NEWS BRIEF

MACALISTER TODD PHILLIPS BODKINS
BARRISTERS • SOLICITORS • NOTARIES

Spring 2005

BUILDING COMPLIANCE AND THE BUILDING ACT

You may recall an earlier article about the Building Act 2004 ("Act"). One of the areas in which its impact is being felt is by vendors selling properties on which building work has been undertaken. Purchasers often require evidence of compliance with the Act.

Building Code

One of the fundamental principles of the Act is that all building works must comply with the building code. Compliance with the building code is mandatory regardless of whether or not a building consent is required for the work. Even for minor building projects, householders need to check whether or not the building code is relevant and if it is, must ensure that the building work complies with the requirements of the code.

Evidence of Compliance

The most common way a building owner may provide evidence that work complies with the building code is by obtaining and being able to provide the purchaser with a Code Compliance Certificate ("CCC"). A CCC is issued where a building consent is applied for before building work is commenced. The CCC effectively provides that the consent authority is satisfied on reasonable grounds that the building work complies with the building consent. It is the building consent that is crucial in ensuring that the performance standards set out in the building code are met by the finished building product. A building consent will lapse if work does not commence within 12 months of the date of issue. However, it appears that commencement of work within the first 12 months after the building consent is issued preserves the consent indefinitely.

Certificate of Acceptance

Sometimes a purchaser will ascertain that building work for which a building consent and CCC should have been issued, has not been completed in accordance with those requirements. The Act provides that in that situation a building consent authority can issue a certificate of acceptance.

A certificate of acceptance certifies, to the best of the building consent authority's knowledge and on reasonable grounds, that, as far as it could ascertain, the building work complies with the building code.

Obviously this certificate conveys a far lower degree of quality assurance than a building consent or CCC. It replaces what was previously referred to as a "safe and sanitary" letter which followed an inspection by the Council certifying to the effect that the building was deemed to be neither unsafe nor unsanitary.

Building Warrant of Fitness

Another matter which may require consideration when purchasing a commercial building is whether or not a building warrant of fitness is required and is up to date. If a building contains systems or services that require ongoing maintenance in order to function at the level demanded by the building code, a compliance schedule must be established in regard to those systems to ensure that maintenance is routinely carried out.

The compliance schedule sets out the inspection, maintenance and reporting procedures required to ensure that those systems meet performance standards. The building warrant of fitness confirms that the inspection, maintenance and reporting procedures set out in the schedule have been complied with for the foregoing 12 months.

There are significant fines for a building owner who fails to obtain a compliance schedule or to display an up to date building warrant of fitness.

The Auckland District Law Society form of Agreement for Sale and Purchase of Real Estate (7th edition(2)) has been updated to incorporate the terms of the Act. If you require further information in regard to a specific building or a particular point mentioned in this article then please consult us.

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RECOGNISING THE RIGHTS AND VIEWS OF CHILDREN

On 1 July this year the Care of Children Act ("Act") replaced the Guardianship Act. The Act extends the principle that children's needs should be of primary importance in proceedings before the Family Court and increases children's rights of participation in those proceedings.

Child's Welfare Paramount

When making a decision under the Act, the court must ensure that the welfare and best interests of the child are the first and paramount consideration. The Act provides guidelines as to what constitutes the welfare and best interests of a child. Those guidelines are consistent with the principles of the United Nations Convention on the Rights of the Child (UNCROC).

The Act emphasises agreement rather than litigation, with parents encouraged to share responsibilities and to reach agreement as to their child's care, development and upbringing. Emphasis is also placed on the child's right to know and be cared for by both parents. One of the key aims of the Act is to involve children in decisions that affect them.

The child must be given a reasonable opportunity to express his or her views, and those views must be taken into account.

Ways in which the court will achieve this include using the lawyer appointed to represent the child, obtaining a specialist report from a child psychologist or by the Judge talking to the child.

Parenting Orders

The Act also increases the ability of the Family Court to enforce parenting orders. The court will have the power to admonish the person breaching the order, vary an existing order, require the parties to attend counselling, or order the person in breach to enter into a financial bond to deter further breaches. The court can also issue a warrant that gives police the power to take possession of a child for the purpose of enforcing an order, but this is considered a last resort. Parents deliberately breaching parenting orders could face up to three months in prison or a maximum fine of $2500.

Open Court

The previously closed environment of the Family Court will be opened up, although this will still be subject to certain restrictions. The reporting of proceedings, with identifying details removed, will also be allowed. The key principle here is that justice must not only be done, but be seen to be done.

New Terminology

The Act also removes all reference to the terms "custody" and "access". These are replaced with "day-to-day care" and "contact". Contact includes contact by writing, email, telephone as well as direct face-to-face contact.

One of the aims of the new terminology is to remove the implications of control and power associated with the term "custody".

SUMMARY

In conclusion, the new Act aims to move the focus away from parental rights, to parental responsibilities, recognising the child's right to participate in decisions affecting him or her and to ensure that those views are taken into account.

The child's welfare and best interests must be the paramount consideration.

NOISY NEIGHBOURS WHAT ARE YOUR RIGHTS?

Most of us are used to living in an environment where there is a certain amount of noise. However, there are also times when noise can become excessive and can interfere with the peace, comfort and convenience of other people.

SO...

If you suffer from noisy neighbours, and it cannot be satisfactorily resolved by talking to your neighbours (or if you do not feel comfortable doing so) contact your local council for assistance.

How do you make a complaint about noise?

The Resource Management Act 1991 ("RMA") imposes obligations on occupiers of land to ensure noise does not exceed a reasonable level. The RMA deals with problems with excessive and unreasonable noise and provides various remedies. The environmental health sections of local district or city councils administer the noise control provisions of the RMA.

What is excessive?

Your local authority will not take action unless it considers the noise to be excessive or unreasonable. Excessive noise is defined as any noise that is 'under human control and of such a nature as to unreasonably interfere with the peace, comfort, and convenience of any person (other than a person in or at the place from which the noise is being emitted), but specifically excludes noise from aircraft in flights, vehicles on the road and trains.

What is the process?

Local authority enforcement officers can issue excessive noise directions or abatement notices to control noxious elements, adverse effects on the environment or unreasonable noise. When a complaint of "excessive noise" is made to the local authority an enforcement officer will then be sent to the address. If the officer considers the noise to be excessive, either an excessive noise direction or an abatement notice will be issued to the occupiers of the address.

Excessive noise directions are short-term notices that last for 72 hours. These notices are usually issued in cases where the problem is easily resolved, for instance, turning down the volume dial of a stereo if it is too loud. Abatement notices last indefinitely until either the council is willing to remove them or until an appeal is lodged and is decided upon by the courts. Such problems are usually more serious and occur over a longer period, for instance, industrial noise.

If a noise direction or abatement notice is ignored the officer has the right to enter the property and seize and impound the source of the noise.

A policeman must accompany the officer if the building is a dwelling house. The officer can also issue an infringement notice imposing instant fines between $500 and $750, or the occupier may face a penalty of up to $10,000 if successfully prosecuted.

NEW RULES FOR LOANS AND CONSUMER CREDIT

The Credit Contracts and Consumer Finance Act 2003 ("Act") came into effect on 1 April 2005. It replaces the Credit Contracts Act 1981 ("CCA") and is designed to simplify and update the laws relating to the provision of credit.

Why Change?

The provisions of the CCA were quite complicated and some of the concepts were not well understood. As a result, the purpose of the CCA, (to simplify the disclosure of financial terms such as the finance rate, interest rate and other charges to debtors), was often not achieved. Furthermore, the CCA did not provide any real means of redress for debtors with the result that its provisions tended to be disregarded by creditors. The purpose of the new Act is to ensure that the interests of debtors who are entering into credit contracts are protected by ensuring that proper information is given to them as to the calculation of costs, fees, charges and interest charges in relation to the credit contract. Furthermore, it is designed to prevent oppressive terms or conduct by creditors.

Which Contracts Does The Act Apply To?

The Act is mainly concerned with "consumer credit contracts". The key requirements for a consumer credit contract are:

- The debtor must be a natural person and must enter into the contract primarily for "personal, domestic household purposes"; **and**
- Interest and/or credit fees are payable, and/or a security interest is being taken by the creditor; **and**
- The creditor must be in the business of providing credit or makes a practice of doing so in the course of another business.

The Act does not apply to companies, incorporated societies or family trusts.

The requirement for a loan to be primarily for personal, domestic or household purposes should make it relatively easy to determine whether or not the Act applies. A good example is a loan for the purchase of a home.

Clearly that would be for personal, domestic or household purposes in which case the loan is a consumer credit contract. However, if the loan is for the purchase of a rental property, it is not a consumer credit contract, as the debtors are not intending to occupy the house themselves.

In cases of doubt, the Act does provide that a declaration by the debtor that the credit is for use primarily for business or investment purposes (or both) rather than personal use, will generally be sufficient to ensure the contract falls outside the Act.

WHAT ARE THE ADVANTAGES?

- The creditor must disclose in a format whereby the financial terms of the transaction can be easily understood (including the method of calculating interest, any penalty charges for early repayment of a loan and default interest charges).
- The debtor has the right to cancel the credit contract at any time before initial disclosure has been made and within three working days after that has occurred. In order to cancel a consumer credit contract, the debtor must give written notice and refund any money or return any property they have received under the contract.
- Creditors are now required to charge reasonable fees for credit (but this does not apply to the interest rates).
- The Court now has the right to "reopen" a credit contract if it considers the contract is oppressive or that a power contained in the contract has been or will be exercised in an oppressive manner or if a person has been induced to enter into a contract by oppressive means.
- The Court's powers to reopen a consumer credit contract include situations where the debtor suffers unforeseen hardship and it was not foreseeable at the time the debtor entered into the contract that they would not be able to meet their obligations (for example illness, injury or loss of employment).
- A failure by a creditor to comply with the Act's disclosure requirements means that the contract cannot be enforced.

In summary, the changes introduced by the Act should be of general benefit to all parties in that the process for disclosure of financial terms has been simplified.

However, time will tell whether the new Act proves effective in practice.

THE CHARITIES ACT

The new Charities Act was passed by Parliament on 13 April 2005. It is the culmination of a process which began in 2001 when the Government released a discussion document as part of a review of the tax treatment of charities. The document arose out of concerns that:

- there were no means by which the public could identify legitimate charities as opposed to sham operations; **and**
- there was no way of monitoring charities claiming tax free status.

Following receipt of the submissions, Cabinet set up a working party to look specifically at registration, reporting and monitoring systems suitable to the New Zealand charitable sector.

From there a Bill was drafted which aimed to address some of the issues raised. The Social Services Committee reported back on the bill on 17 December 2004 and recommended that it be passed with amendments.

Charities Review

Although there is a procedure available to register charitable trusts, there was no system to monitor their ongoing activities or funding sources.

The Act establishes a Charities Commission to register and monitor charitable entities to ensure that those entities receiving tax relief, continue to carry out charitable purposes and provide a clear public benefit.

Key Provisions Of The New Act

Registration

Registration with the Charities Commission will be voluntary, but a charity will need to register to continue to retain its tax exemption. Charities wanting approved donee status will also have to register. People who donate to organisations with approved donee status can claim a tax rebate on their donation. Registered charities will no longer have to apply to the IRD for income tax exemption and approved donee status.

Charitable Purpose

In order to register, charities and approved donees will need to submit a copy of their rules or trust deed, and other information about current and proposed charitable purposes and activities. This information will then be assessed against the requirements of the charitable purposes test.

Charitable purposes must fall within one of these groups:

- The advancement of education;
- The advancement of religion;
- The relief of poverty; and
- Any other matter beneficial to the community.

Compliance

Once a charitable organisation has registered with the Commission it will be issued with a unique registration number which must be displayed on all fundraising materials used (eg, collection tins) when money is collected from the public. This should provide the public with a high degree of confidence that an organisation is undertaking activities that are both charitable and in the public interest.

If a charity changes any or part of its core practices during the year (such as the organisation's charitable purpose) they must notify the Commission. This requirement should ensure that all information held on the register is as up to date as possible.

Penalties will be imposed on organisations that fail to notify the Commission of these changes within a specified time.

AFFECT YOU

How Does This Affect YOU?

The new Charities Act has important implications for those of you who are involved with a charitable organisation or collect rebates for charitable donations.

Further information can be obtained from the Ministry of Economic Development's website www.charities.govt.nz

INDEPENDENT CONTRACTORS VS EMPLOYEES

In New Zealand, workers are divided into two categories – independent contractors and employees. Is the distinction between the two important?

"Employees"

The Employment Relations Act 2000 defines an "employee" as any person 'employed by an employer to do any work for hire or rewards under a contract of service.'

This definition includes home-workers or persons intending to work. It excludes volunteers who do not expect to be rewarded and do not receive rewards for work done voluntarily.

"Independent Contractors"

In contrast, "independent contractors" work for "principals" under contracts for service and are typically seen as autonomous commercial operators.

Independent contractors are responsible for paying their own taxes.

Statutory Protections

Employees enjoy statutory protections contained in the Employment Relations Act 2000. Independent contractors do not and their relationship with a principal is governed by contract law. There is limited statutory protection for independent contractors contained in the Health and Safety and Employment Act 1992 and in the Human Rights Act 1993. The underlying philosophy behind this is that the bargaining position of an independent contractor with a principal is considered to be equal and it is assumed that independent contractors have the ability to take care of themselves in the market environment.

How To Tell The Difference

On occasion the Court must determine which category an individual belongs to. In doing so, it must consider all relevant matters – including those that are indicative of the parties' intentions. The Court cannot treat any statements made by persons that describe the nature of the relationship as determinative. Essentially, this means that a written contract that labels a party an "independent contractor" will not on its own determine the matter and the Court will look to other relevant matters to make a final determination.

Recent Case Law

In *Three Foot Six Limited v Bryson*, the Court of Appeal had to decide the relationship between the parties. In mid-2000, Mr Bryson was seconded from Weta Workshop to Three Foot Six Ltd and was engaged to work as an Onset Model Technician. Mr Bryson's conditions of employment were written and the written document took the form of a tax invoice. The conditions of Mr Bryson's employment described him as an independent contractor. Over a year later, Mr Bryson was informed that his services were no longer required as Three Foot Six Ltd had made the decision to downsize its miniatures unit. Mr Bryson argued that he was unjustifiably dismissed but he had to first establish that he was an "employee" and therefore entitled to bring a claim under the Employment Relations Act 2000.

In analysing one of the tests commonly applied by the Courts, the Court of Appeal noted that while Mr Bryson may appear to be an "employee" (as found by the Employment Court) insufficient weight had been given to other relevant factors – specifically, the form of the contract and film industry practice. The Court of Appeal held he was an independent contractor.

Mr Bryson appealed that decision to the Supreme Court who have now allowed the appeal by reinstating the original decision of the Employment Court which found Mr Bryson to be an employee.

In reaching its decision, the Supreme Court has done so on the basis that the Employment Court did not make any errors of law and that it had based its decision on the particular circumstances of Mr Bryson's employment. The decision is however not to be treated as affecting the status of any other employee in the film industry.

To that extent, the Supreme Court has not provided the clarity hoped for on the issue, as to whether an individual is an independent contractor or an employee. It appears therefore that the issue is one which will tend to be decided on the individual circumstances of each case rather than on general principles.

NEWS IN BRIEF

Penalty Interest On Leases

Commercial tenants would do well to carefully consider the penalty interest provisions in their lease agreements. Some agreements specify a percentage rate while others refer to a percentage (say 5%) above the interest rate charged by the Landlord's bank. When the bank rate is high, some tenants can be paying 18% or more in penalty interest. And be warned – just because the landlord is not taking action at the tenant's failure to pay rent, does not mean that penalty interest is not accruing and the landlord may eventually come knocking for the whole amount owed.

Update On The Christchurch Cycle Race

You may recall reading in the media about the Astrid Andersen case whereby an entrant in the Christchurch Cycle Race was killed. This was a result of Ms Andersen's failure to advise entrants that only part of the Port Road would be closed. Ms Andersen appealed her conviction to the Court of Appeal and was successful. Essentially the appeal turned on an interpretation of the relevant section of the Crimes Act and whether or not Ms Andersen's omission in pre-race instructions required negligence or recklessness on her part. If the former applied, Ms Andersen would have to have known that her omission was dangerous if she turned her mind to it. If the latter, she would have to have actually known that her omission was dangerous. The Court ruled that the latter standard applied and as the Crown had no evidence that Ms Andersen had actual knowledge there was no point in a new trial. Event organisers around the country are no doubt breathing a sigh of relief.

Court Fees Update

Last year Court filing fees were increased substantially by the Government. The primary reason given was to ensure that the cost of justice was met by those utilising the system. The New Zealand Law Society and New Zealand Bar Association both opposed the increase and have continued to voice concerns. The good news is that those concerns have been heard and the Regulations Review Committee is reconsidering the increases because they are seen to be impeding access to justice. Watch this space for an update.

An Introduction to the Kyoto Protocol

Part One – Confused about the Kyoto Protocol? How did it come about? What does it provide for? And, what is all the recent fuss about?

The United Nations Framework Convention on Climate Change ("the UNFCCC"), adopted in 1992, sets the overall framework for inter-governmental efforts to respond to the effects of climate change and reduce greenhouse gas emissions. It recognises that the climate system is a shared resource – the stability of which can be affected by industrial and other emissions of carbon dioxide. Ultimately, the Kyoto Protocol was born out of the participating countries' attempts to consolidate and crystalize the UNFCCC's original aims.

New Zealand's entry to the UNFCCC was made on 21 March 1994 and the UNFCCC lists New Zealand as one of the wealthier countries that have special obligations to assist developing countries with financial and technological support.

The UNFCCC set a voluntary goal for participating developed countries to reduce greenhouse-gas emissions to 1990 levels by 2000. Possibly because it was a voluntary goal, most countries did not meet it. However, the UNFCCC recognised and anticipated that the convention was essentially a framework that required more teeth in order to be effective. Negotiations at conferences of parties to the convention led to the Kyoto Protocol which, amongst other things, sets binding targets for participating countries to reduce carbon dioxide and greenhouse-gas emissions by 5.2% percent below 1990 levels before 2012.

The Kyoto Protocol was adopted in 1997 in Kyoto, Japan and came into effect on 16 February 2005. Since then it has given rise to a number of concerns resulting from unanticipated consequences – in particular, what was supposed to be an additional source of income to our country now appears as though it may be a major expense.

What is the Kyoto Protocol about?

How does it work and why will it cost us?
What will it mean for Joe and Jo Bloggs with their 2.5 children, picket fence and coal range?

Watch this space in our next edition for the feature article.

OUR PEOPLE ...

We are pleased to announce two new Partners to the Macalister Todd Phillips Bodkins Partnership:

Toni Brown

Toni Brown has been practising in the Central Otago region since 1998 and with MTPB since 2001. Originally from the North Island, following the completion of her studies at Otago University, Toni decided to make Central Otago her home and moved to Alexandra. Toni's outside interests primarily relate to horse riding with her two young children, and the breeding of Sport Horses.

Toni's area of specialty is Family Law and she is also on the Executive Committee of the New Zealand Law Society, Family Law Section. This enables Toni to be actively involved at a Central Government level on issues regarding Family Law for citizens of New Zealand. Toni also is appointed regularly by the Courts to represent children, and also for International Hague Convention cases. Matrimonial and de facto Property law is another field that Toni enjoys, including issues relating to Family Trusts.

Based in our Alexandra office, Toni regularly travels to our other offices as clients needs arise.

Clark Pirie

Clark has been practising with MTPB since January 2002 after he returned from his OE where he was based in London. Clark worked in general practise in Dunedin for four years after completing his degree at the University of Otago. Clark is originally from a farm near Invercargill.

Clark practises in the commercial department of the Queenstown office. His areas of specialty include: all types of conveyancing transactions (sections, houses, small business) major property transactions such as hotels and large property portfolios, company transactions, leases, financing, formation of family trusts.

Clark enjoys participating in most sports and is involved in golf, squash, basketball, cricket and clay target shooting. He has in the past competed at International Cup and Championship events throughout the world for Olympic Skeet shooting.

New Practice Manager

We are pleased to announce the recent appointment of **Andrea Lambie-Shaw** as Practice Manager for the MTPB. Andrea has had extensive experience in the management/leadership of Law firms both in New Zealand and London over the last 20 years. This includes serving on Law Society, Law Management Committees both in New Zealand and England. Andrea commenced her career in Chartered Accountancy, qualified as a Legal Executive, and then graduated in 1992 with an M.B.A. from the University of Auckland. Shortly afterwards Andrea served as National President of the New Zealand M.B.A. Association for two years. Andrea is a member of the Rotary Club of Queenstown.

Congratulations...

...to **Emma Kitto** for achieving the top marks in New Zealand for the recent Litigation Law & Practice examination; the final paper in her Legal Executive qualification. MTPB are very proud of the number of qualified Legal Executives we have, and the number we currently have undertaking study:

Qualified Legal Executives:
Sally Doherty
Andrea Gilbert
Emma Kitto
Andrea Lambie-Shaw
Sarah Swale
Sandra Torrey

Those currently studying for the Legal Executive qualification are:
Carissa Crozier
Ros Ecclestone
Leigh McAvinue
Alexis McStay
Stacey Moran
Joan Mulqueen
Anna Russell
Debbie Wilson.

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Partners
Graeme Todd
Kevin Phillips
John Troon
Bryce Jack
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Alistair Bowers
Toni Brown
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Eric Thomson
Clifford Brunton

Associates
Dale Llyod
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Professional Staff
Charlotte Allan
Elliot Goldman
Emma Kitto
Hellena McArthur
Kristy Rusher
Mary Flannery
Phena Byrne
Sally Doherty
Sarah Swale
Tim Cadogan

Practice Manager
Andrea Lambie-Shaw

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

Alexandra Office
18 Limerick Street
PO Box 268, Alexandra
P 03 448 8109
F 03 448 6079
alexandra@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

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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
Macalister Todd Phillips Bodkins News Brief,
P.O. Box 653, Queenstown, New Zealand
or newsletter@mactodd.co.nz