



AUTUMN 2008

# NEWS BRIEF

## BAG THE HABIT WITH A MACTODD BAG

While waste minimisation strategies are already in place for many businesses and households, Mactodd joins in supporting local community groups and Council initiatives in their quest to encourage our Central Otago and Southern Lakes communities to be rid of plastic bags.



PLEASE CALL INTO ANY OF OUR OFFICES AND PICK UP A BAG OR TWO FOR YOU AND YOUR NEIGHBOURS.

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The average useful lifetime of a plastic bag is limited to about two minutes in total when you consider its use for the packaging and transportation of food from supermarket conveyor to car and from car to house, or at best a day if it serves as a liner for your rubbish bin. By contrast however, its unuseful lifetime spans some 500 years, being the estimated time that it takes to breakdown in a landfill.

2007 was the year that sustainability grabbed everyone's attention. As we head into 2008 and beyond the future is towards implementation, education and regulation as various initiatives both regulatory and non regulatory emerge.

The Waste Minimisation (Solids) Bill for example is steadily moving towards its second reading in parliament. The Bill seeks to put in place provisions which will enable and require businesses, public organisations and households to decrease their disposal of waste. While the focus of the Bill is on waste minimisation, there are also initiatives for producers to design products with the environment in mind, particularly in terms of their reuse.

Join us in doing our bit to Bag the Habit. "Bag the Habit" is an initiative of Sustainable Wanaka. For more information on the Bag the Habit campaign visit [www.Sustainable-Wanaka.co.nz](http://www.Sustainable-Wanaka.co.nz).

# THE NEW PROPERTY LAW ACT

On 1 January 2008 the Property Law Act 2007 came into force, replacing the 1952 Property Law Act and several other related Acts, including a number of old English ones going back as far as 1257.



It has been described as the largest single change to property law in the past 55 years and is the culmination of a project that took over 16 years.

When the Act was passed last year, the Associate Justice Minister, Clayton Cosgrove, noted that the aim of the Act is to create modern, more user-friendly legislation for people buying or selling property, mortgaging their property to raise finance, or entering into commercial leases of land.

Not everything in the Act is new; some parts of it repeat or codify the existing law. The following highlights some of the changes that have been introduced.

## **Landlord's Consent**

If a tenant asks a landlord for permission to transfer or sublease premises to a third party, or to change the permitted use of the premises, the landlord must not unreasonably withhold consent. The landlord must respond in writing within a reasonable time. If consent is given subject to conditions or is withheld, the landlord must give written reasons for their decision, if asked to do so by the tenant.

A range of parties affected by the decision may claim damages from a landlord if they suffer loss as a result of the landlord unreasonably delaying or withholding the landlord's consent.

## **Insurance Protection for Tenants**

If the premises are damaged by an insured risk (e.g. fire, flood, explosion) the landlord and their insurers may not require the tenant to

pay for the repairs. This is so even if the damage was caused by the tenant's negligence.

## **Distraint**

The Distress and Replevin Act 1908 enabled a landlord to enter the premises and seize certain chattels of the tenant, if the rent was in arrears. This self-help remedy has been abolished.

## **Sale and Purchase – Return of Deposit**

A purchaser of land now has a statutory right to apply to a court for the return of the purchaser's deposit. The surrounding circumstances must be such that a court would not order the purchaser to perform the contract and also that the purchaser has no right to cancel the contract.

An example could be where there is a defect in the property that the purchaser was not aware of until after signing the contract and paying the deposit.

The court is also given the power to cancel the contract and declare that the purchaser has a lien on the land to secure payment of the refund.

## **Conclusion**

The new Act affects many facets of the law relating to property. It includes leases, sales and purchases, mortgages, access to land and special powers of the court.

Chances are, if you are dealing with land in any way, the new Act will affect what you are doing. With such a major law change, it is more important than ever to obtain proper advice at the outset of any transaction.

# ROOM WITH A VIEW

Imagine this, after considering the various housing options you decide you want an apartment in the heart of Auckland City. You want to be close to the action. It's central, a perfect base, a long term investment! The city has many beautiful views so you want to be elevated to take advantage of the opportunity for that.

You spy a brochure which covers the key aspects of your search. The apartments are not built yet but the glossy publication promises classy central city living, and that view. Once you have signed up and the building has been constructed, you walk in and discover that a roof is obstructing your priceless view!

## **A Misrepresentation**

The key question for the court in the case that followed this disappointing discovery by the purchaser was whether the misrepresentation made in the brochure meant that the agreement to purchase could be cancelled. Alternatively, would the Court require the purchaser to pay over the purchase price and buy an asset that did not live up to the initial expectations? The Court in this case said settlement must proceed.

## **The Agreement and Plans/Specifications**

After the "tease" in the original brochure, came the actual agreement for sale and purchase with detailed plans and specifications. These, when taken as a whole, showed the existence of the roof in front, and fully disclosed the exact situation. The agreement included the standard provision that once signed, the agreement was the binding and complete legal arrangement between the vendor and purchaser.

In other words, the brochure was not to be taken into account when finally deciding what the terms of the contract were. As the purchaser had the opportunity to take any legal or other advice available prior to signing, there was no reason, in the Court's view, why the contract should not stand. The Court ruled that the settlement must proceed.

## **Conclusion and Warning**

In the excitement of the purchase, who would have given a thought to the roof next door, particularly as nothing was constructed at the date of signing. In hindsight, the warning is clear and the principle applies to every signed sale and purchase agreement.

Before you sign, obtain all the advice you can, because prior representations will usually not be a relevant factor. In this instance, not only legal advice was required, but specific architectural advice regarding the plans and specifications was also needed.



# THINKING ABOUT RENTING OUT YOUR HOME OR INVESTMENT PROPERTY?

The purchase of a residential property with a view to letting it out is a popular investment choice for many New Zealanders.

If you are considering such an investment, or indeed already rent out a property, then you need to be familiar with the provisions of the Residential Tenancies Act 1986 (the "Act") which sets out the requirements for many residential tenancies.

Some of the main points are as follows:

## 1. Tenancy Agreements to be in Writing

The Act provides that all residential tenancy agreements must be in writing. However, an agreement is still enforceable even if it is not in writing.

## 2. Term of Tenancy

The Act recognises two types of tenancies:

- Fixed term tenancies that are for a specified term;
- Periodic tenancies that are not for a defined term but continue until terminated by either party in the manner set out below at point 5.

The Act does not apply to fixed term residential tenancies that are for less than 120 days or for five or more years. However, in the latter situation, both the landlord and the tenant

must agree that the Act will not apply.

## 3. Bond

The Act permits the landlord to require a prospective tenant to pay up to four weeks rent as a bond in advance. The money is held by the Tenancy Tribunal and is only refundable once both parties sign a form agreeing on the amount to be allocated to the tenant and/or the landlord.

The landlord is entitled to deduct from the bond the cost of any repairs that are the responsibility of the tenant but cannot use it to recover costs associated with fair wear and tear. If the parties cannot agree upon the amount of bond to be refunded, then the matter will have to be referred to the Tenancy Tribunal.

## 4. Form of Tenancy Agreement

The Act prescribes a simple form of tenancy agreement; a copy can be downloaded from the website of the Tenancy Tribunal: [www.dbh.govt.nz](http://www.dbh.govt.nz)

## 5. Terminating a Residential Tenancy

Either the landlord or the tenant can give notice to bring a tenancy to an end. In the case

of the tenant, at least 21 days notice must be given. In the case of a landlord, 90 days notice must be given but only 42 days is required if the landlord:

- Requires the premises for his or her own use or that of his or her immediate family;
- Has entered into an agreement to sell the property and the terms of that agreement require vacant possession;
- Requires the property in order that one of his or her employees can live in it so long as the landlord has previously notified the tenant that the premises are normally used for that purpose;

All notices to terminate a tenancy must be in writing.

## 6. Disputes

The Tenancy Tribunal deals with all disputes arising out of residential tenancy agreements regardless of the issues involved. Either party can make an application to the Tribunal either during the tenancy or after it has ended. If you are a landlord, it pays to fully familiarise yourself with the responsibilities and duties imposed upon you by the Act. It could save you a lot of time and trouble in the future.

# NEIGHBOURS' TREES OBSTRUCTING YOUR VIEW?

Trees have long given rise to friction between neighbours. Even in a rural environment your neighbours' trees can obstruct your view, or otherwise impede your enjoyment of your property.

The Courteney's and the Garstang's owned adjoining lifestyle blocks in the Wairarapa. They had purchased their part of a subdivided farm at around the same time. The Garstang's bought their property in May and had tried to buy an escarpment to protect their view to the south but were unable to persuade the vendors to sell it to them. The Courteney's bought their property in October. They bought six hectares which included the former farmhouse and the escarpment. The Courteney's always knew when they bought their property that the Garstang's would build a home. It was possible for a home to be built on the Garstang property further north without compromising the elevation of their home in any way.

The Garstang's built their house on the southern edge of their property and oriented it towards the north and west. The home was described in a magazine article as "resembling a small hilltop village". The house consisted of a three storey tower some seven metres in height, a studio built over a garage and a living area between the two. The house enjoyed panoramic views including over the Courteney's property. The Courteney's for their part viewed the Garstang home with dismay from the outset and immediately planted trees along their side of the boundary. They planted eucalyptus cordata, a fast-growing species that can reach 20 metres in height. After initially getting on, the neighbours fell out. The Garstang's sought an order that the Courteney's remove some trees from their property and limit the height of others to ensure preservation of their long distance view to the south.

In the District Court the Judge agreed with the Garstang's. The Courteney's appealed to the High Court. The High Court Judge at the outset noted that the Court's power involved "a highly intricate discretion" that was to be "exercised conservatively".

Authority for the Court to order the removal of trees is provided in the Property Law Act. As the High Court Judge said, it is an intricate provision. In the District Court the Judge had gone through each of the requirements set out in the Act and referred to the facts of the case between the Courteney's and the Garstang's. The Judge referred to the obstruction of the Garstang's view compared to what had existed before. The Judge did not take into account any privacy issues for the Courteney's because they had tried to subdivide. The Judge ordered removal of a number of

the eucalyptus cordata trees on the boundary to ensure the Garstang's long distance view to the south was preserved.

The High Court Judge said that all circumstances of the case had to be taken into account when considering the obstruction of view. The Garstang's did not have that obstruction when they bought their property. While the trees were probably higher than necessary to protect their privacy, the planting by the Courteney's had been a response to the positioning of the Garstang house. The Courteney's always knew that a house was going to be built on their neighbour's land, however the position of the house could have been built further to the north and designed in a less intrusive way. The Judge compared the hardship between the Garstang's and the Courteney's. While the Garstang's were within their rights to build as they did, the Courteney's were equally within their rights to plant trees.

There is no property in a view over a neighbour's land. The situation the Courteney's found themselves in was that the Garstang's house had a substantial effect on their outlook and privacy. Privacy is an important value. The Courteney's planted the trees as soon as they possibly could which reinforced that their concern for privacy was genuine.

Next, the Judge considered whether the Courteney's and Garstang's had been reasonable in their responses. There had been a degree of co-operation between the neighbours at the outset with the Courteney's having maintained a viewshaft for one bedroom and having trimmed some of the trees at the Garstang's request in 2002. It was also relevant that the Garstang's had outstanding views in other directions, though that fact did not detract from the fact that there was an undue obstruction of their view to the south.

The overall purpose of the legislation is to protect residential properties and the provisions of the Operative District Plan needed to be considered also. The District Plan included matters that needed to be taken into account, including a policy requiring the natural and physical resources of the rural area to be maintained. Shelter belts are a prominent and attractive feature of the rural landscape and the eucalyptus is distinctive in the use of that shelter belt.

The finding that the obstruction was undue was based in part on proximity of the trees to the house and the density of the planting.

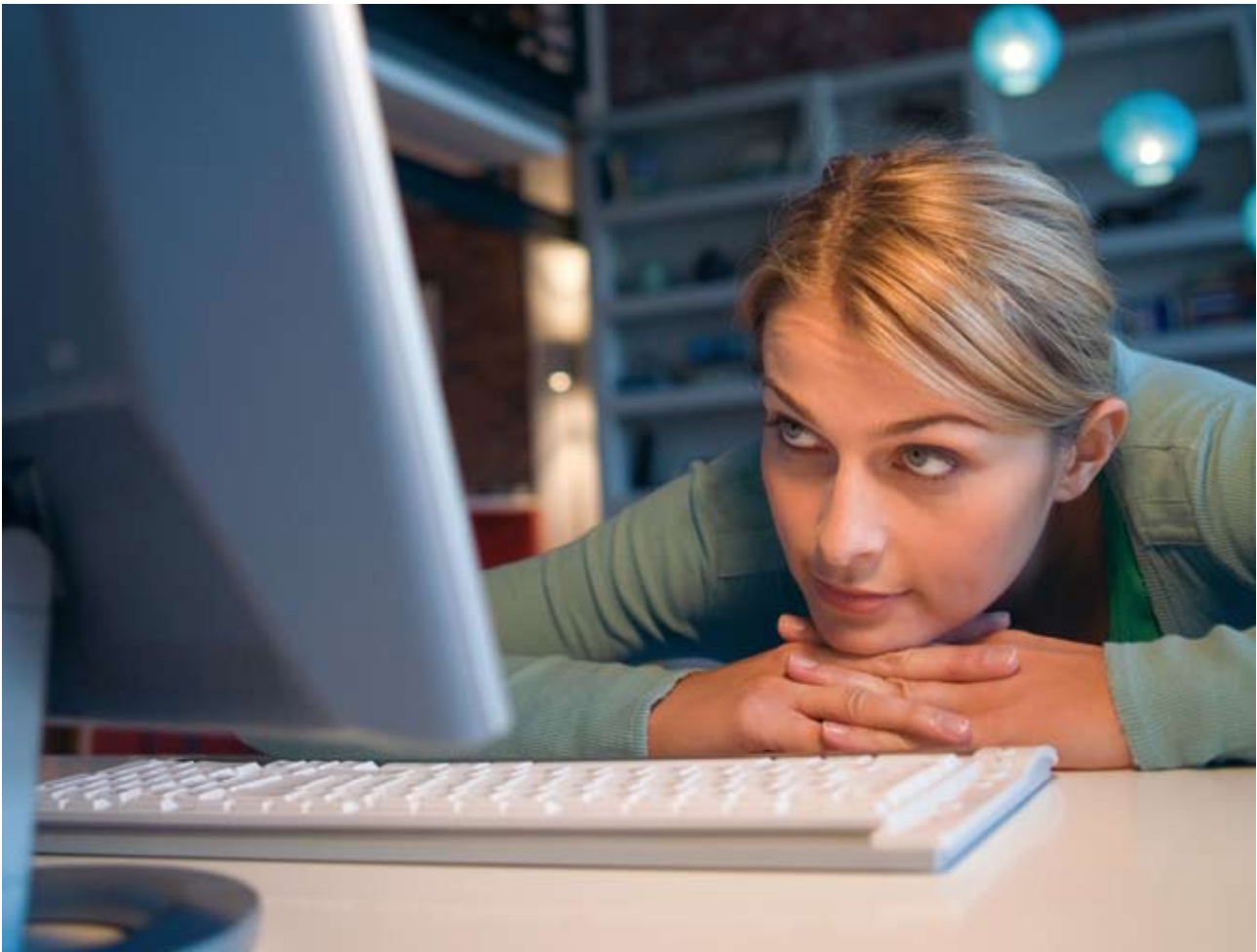
Next, the Court had to then determine what was necessary to reduce the obstruction to a point where it ceased to be undue. Preservation of the Garstang's view did not require that they be able to see every part of the Courteney's property when standing at their windows. That was not undue.

That does not end the matter. Simply because there is undue obstruction of view does not mean that an order will be made by the Court. The Court then has to balance the hardship between the parties. Here, the Court said that the hardship was greater on the Garstang's. That being the case the Judge then had to consider whether an order to remove the trees obstructing the Garstang's view was fair and reasonable.

As can be seen the criteria the Court had to consider are wide and varied. Ultimately the High Court identified views that were to be preserved and directed removal of some of the trees and a height limitation on others. However that order was much less extensive than the District Court had directed and the costs of that work were to be borne by the Garstang's. As neither party was entirely successful in the High Court, each had to meet their own costs. It was an expensive exercise for each of the parties.

That decision was made under the Property Law Act 1952. Since then the Property Law Act 2007 has come into force. While the substance of the 1952 Act has largely been reproduced, the new provisions are slightly more extensive.

The new legislation applies to all land, although an application for orders for preservation of a view cannot be made unless land is or can be used for residential purposes. So now you may also get an order where your neighbour's own land that they are unlikely to build on if you suffer an obstruction or interference (other than a view) in your use and enjoyment of your land because of the growing of trees or crops, or the fall of leaves, flowers, fruit or branches or shade or the blocking of drains or gutters. As with the earlier legislation whether the obstruction existed when you buy that property or later arises will be relevant. While different circumstances will apply in each case, the decision here is useful for indicating the extensive nature of the enquiry that will be made by the Court.



# INTERNET BANKING FRAUD — ARE YOU PROTECTED?

## Code of Banking Practice

If you do your banking on the Internet, then you should be aware that the risk associated with Internet banking increased as of July 2007. The New Zealand Bankers Association (of which all the main trading banks are members) has introduced a new Code of Banking Practice, which includes a section on Internet banking.

If an Internet banking user becomes the victim of fraud and has contributed to the Internet fraud by either:

- having a computer or device that does not have appropriate protective software and operating systems installed and up to date; or
- failing to take reasonable steps to ensure that the protective systems such as virus scan, firewall, anti-spyware, operating system and anti-spam software on the computer are up to date; or
- failing to follow reasonable security warnings about the appropriate processes and safeguards to follow when using Internet banking;

then the bank is not liable for any loss.

The code provides for the bank to have the right to request access to the user's computer in order to verify all reasonable steps to protect the computer had been taken. If access is denied then the user may be held liable. The effect of the new code is that the onus to safeguard a computer has been shifted to the user although the banks retain the responsibility to inform the user of the best way to do so. The Code has been criticised for not being specific enough as to what constitutes adequate protection.

However, as matters now stand, users are obliged to update their computer security systems in accordance with their bank's recommendations. Failure to do so means that the Internet user will be liable for losses up to their overdraft limit.

The Bank is responsible for fraudulent transactions that are not caused by the user if they are promptly advised of the fraud or advised that the customer ID, password or other security information is, or may be, known to

another person or that there has been unauthorised access to the bank's site for Internet banking information or accounts.

## Remedies

If you become involved in a dispute with your bank over liability for Internet fraud, then you should initially attempt to resolve the matter through the bank's internal complaints procedure.

If this is unsuccessful, a complaint may be made to the Banking Ombudsman, provided the amount at issue is less than \$200,000. The Banking Ombudsman in turn can refer complaints to another party such as the Insurance and Savings Ombudsman, the Privacy Commissioner or the Human Rights Commissioner. Banks are bound by recommendations made by the Banking Ombudsman.

If a claim is unsuccessful with the Banking Ombudsman, or it is for an amount exceeding \$200,000, then an application will have to be made to the Court. Either way, it would be advisable to consult us at the outset.

# RELATIONSHIP PROPERTY; CONTRACTING OUT AGREEMENTS

Increasingly New Zealanders are becoming more alert to the implications of the Property (Relationships) Act 1976 (“the Act”) and are seeking legal advice about the preservation of their hard-earned property.

## Who can enter into an agreement?

Section 21 of the Act provides a husband and wife, civil union partners, de facto partners, or two persons in contemplation of entering into a marriage, civil union or de facto relationship may contract out of the provisions of the Act.

## Why enter into an agreement?

In a recent decision of the Court of Appeal, *Harrison -v- Harrison*, the court commented, “the paradigm situation in which a contracting out agreement will be sought is where one party has pre-relationship assets of a significant magnitude to render justifiable the social awkwardness of insisting on a contracting out agreement...”

There are numerous reasons for electing to contract out of the Act. Usually, it is to avoid the presumption of equal sharing of property that arises when the relationship ends. However, an agreement may also assist with asset, estate or tax planning. It may be a desire

by one or both parties to preserve all of the property owned or acquired by them prior to the commencement of the relationship as his or her own separate property. Alternatively, the parties may simply wish to record their decision to treat certain property differently.

## What can be included in the agreement?

Section 21D of the Act sets out what can be included in an agreement. An agreement can:

- declare property to be separate or relationship property;
- define the share each party to the agreement has in any part or all of the relationship property;
- define shares on death;
- provide for the calculation of the shares; and
- prescribe the method by which the relationship property is to be divided.

Section 21 of the Act permits parties to an agreement to make any arrangements they

think fit with respect to their property, including property acquired in the future by one or other or both of the parties.

“Property” is specifically defined in Section 2 of the Act and includes the following:

- real property (i.e. land);
- personal property;
- any estate or interest in any real property or personal property;
- a debt; and
- any other right or interest.

## How is the agreement made valid?

Section 21F of the Act records an agreement will be void unless it complies with certain requirements. Those include the following:

- The agreement must be in writing and signed by both parties.
- Each party to the agreement must have independent legal advice before signing the agreement.
- The signature of each party to the agreement must be witnessed by a lawyer.
- The lawyer who witnesses the signature of a party must certify that, before that party signed the agreement, the lawyer explained to that party the effect and implications of the agreement.

## Future Considerations

It is important to recognise that an agreement contracting out of the provisions of the Act needs to be revisited on a regular basis. It is impossible when drafting an agreement to anticipate every eventuality just as it is impossible to foresee, at the outset, the longevity of a relationship.

# REVERSE MORTGAGES

For many New Zealanders, the family home is their most valuable asset. For some people this can mean they are asset rich but cash poor. It is such people who are being targeted in marketing campaigns for reverse mortgages. These mortgages are relatively new in New Zealand and can have serious implications for the home owner.

## What are they?

Reverse mortgages usually involve a loan borrowed against the equity in the home owner's property. Generally, the loan is repayable on the sale of the property or upon the owner's death, whichever occurs first. They are particularly attractive to people who have retired and whose home is mortgage free.

## How much do reverse mortgages cost?

Reverse mortgage schemes are often advertised on the basis that there are no regular repayments. Whilst this is true, interest and fees are still charged for so long as the loan continues and are added to the balance,

which will ultimately have to be repaid. The interest rate will usually be higher than an average bank loan. There may also be fees payable in addition to interest and these can include a valuation fee, commission (e.g. to a broker), early repayment charges and other costs which may be payable in the event that the home owner decides to sell the home.

## Be aware of the downside

Advertising for reverse mortgages is often presented in attractive terms, which suggest that money can be made available to fund things that most people desire, such as holidays, home renovations and travel. While reverse mortgages can make it possible to obtain money from the family home for these purposes, the cost is significant.

Most importantly, the increasing value of your home may not keep pace with the debt owed under the terms of the mortgage. Interest may compound. The amount owing will continue to increase the longer the loan re-

mains unpaid. This will not present a problem so long as you continue to live in your home. However, if you wish to sell your home then the mortgage will be repayable and you may find that the amount that you receive after repaying the loan is insufficient to enable you to buy another home of an equivalent standard.

## Seek advice

If you are contemplating taking out a reverse mortgage, it is absolutely vital that you obtain independent advice from your lawyer, and fully understand the terms of the loan and the long term implications for you. Reputable companies offering reverse mortgages will require you to take independent advice before proceeding.

Although the Government has indicated that a code of practice is to be established for reverse mortgage schemes, it is not yet in place. Home owners should be wary of any reverse mortgage scheme which does not state that it is mandatory for the home owner to obtain independent legal advice before proceeding.



# TRUSTS – THE PAPERWORK IS CRUCIAL!

Trusts are a popular choice for people who are concerned about protecting their assets for themselves and for their children. However, the formation of a trust by the execution of a trust deed and transfer of assets to the trust is only the start. A successful trust is one that is regularly monitored by the trustees and where there is a clear paper trail evidencing the ongoing administration of the trust by the trustees.

## Why the need for paperwork?

If the trust is not properly administered, there is a risk that it may be seen to have either “lapsed” or that it is simply a “sham”. This usually occurs where the assets which form part of the trust fund are treated by the trustees as if they are their own personal property held for their own benefit rather than assets held by them for the benefit of the beneficiaries of the trust. Given that trustees are frequently both trustees and beneficiaries of the trust, it is all the more important that a clear distinction exists in the minds of the trustees regarding assets which are held by them personally and those which belong to the trust.

## Essential paperwork

The administration of a trust will depend very much on the nature of the assets which make up the trust fund. A trust fund that consists of

the family home in which the beneficiaries reside will not require the trustees to do a great deal for so long as that situation continues. If there is a debt owing by the trust to the settlors of the trust (i.e. the persons who originally set up the trust and transferred assets to it) then the debt should be gifted by the settlors in annual increments of \$27,000.00 (for each settlor) until the entire debt has been forgiven. As house prices continue to rise, the gifting process is taking longer and trustees should be vigilant in ensuring that gifting continues as this will maximise the benefit of the asset for the beneficiaries of the trust.

In addition to gifting, trustees should meet at least once a year to review the trust fund and the manner in which the trust fund has been applied for the benefit of the beneficiaries. There may be no need for the trustees to make any decisions but the important point is that:

- the trustees have turned their minds to their duties and responsibilities, and
- a trustee resolution records how those duties have been discharged over the previous 12 month period.

In the case of trusts that hold income producing assets (such as investment proper-

ties and shares), the matters which trustees should attend to include:

- Regularly reviewing the performance of investments.
- Preparing and filing a tax return.
- Ensuring that the trustees meet at least annually and possibly more frequently, depending on the nature of the investments which they are monitoring.
- Ensuring that any new investments and/or transactions that the trust may enter into are properly documented and supported by appropriate resolutions.

Minutes of trustees' meetings should be kept and particular care taken to record decisions taken concerning investment of trust funds and distributions to the beneficiaries.

## Conclusion

In summary, the advantages of keeping the paperwork for your trust up to date cannot be overstated. A trust which is properly administered will provide a much greater degree of protection than one which is effectively dormant because the trustees have not turned their minds to their duties and responsibilities under the terms of the trust deed. If you have any doubts as to whether your trust is being properly maintained, please consult us.



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# NEW FACES AT MACTODD

**TANYA SURREY**

**Barrister & Solicitor**

Tanya brought a wealth of knowledge and experience in the local government and liquor licensing practice areas when she joined Mactodd's Litigation Team in May 2008. A graduate of Victoria University in 1997, Tanya has developed her skills and knowledge initially as an Investigating Officer with the Liquor Licensing Authority in Wellington, and more recently as the Principal Liquor Licensing Inspector for the Queenstown Lakes District. A resident of Queenstown since 2001, Tanya is involved in the local arts scene and is the Chairperson of Wakatipu District Youth Trust. She is also a volunteer biographer for Hospice Southland and a volunteer advisor for the Central Otago Budget Advice Service.

**LAUREN BARNETT**

**Barrister & Solicitor**

We are delighted to have Lauren join our

Resource Management and Local Government Team. A graduate of Otago University, Lauren brings with her hands on experience in the RMA/LGA fields having worked for the Queenstown Lakes District Council's regulatory contractor processing a wide and varied range of consent applications. Lauren graduated from Otago University in 2005 and was admitted to the Bar in 2007.

**JACQUI HAAR**

Following completion of her Honours degree in Law at Otago University in 2007, and having satisfied requirements for Professionals in March 2008, we are delighted to have Jacqui join our Commercial Law Team. Jacqui is looking forward to the challenges and stimulation that the commercial law environment provides. Jacqui will be admitted to the Bar in Dunedin later in the year.



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**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:

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