb@smithpartners.co.nz & phone 09 837 6883

Copyright (Infringing File Sharing) Amendment Bill

The internet has totally revolutionised the entertainment industry. Downloading music and movies, also known as file sharing, has become common practice in this day and age. However, it is sometimes easy to forget that behind that one click on the "download" button, lies someone's art, their work and source of income that when downloaded without permission, is in breach of our copyright laws.

The Copyright (Infringing File Sharing) Amendment Bill (the 'Bill') was passed into law by Parliament on 14 April this year. The Bill repeals a section of the Copyright Act 1994 and replaces it with two new sections that specifically deal with illegal peer to peer file sharing.

A review of section 92A of the Copyright Act 1994 concluded that the enforcement measure was ineffective in its current state and it's repeal and subsequent replacement is intended to offer greater deterrence for illegal file sharing through the implementation of a three-step notice regime. Previous concerns over an ad-hoc approach to the suspension of internet accounts and a lack of judicial oversight have been addressed with the new Bill requiring either the Copyright Tribunal (the 'Tribunal') and/or District Court to assess matters and oversee the formulation of proportionate remedies.

The Three-Step Regime

The Bill provides an overview of the 'Infringing File Sharing' regime and states that the purpose of the amendment is to "provide copyright owners with a special regime for taking enforcement action against people who infringe copyright through file sharing." The regime itself is based on a notice system where three kinds of infringement notices will be sent to offending account holders before enforcement ensues. The first notice is a detection notice, it is followed by a warning notice, and finally an enforcement notice. The notices are to be issued to the account holder by the Internet Protocol Address Provider (IPAP); which was formerly known as an Internet Service Provider (ISP).



Penalties

If an account holder continues to infringe after receiving all three notices, the copyright owner is able, under the new Bill, to apply to the Tribunal or District Court for relief and enforcement options.

The Bill also permits the Tribunal to award damages against the account holder, the sum of which is to be determined by the Tribunal. The amount ordered can be up to \$15,000, and is to be based on the level of damage or loss sustained by the copyright holder.

Alternatively, the copyright holder will be able to apply to the District Court for a suspension of the account holder's internet account. The District Court may, after considering both parties arguments, make a suspension order requiring an IPAP to suspend the internet account of an offender for up to six months. The suspension order is supposed to be reserved for more serious offenders.

Account holders are able to challenge the infringement notices and can request a hearing if they feel they should not be penalised.

ISP Definition Amended

The new amendment has also redefined an internet service provider and the former acronym of an 'ISP' has been replaced with 'IPAP', which stands for Internet Protocol Address Provider. The new definition is a broader one which encapsulates some organisations that are not traditional ISPs such as businesses and universities. The amendment bestows upon such organisations similar responsibilities as a traditional ISP and requires such organisations to send notices to infringers in the same manner as a traditional ISP.

If you have any questions in regards to The Copyright (Infringing File Sharing) Amendment or any other Copyright matters, please contact:
Jason Carruthers by email jnc@smithpartners.co.nz & phone at 09 837 6830
or Ilsaad Razak by email at imr@smithpartners.co.nz & phone 09 837 6841

Employment Law Update

Do your employees have employment agreements?

As of 1 July 2011 employers are required to retain a signed copy of the employment agreement or the current terms and conditions of employment they have with each of their employees. This includes retaining a copy of the intended agreement in the situation where an employee has been given an employment agreement but either has not signed it or agreed to its terms. Employers are required to provide a copy of the agreement, or intended agreement, on request by an employee. This change to the Employment Relations Act is in addition to the already existing requirement that all employees must have a written employment agreement. Any breaches of these requirements could result in action being brought by a Labour Inspector or be subject to a penalty imposed by the Employment Relations Authority.

As well as recording the key terms, obligations and benefits with your employees, employment agreements are also useful in restructuring and performance situations and in determining what happens upon termination.

Unjustifiable dismissal – following the correct disciplinary procedures.

In the case of *Costley v Waimea Nurseries Limited* [2011] NZERA Christchurch, the Employment Relations Authority ('ERA') found that Mr Costley was unjustifiably dismissed for using drugs at work because Waimea did not disclose to Mr Costley information that was relevant in reaching their decision to dismiss him. It was reported to Waimea's nursery manager, Mr Jameson, that Mr Costley and another employee (Api) may be consuming drugs during their lunch breaks. Mr Jameson met with each employee separately and told them of his suspicions. Api confessed that he and Mr Costley were smoking marijuana at lunch time. Mr. Costley was not told about Api's admission or the identity of the person who raised concerns about their suspected drug use.



The ERA found that by not disclosing Api's admission to Mr Costley, Waimea had withheld the piece of information that was most relevant to the decision to dismiss, and that this was a breach of s4(1A)(c) of the Employment Relations Act 2000.

This decision serves as a timely reminder that employers must follow a fair procedure when disciplining or dismissing employees including providing the employee with any relevant information that may be relied on by the employer in reaching their decision.

If you need assistance ensuring that you are following correct disciplinary procedures, or with the creation of employment agreements, please contact our employment specialist *Elizabeth Briggs* by email erb@smithpartners.co.nz or phone 09 837 6889.

A King or Queen - The Law of Succession

Following the recent marriage of Prince William and Kate Middleton, the expectation of children in the future raises the question of succession for the future King or Queen of New Zealand.

Succession to the British Throne is passed on by "male-preference primogeniture". The rule has been in place for over 300 years and means male children are preferred over female children and an older child is preferred over a younger child of the same gender.



The British Government is currently consulting with Commonwealth countries about changing the laws on Royal Succession to enable an older sister to succeed over a younger brother.

Recently our own Prime Minister, Hon. John Key, has said he agrees that the current rules, which could block the succession of a first born daughter of Prince William and Kate Middleton, are "old fashioned". However, because the British Monarch is also head of state of Canada, Australia, nine countries in the Caribbean, three in the South Pacific as well as New Zealand, it would have to be approved by all these countries.

Are you interested in giving back to the community?

At the end of last year Elizabeth Briggs, our employment solicitor, joined the Board of Te Rori A Mua Trust as a trustee.

Te Rori A Mua was established in 1993 to provide residential services for young adults with an intellectual disability. Its residence is situated on six acres of farm land in Ranui and receives funding from the Ministry of Health.

The Board is currently looking for community minded people who would be interested in joining the Board as a trustee. As Te Rori is a small organisation this would suit someone looking to take their first step to board membership.

The primary purpose of the Board is to provide governance of the organisation and support to the manager of the residence. Board meetings are held approximately every eight weeks at Smith & Partners.

If you are interested in finding out more, please contact Elizabeth on 837 6889.

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