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BARRISTERS SOLICITORS NOTARIES

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ACCESS ONTO PRIVATE PROPERTY - YOUR RIGHTS AND OBLIGATIONS

The new Government has indicated it may not proceed with a proposal to provide public access over farms and instead may look at alternatives including negotiation with land owners to improve access. The news has been welcomed by Federated Farmers who say they will be taking a keen interest in the framework for negotiating rights of access.

MACTODD...

In this Autumn newsletter we take the opportunity to announce some important changes in Central Otago's largest legal partnership of Macalister Todd Phillips Bodkins. These will take effect as from 1 April 2006.

Mr Kieran Tohill and Ms Toni Brown will retire as partners of Macalister Todd Phillips Bodkins and will commence practice from the firms Alexandra premises under the name of "Bodkins".

Graeme Todd, John Troon, Bryce Jack, Jayne Macdonald, Clark Pirie and Alistair Bowers will continue to practice in partnership under the name of MACTODD, from its offices in Queenstown, Wanaka, Cromwell and premises in Alexandra.

At MACTODD we remain committed to continuing our service to the whole Central Otago Region.

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BARRISTERS SOLICITORS NOTARIES

Rights of Access

So what are some of the issues surrounding your rights and liabilities with visitors on your land?

Network Utility Operators can request access to private land. They are usually involved in providing services such as gas distribution, telecommunications, electricity distribution, water supply and drainage or sewage systems.

Before entering onto land, a Network Utility Operator should provide information in writing to the owner. This information should include:

- *the reason entry is required*
- *any rights the land owner may have to object to the entry*
- *a description of the work to be done on the land*
- *who will be undertaking the work*
- *confirmation that any damage caused will be remedied or paid for*
- *a complaints referral procedure*

You do have the right to refuse entry to some operators but you must allow others access in certain circumstances. If you are unsure as to which situation applies, seek advice from your lawyer.

Health and safety

The Health, Safety and Employment Act 1992 ("Act") imposes obligations on land owners regarding access by third parties onto their land.

The focus of the Act is on identification of hazards in the work place. Residential premises are excluded from the definition of workplace so the Act's provisions do not apply to most urban residential properties nor does it apply to those parts of a farm which are used for domestic accommodation.

The purpose of the Act is to ensure that all practical steps are taken to ensure the health and safety for all persons on the property.

Land owners whose properties are a place of work are therefore obliged to take steps to ensure the following people are not harmed by hazards:

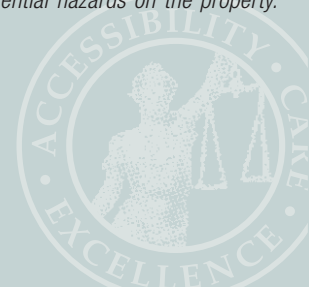
- *people in the vicinity of the place of work*
- *employees, contractors and subcontractors*
- *people who are on the land with the owner's consent and who have paid to be there*
- *customers*

There are circumstances where a duty of care is not owed to visitors. This includes people visiting for the purposes of leisure, recreation and also includes trespassers.

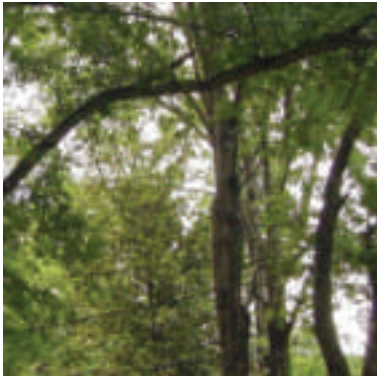
SUMMARY

Have a plan

As the issues of both access and health and safety are closely linked, it is worthwhile for land owners to have a policy in place to deal with them. In particular, it would be wise to ensure that practical steps are taken to manage any existing or potential hazards on the property.



PROBLEM NEIGHBOURS - WHAT TO DO



Problems with neighbouring trees can be a common source of tension between neighbours. Have you ever purchased a property and later discovered that your neighbour's trees will eventually block your view or prevent your property from having the benefit of sunlight?

Obstructing trees can be a major cause of property disputes between neighbours. It is a good idea to talk to your neighbour first to see if you can come to some arrangement that is suitable to both parties, such as, agreeing to have the trees trimmed or reduced in height.

However, if that doesn't work you can apply to the District Court under the Property Law Act 1952 ("Act"). Section 129C of the Act gives the Court the power to order removal or trimming of trees injuriously affecting neighbour's land. Specifically, section 129C(6) includes factors that the Court may take into consideration in determining whether a tree is obstructing the applicant's view or is otherwise causing injury or loss to the applicant. These factors include the:

- *Interests of the public in the maintenance of an aesthetically pleasing environment;*
- *Desirability of protecting public reserves containing trees;*
- *Value of the tree as a public amenity;*
- *Historical, cultural or scientific significance (if any) of the tree; and*

- *Likely effect (if any) of the removal or trimming of the tree on ground stability, the water table or run-off.*

Other considerations

The Court will not make an order under this section unless it is satisfied that:

- *The tree is causing or is likely to cause loss, injury or damage to the applicant's life, health or property (section 129C(8)(a)); or*
- *The tree is obstructing any view that an occupier of the applicant's land would otherwise be able to enjoy, or is otherwise causing injury or loss by diminishing the values of the property or reducing the enjoyment of it for residential purposes (section 129C(8)(b)).*

The Court will balance these considerations between the hardship that would be caused to the applicant by the refusal to make the order and the hardship that would be caused to the defendant by the making of the order.

LEAKY HOMES

Background

There has been considerable publicity over recent months about the problem of houses which are not watertight – commonly known as "leaky building syndrome". There can be a number of causes for this, including:

Incorrect installation of monolithic cladding systems

Inadequate construction of design features which do not allow for proper deflection or drainage of water

Inadequate administration by councils and the Building Industry Authority (the latter having been set up under the Building Act 1991 to monitor the implementation of building standards)

A failure by building industry to deliver the additional level of care and skill required for modern building systems

The use of untreated framing timber which is susceptible to rotting if moisture penetrates the outer building frame

What Do You Do If You Own An Affected Property?

If you observe signs of cracking, staining or discolouration either on the exterior or interior of your property, then a weather tightness specialist consultant should be engaged to assess

the damage before undertaking any repairs. The consultant will be able to advise you as to the likely cause of the damage which, in turn, will enable you to assess what remedies are available to you.

Weather Tight Homes Resolution Service

The Weather Tight Homes Resolution Service was established pursuant to the Weather Tight Homes Resolution Services Act 2002 to assist home owners whose properties are affected by leaky building syndrome. The purpose of the Act is to provide access to "speedy, flexible and cost effective procedures" for assessment and resolution of claims. Despite this, it appears that in practice building owners are dissatisfied with the service and the high costs associated with pursuing claims. This dissatisfaction has resulted in the formation of several action groups to try and address the problem.

How To Avoid Buying A Leaking Home

If you are purchasing an existing property, then arrange for a professional inspection of the house to be carried out by a qualified and experienced inspector. The relevant professional or trade organisations include:

- Building Officials Institute of New Zealand*
- Building Research Association of New Zealand*
- Accredited Advisors*

Institution of Professional Engineers New Zealand
New Zealand Institute of Architects
New Zealand Institute of Building Surveyors
New Zealand Institute of Quantity Surveyors

If you are constructing a new home, then make sure the design takes into account the issue of weather management. This includes:-

adequate drainage

using a design which ensures rain cannot enter the building through eaves or other features

adequate ventilation so that water which leaks inside cladding can dry if it cannot drain away

the use of materials which are suitable to the environment for the area in which you are building

Make sure you obtain guarantees from the cladding installer, system manufacturer and your builder. In addition, check your builder is a member of Master Builders or the Certified Builders Association of New Zealand.

Conclusion

In an effort to prevent further problems of buildings affected by leaky building syndrome in the future, the Building Act 2004 introduced stricter compliance procedures for the building industry. However, the problem is set to continue for some time in respect of buildings constructed prior to that Act coming into force and prospective purchasers should be aware.

NEWS IN BRIEF



If the Bill is passed it will take effect from 1 July 2006.

Making a Will and Relationship Property

The Relationship Property Act 1976 ("Act") was amended in 2002 to include provisions that may apply when a relationship ends on the death of one of the parties. If they do, then the surviving partner can elect whether to claim against the estate of the deceased or receive under the deceased's Will.

If the first option is chosen then the Act provides that the surviving partner will receive half of the relationship property unless there is evidence to the contrary.

In choosing to make a claim under the Act, the surviving spouse's entitlement effectively overrides the wishes of the deceased person. The claim under the Act also takes priority over other claims against the estate, for example those made under the Family Protection Act 1955.

Any person making a Will therefore needs to be aware of the options which their surviving partner has under the Act and plan accordingly.

Update on the Charities Act

You will recall that in the Spring newsletter, we featured an article about the new Charities Act.

The Act has been in force since April this year. The establishment of the charities commission was completed in July and a chief executive has been appointed.

Charities wishing to claim a tax exempt status will need to be registered with the commission and will have until April 2007 to do this. The commission anticipates having the registration forms available by the end of March 2006.

The commission is keen to establish a relationship with the charitable sector and if you need further information, this can be obtained from the commission's website – www.charities.govt.nz.

Extension Of Paid Parental Leave To The Self Employed

A Bill that has now been referred to the select committee proposes to extend paid parental leave to the self-employed. Self-employed mothers who have been working an average of 10 hours per week, during either the previous 6 or 12 months before the expected date of delivery of their child, will be entitled to 14 weeks paid parental leave. Parental leave payments may be transferred by a self-employed mother to an eligible partner.

To be eligible for parental leave payments a selfemployed person is required to take a break from his or her work. However, unlike an employed person, the self-employed person can maintain a level of oversight of his or her business during the period of parental leave.

OUR PARTNERS...



Graeme Todd



John Troon



Bryce Jack



Jayne Macdonald



Alistair Bowers



Clark Pirie

Partners

Graeme Todd
John Troon
Bryce Jack
Jayne Macdonald
Alistair Bowers
Clarke Pirie

Professional Staff

Charlotte Allan
Catherine McKenzie
Elliot Goldman
Emma Kitto
Phena Bryne
Tim Fischer

Associate

Dale Lloyd

Practice Manager

Andrea Lambie-Shaw

Consultant

Alan Macalister



Queenstown Office

0' Connells Pavillion
Corner Beach & Camp Streets
PO Box 653, Queenstown
P 03 441 0125
F 03 442 8116
queenstown@mactodd.co.nz

Wanaka Office

80 Ardmore Street
PO Box 392, Wanaka
P 03 443 0040
F 03 443 0030
wanaka@mactodd.co.nz

Cromwell Office

1 The Mall, Cromwell
P 03 445 3027
F 03 445 3029
cromwell@mactodd.co.nz

Alexandra Office

P 03 448 8029
alexandra@mactodd.co.nz

Disclaimer

The information and comments contained in this News Brief, while intended to be accurate, are of necessity of a general nature. It is not intended that the newsletter provide legal advice and it is strongly suggested that, where appropriate, specific legal advice is sought on matters of concern. The Editor does, however, welcome comments. These should be addressed to:

The Editor

Mactodd News Brief,
P.O. Box 653, Queenstown, New Zealand OR: newsletter@mactodd.co.nz