



NEWS BRIEF

SUMMER 2008/09

NEW FACE IN OUR WANAKA OFFICE, TONY RAY

Tony is based in our Wanaka office. He joins Mactodd after 15 years as a partner in a Northland law firm and 30 years legal experience.



Tony has over thirty years experience advising local authorities throughout the country including Wellington City, Auckland City, several other Auckland local authorities, the Northland Regional Council and the Far North District Council, since its creation in 1989. He has also advised private clients on a wide range of issues.

He appears regularly before the Environment Court and is a qualified Hearings Commissioner.

Married to Leanne with two school age daughters, Tony is a keen yachtsman having recently completed a voyage from Europe to New Zealand with his family on their yacht.

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PROTECT YOUR BUSINESS FROM BAD DEBTORS

Owners or managers of small to medium sized businesses will be increasingly aware of how the global credit squeeze is affecting New Zealand. As finance companies collapse, fuel costs escalate and interest rates rise (amongst other things) the pressure grows for everyone to cut costs and make savings.

One common response from debtors to these pressures is to delay paying creditors – including you. Effectively they are using you as a low cost source of extended funding.

Planning how best to protect your business from bad debtors involves both practical and legal issues, as set out in the following paragraphs.

Take time at the outset to ensure the customer can and will pay. Sometimes the promise of a new order for work overrides common sense enquiries at the time about the customer's circumstances and their ability and willingness to pay the price you require.

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OUR INITIAL RUN OF ENVIRONMENTALLY FRIENDLY SHOPPING BAGS WAS SO SUCCESSFUL WE'VE COMPLETED ANOTHER RUN TO MEET THE DEMAND. PLEASE CALL INTO ANY OF OUR OFFICES AND PICK UP A BAG OR TWO FOR YOU AND YOUR NEIGHBOURS.

Protect your Business from Bad Debtors continued

Ensure that you have full details of your customers before you commit to the work. This includes all of their contact details but also the legal name and type of entity. All too often creditors go to take enforcement action only to find they are missing details that compromise debt recovery.

For example, you might assume your customer is John Brown trading as John's Timber Supplies only to find out that he was representing John Brown Limited trading as John's Timber Supplies. This can result in you having no action against John Brown personally, only his limited liability company, which might be insolvent.

If your customer is a small company, obtain a guarantee from the directors. It is often more effective to pursue a director personally, rather than a company.

Have written terms of trade that the customer signs before you supply the product or service. This makes it very difficult for the customer to dispute your terms at a later stage, which often happens if the terms are posted with an invoice, after supply, or not recorded in writing at all. Include terms that:

- state when payment is due
- set a default interest rate for late payment, and
- provide for recovery of full legal costs, should you have to take enforcement action.

If appropriate, include specific reference to creating a security interest pursuant to the Personal Properties Securities Act 1999. This will enable you to become a secured creditor. If you do this, you will also need to be aware of the process for registering a financing

statement on the Personal Properties Securities Register at www.ppsr.govt.nz/cms, without which your security won't be complete and is likely to be ineffective. Take steps as soon as a customer is late. Speak with them if possible. If not, write to them. Too often debtors are not contacted early enough and a problem that could have been a minor one becomes a major one.

The overall key is to take care with your procedures and documentation at the outset of the transactions. It may require time and money to put everything in place but it will more than pay for itself over time. Lawyers often deal with creditors who fail to recover some or all of their debt, despite having provided an excellent product or service, because they haven't taken enough care or obtained adequate advice when setting up their paperwork and procedures.

FARM SUCCESSION – PLANNING AHEAD

The most important decisions pertaining to the family farm are made when the boots are off and the kettle is on. There are many difficult questions that must be discussed and resolved by the farming family, including how to achieve the most tax effective outcome while reflecting an ownership structure that meets the needs of the farming family now and in the future.



Farm succession differs from non-farm based estate planning in that the farm is the major asset. As such it needs to provide retirement income for the retiring generation, as well as employment and income for the younger generation.

Elements of a good succession plan

The starting point of any succession plan is to consider what the goals and aspirations are for each member of the family. These will include business, personal and financial goals. In planning for these goals you will need to consider the following issues:

- the possibility of keeping the farm in the family

- what age the older generation wish to retire – are they going to wind down slowly on the farm or retire to another property
- the desired level of retirement income
- is the younger generation ready to succeed and do they have the skills and commitment to run a farming business
- will the younger generation take on an acceptable debt burden and how will they pay out the other siblings
- fairness to non-successor siblings
- business structures – whether it will be a trading/family trust, sole trader, partnership, a limited liability company or a combination of two or more of these
- tax implications for all of the above

- the distinction between the farm operating as a business and the ownership of farm assets.

Implementing the plan

Once the family goals have been developed and outcomes agreed, the next step is to seek professional advice regarding business structures and tax implications. Your lawyer and accountant should work closely together to discuss options with you in order to implement the best structure to enable your family to achieve their goals. The long term benefits achieved by restructuring correctly outweigh the short-term associated costs.

It is prudent to start early as it may take some time to put the structure in place and to transfer assets. The final structure must be able to adapt to changing needs.

Plan maintenance

Ensure the plan is revisited regularly, especially when there are new additions to the family, marriages or de facto relationships, or deaths. Make sure all family members have an up-to-date will.

Enduring Powers of Attorney are also important to have in place, of which there are two types, a 'property attorney' and a 'personal care and welfare attorney'. In both cases these are people who you trust to make decisions and act for you when you are unable to make decisions for yourself.

Throughout the whole process remember the key to success is careful, well informed consideration of all the issues, and effective and early communication with each other and your advisers.



THESE BOOTS ARE MADE FOR WALKING — THE WALKING ACCESS ACT 2008

If you are a farm owner this Act won't walk all over you!

On 25 September 2008 the Walking Access Bill was passed in Parliament. The origins of the Bill hail back to 2004 when the Government floated the idea of creating marginal public strips across privately owned land to allow all New Zealanders access to important recreational waterways. Property owners were concerned law may be passed to compulsorily acquire privately owned land for public walkways and farmers raised various concerns related to disruption of stock, damage to private property near the walkways and public safety. One major concern was their own potential liability for accidents on their property.

In answer to these concerns a Walking Access Consultation Panel was established that received almost 1400 submissions in response to its consultation document. The Panel made various recommendations that have now been enshrined in the new Act.

The Walking Access Act 2008 ("the Act") establishes a New Zealand Walking Access Commission ("the Commission") to enhance and extend walking access to our great outdoors. The Commission will form national strategy and provide national leadership to co-ordinate access among key stakeholders. The Commission will also provide advice and information on walking access routes, determine the nature of the access (i.e. walking, bicycles, access with motor vehicles, dogs

and use by hunters) negotiate new walking access across private land and facilitate the handling of any disputes.

The Commission will develop, promote and maintain a code of responsible conduct for users of walkways that will include such matters as:

- Standards of behaviour to be observed;
- Information about Māori customs, values and practices;
- Māori relationships with the land and waterways;
- A summary of benefits conferred and obligations imposed by the Act, and

Any such other matters that the Commission feels would be beneficial to users of walkways and relevant landowners. A draft code is to be prepared as soon as practicable.

The Act preserves private property rights and provides that public access to private land should be achieved through negotiation and agreement with landholders rather than compulsory acquisition. It sets out the process that must be followed to declare a walkway over public land and to negotiate a walkway over private land and Māori freehold land.

Section 54 of the Act sets out a number of strict liability offences that may be incurred

while using walkways. Strict liability offences include:

- Discharging a firearm
- Setting a net, trap or snare
- Placing poison or explosives
- Lighting a fire
- Taking plants
- Using a vehicle
- Taking a horse or dog on a walkway without authority.

Section 56 sets out offences that require knowledge, intent or recklessness, such as interfering or disturbing livestock or wildlife, damaging or destroying structures and attempting to intimidate persons using a walkway.

The Act provides for the appointment of enforcement officers, for a term not exceeding 3 years, who have powers to prevent or stop offenders. A fine not exceeding \$5,000 may be imposed for offences under section 54 of the Act and a fine not exceeding \$10,000 for offences under section 56 of the Act. Within 11 years from the commencement of the Act the Minister must report on a review into the Act and any recommendations for changes to the Act.

You can find out more about the commission at its website, www.walkingaccess.org.nz.

THE EARLY BIRD CATCHES THE WORM — TIME LIMITS IN CIVIL CLAIMS

Imagine that 2008 was just not your year. It began with the discovery that your home, bought four years ago, is a leaky home and needs major repairs that will cost over \$200,000.

A short time later your widowed mother died, leaving her entire estate, worth several million dollars, to your siblings because of a recent falling out with you – and that after years of living with you and your family. Then, two months ago, you lost your job because you stood up to your manager, who is a workplace bully. The final straw came when your plasma TV died last night during a test match, after having intermittent problems since you bought it 18 months ago.

You decide it is time to right some wrongs and go to see your lawyer. One of the issues that will be raised with you is limitation periods, which are time limits within which certain claims must be brought.

Some of the limitation periods that might apply in the present scenario include the following:

You believe that the real estate agent who sold you the house misled you and you would like to bring a claim under the Fair Trading Act 1986. However, your claim under that Act might be barred because ap-

plications under the Fair Trading Act must ordinarily be made within three years of the date of the event.

You then consider bringing a claim through the Weathertight Homes Resolution Service against the architect, the developer, the builder, the roofing company and the council that issued the code compliance certificate. Unfortunately, the house is 11 years old and section 393 of the Building Act 2004 prevents claims being brought 10 years or more after the date the work was carried out.

You may have better luck bringing a claim against your mother's estate pursuant to the Family Protection Act 1955 (or on the basis of a testamentary promise, if you had been led to believe that you would inherit some of the estate). The general rule for bringing such claims is that they must be filed within 12 months of the date that administration or probate is granted. However, in certain circumstances you need to be even quicker, because the estate may be distributed after six months.

What about your case for unfair job dismissal? If you wish to bring a personal grievance pursuant to the Employment Relations Act 2000 against your employer, it must be submitted to the employer within 90 days from the date you were dismissed.

Surely the Consumer Guarantees Act 1993 won't let you down. However the Act provides that you must reject goods "within a reasonable time" and what is reasonable will depend upon the type of goods and how they were used. You might not be entitled to compensation if it turns out that the minor problems you have been having for 18 months should have been fixed and would have prevented the TV from stopping altogether.

These are only a handful of examples of the limitation periods that apply to a vast array of legal situations. While some of the limitation periods can be extended by a court, the examples highlight that it may be crucial to seek legal advice as soon as possible. Most claims must be brought within a certain time, or the opportunity to obtain a remedy will be lost.



ENDURING POWERS OF ATTORNEY – A NEW REGIME

Enduring Powers of Attorney (“EPA”) are a common component of estate planning. An EPA records the nomination of a person or persons who will have the ability to make decisions regarding your property and welfare, should you become mentally incapable of doing so.



The amendments to the legislation governing EPAs are intended to increase the accountability of attorneys and minimise the opportunity for misuse of the powers granted. These are important developments for any person who has executed an EPA or are considering doing so, and those who have accepted a nomination to take on the role of attorney for another.

There are two types of EPAs. One records your wishes in relation to your property and the other in relation to your personal care and welfare. While in many instances the attorneys will be the same person, they need not be. Further, the role of property attorney may be held by more than one person, either jointly (any decision made must be agreed upon by the two attorneys) or severally (each attorney has the independent ability to make decisions regarding your property).

EPAs are now more detailed giving you (the donor) greater ability to control your affairs through the terms recorded in the EPA.

Property EPAs

You may authorise your attorney to act on your behalf while you are mentally capable, and

to continue to act if you become mentally incapable. Alternatively, you may authorise your attorney to act on your behalf only if you become mentally incapable. Mental incapacity for the purposes of the property EPA occurs when you are not wholly competent to manage your own affairs in relation to your property.

As a donor, you have several decisions to make:

- One attorney or two? If two, are they to act jointly or severally? This is an important consideration, as if you provide for joint authority, and the appointment of one of them ceases, neither will have the authority to act.
- To act on your behalf in relation to all of your property affairs, or only in relation to specific affairs?
- Do you require any conditions or restrictions to be placed on your attorney?
- Must your attorney consult with anybody? On every matter, or something particular?
- Do you consent to your attorney executing a Will for and on your behalf if you lack the capacity to make one?

- Is your attorney/s to have restrictions placed on their power to act?

Personal care and welfare EPAs

Your personal care and welfare attorney would only have power to act if you have become mentally incapable. Mental incapacity for this purpose occurs when the donor lacks the capacity to:

- Make a decision about a matter relating to his or her personal care and welfare; or
- Understand the nature of decisions about matters relating to his or her personal care and welfare; or
- Foresee the consequences of decisions about matters relating to his or her personal care and welfare or of any failure to make such decisions; or
- Lacks the capacity to communicate decisions about matters relating to his or her personal care and welfare.

The EPA in relation to personal care and welfare contains many of the same options as those contained in the property EPA. These relate to the extent of the Attorney’s author-

Enduring Powers of Attorney – A New Regime continued

ity, successor Attorneys, consultation, the provision of information and the type of health practitioner who is to undertake any assessment of your mental capacity.

The new obligations

The paramount consideration of the property attorney while the donor is mentally incapable is to use the donor's property in the promotion and protection of the donor's best interests (not simply the donor's financial advantage), while seeking at all times to encourage the donor to develop the donor's competence to manage his or her own affairs in relation to his or her property.

As previously indicated, there is a duty to consult with any person specified in the EPA, and also with the personal care and welfare attorney, should the two be different. The property attorney must also financially support the personal care and welfare attorney.

The property attorney must keep records of each financial transaction he or she enters into while the donor is mentally incapable. This will enable any person specified in the

EPA to be provided with information regarding the attorney's actions, as well as enable the attorney to complete tax returns. It is an offence punishable by a fine not exceeding \$1,000 to fail without reasonable excuse to comply with this obligation.

Obligations of the personal care and welfare attorney mirror those of the property attorney. The paramount consideration is the promotion and protection of the welfare and best interests of the donor, while seeking at all times to encourage the donor to develop and exercise his or her capacity to understand the nature and foresee the consequences of decisions relating to the donor's personal care and welfare

Other matters

New witnessing requirements have been introduced for all new EPAs as part of the protective measures introduced by the new legislation.

Before signing the documents, the donor must receive an explanation of the effects and implications of the EPA and his or her

rights from a lawyer, an authorised officer of a trustee corporation, or a qualified legal executive who is independent of the attorney. That person must also witness their signature and certify certain matters.

Once the document is signed, you can revoke it at any time by giving notice in writing to the attorney and to any successor attorney.

Conclusion

It is hoped that the new Legislation will go some way to limiting situations in which it might be possible for EPAs to be misused or abused. It also allows a donor to give greater consideration to how they wish for their affairs to be managed should they become incapable of doing so. While the process of creating an EPA is now more time consuming, they remain an invaluable tool for managing unforeseen eventualities and our affairs as we age.

If you would like to discuss further the options available to you under an EPA please make an appointment to see one of our solicitors.





AGREEMENT FOR SALE AND PURCHASE OF REAL ESTATE TO CHECK OR NOT TO CHECK

In most cases, the first point of contact when you make the decision to purchase or sell a property is with a Real Estate Agent (Agent). Once the parties have agreed on the terms and conditions of the transaction, the Agent will usually draw up the Agreement for Sale and Purchase of Real Estate (Agreement) on the REINZ standard terms of sale and arrange for each party to sign. At this point, **before the Agreement is signed**, we recommend that each party obtains independent legal advice regarding the contents, terms and conditions of the Agreement to ensure that it properly reflects the transaction contemplated by the parties.

Once signed, a binding Agreement is formed between the parties. There are an increasing number of situations arising where Agreements have failed to properly reflect the intentions of one or both of the parties and the parties have failed to obtain any legal advice regarding the Agreement before it is signed.

Some of the issues that arise are as follows:

1. Goods and Services Tax (GST)

The Agreement provides for the purchase price to be "Plus GST" or "Inclusive of GST". If neither is deleted the purchase price includes GST (if any). The significance of this provision in the Agreement may only become apparent at a later stage and well after the parties have signed the Agreement. It is important to obtain the necessary advice from both your Accountant and Solicitor on the provisions of the Agreement in relation to GST so that it properly records how the GST will be accounted for.

2. Deposit

Confusion can arise from the parties regarding the deposit, specifically, the amount of deposit payable and to whom it is payable. The Agree-

ment usually records that a deposit of 10% of the purchase price is payable to the Agent upon the Agreement becoming unconditional or upon the Agreement being signed by all parties. If you are purchasing a property, you need to ensure that the deposit recorded on the front page of the Agreement correctly records the amount that you intend to pay. For instance, if you can only afford to pay a 5% deposit, you must ensure that a 5% deposit is recorded on the Agreement and not a standard 10% deposit.

If you are selling a property, be clear about the amount of the deposit, when the deposit is payable and to whom it is payable. More often than not, the deposit monies are paid directly to the Agent who will then deduct their Commission and pay the balance of the deposit to the Vendor. Before completing the Agreement you should ensure that the proceeds of sale of the property are sufficient to meet all of your obligations to your bank, your Agent and your Solicitor.

3. Settlement / Possession date

The majority of Agreements schedule settlement to be completed on a Friday which generally corresponds with the Purchasers desire to take possession and move into the property over the weekend. As a result, Friday is usually the busiest day of the week for Banks. If you are purchasing a property and you are not in a position to complete settlement on the scheduled date, you may be charged penalty interest by the Vendor for late settlement. The next business day which settlement can be completed is the following Monday, therefore the Purchaser will be liable for penalty interest over the weekend period.

If you are selling a property and purchasing another property on the same day, and your

purchase is dependent on your sale being completed, it is prudent to allow sufficient time for all parties involved to prepare for and complete settlement. It only takes one party to delay settlement and all subsequent transactions will similarly be delayed throughout the business day.

4. Conditions

Many Agreements contain conditions in the Further Terms of Sale for the Purchaser to complete before the Agreement is "unconditional". Matters such as finance, Land Information Memorandum (LIM) Report, due diligence investigations and Building Report are often matters that are to be satisfied and confirmed by either or both parties before the Agreement proceeds. It is extremely important that these conditions are drafted correctly so they properly reflect the intentions of the parties.

Everyone has a different opinion on what constitutes a "clean" property. What appears to be clean to one person is not necessarily deemed clean by another person and it is not always wise to assume that a property will be cleaned prior to the settlement date. If you are purchasing a property and expect that it is to be cleaned to a certain standard i.e. carpets cleaned, commercially cleaned, such conditions should be included in the Agreement.

5. Chattels

Situations can arise where the parties have differing ideas about the chattels which are included in the Agreement and being sold or purchased with the property. All chattels that are to be included in the Agreement should be listed in Schedule 1 of the Agreement so all parties are clear on what is included and what is not. It is important that an Agreement is drafted correctly at the beginning. Quite often it is too late to make amendments or variations to the Agreement once signed as the other party may not agree to such amendments or variations.

Importantly, we recommend that you seek independent legal advice regarding the contents, terms and conditions of the Agreement before it is signed. This includes any amendments or variations to the Agreement. A small change at the beginning of a transaction can have a large impact at the end.

HOW WE CARE ABOUT YOU

The new Lawyers and Conveyancer's Act 2006 was enacted on 1 August 2008. This has meant a few changes with how we provide services to you. This article is intended to give you an idea of how this new Act may affect you and explain some changes that you might have noticed. From 1 August 2008 we are required to send you a "Terms of Engagement Letter" and adhere to specific Client Care rules.

For us here at Mactodd this is not a new concept as we have had Terms of Engagement Letters established for some years but there is now a legal obligation and an even greater focus on you, the client. Terms of Engagement letters simply set out what we will do for you, how we will charge you, payment terms and options, confidentiality and other important matters to our relationship with you. The full version of our letter is available on the Client Info section of our website www.mactodd.co.nz.

As our valued clients you may be interested in what your options are under the new Act if you have an issue or concern with our services or fees and how we can assist you in dealing with another firm that you may have an issue or complaint with?

The first step is to try and talk with the solicitor/firm involved. Often matters can satisfactorily be resolved in this way. If an agreement cannot be reached especially in respect of a

bill of costs, then you can take up your concerns with the new standards committee of the New Zealand Law Society. This committee has powers to make a number of orders that include a practitioner reducing, cancelling or refunding fees.

One difference in the new Act is that unless there are special circumstances that would justify otherwise, the committee must not deal with a complaint if the bill of costs:

- 1. That was rendered is more than two years prior to the date of the complaint; or
- 2. Relates to a fee that does not exceed \$2,000.00 exclusive of GST.

In summary, whilst the new Act has created a legally more stringent criteria relating to client care and fees charged, in a practical sense this will not affect our relationship with you. As always we endeavour to bring you accessibility, care and excellence.

However, if you do have any issue with any service provided or fees rendered by this firm or another, then please feel free to contact any of the Partners to discuss or alternatively you can look on the Law Society website at www.lawsociety.org.nz for further information. Also available on our website is our Client Feedback Form, (also under the Client Info section); your opinions are important to us.

OTHER NEW FACES

Four new clerks will be with us over the summer period. They are Abigail Mackenzie, Hannah Mason, Nyssa Willcocks and Rohan McKenzie.

SUPPORTING OUR COMMUNITIES

Mactodd is committed to the communities it works in and has a strong culture of sponsorship for local groups, organisations and charities. Everyone at Mactodd including the partners is encouraged to become involved in the community providing voluntary services and pro bono support. Our staff are active in such organisations as Rotary, the Chamber of Commerce, school committees, youth groups, volunteer fire brigade and sporting clubs. The following are some of the events, clubs, organisations and individuals Mactodd has sponsored in the last year.

Arrowtown Autumn Festival Debate
Arrowtown Golf Club
Glenorchy Battery Association Scheelite Mining DVD
Lakes District Museum "Our Piece of Paradise" Cribbies Exhibition

Queenstown Chamber of Commerce Business Awards
Queenstown Library Cards
Tarras Golf Club
Upper Clutha A & P Society Pavilion
Winter Festival Senior Citizens Luncheon

We highly recommend a visit to the Cribbies Exhibition in Arrowtown, it is most worthwhile and will be available until early 2009.

Partners

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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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