



## EDITORIAL

Winter is upon us and we now have to try and adapt to the new season. For me that means pulling out my gumboots, raincoat, scarf and hat and motivating myself to spend time outside in the fresh air when it might be easier to sit inside and enjoy the fire!

Lately there has been much discussion around a substitute for the Foreshore and Seabed legislation and debate will continue to rage to find the answer to this complex issue. Another source of considerable controversy has been the Three Strikes legislation recently passed into law. The success or otherwise of this legislation will continue to be hotly debated with possibly the biggest single question being whether it will help to reduce crime. Time will tell!

Three Strikes legislation was enacted in California 15 years ago and analysis of it is now being produced. A recent study shows an average of 1,000,000 serious or violent crimes being prevented every 5 years and 10,000 Californians spared from becoming murder victims since its passage in 1994. There will no doubt be other studies refuting this. It will be interesting to review New Zealand's statistics on crime in a few years time once we have the statistics available.

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# Three Strikes Law

While there appears to be consensus over the fact there is too much serious crime in New Zealand, debate has raged over whether the 'three strikes' legislation is the correct way forward. New measures have been introduced in the Sentencing and Parole Reform Act but will not cover crimes committed before the law was passed.

The legislation lists 40 offences, which are 'qualifying offences' and count as a strike against the offender:

- **Strike one** occurs when the offender commits the first qualifying offence. The offender will receive the standard sentence and a first warning. The offender is eligible for parole.
- **Strike two** occurs when the offender commits a second qualifying offence. The offender must serve the sentence (which may not be the maximum that can be imposed for that offence) without parole and will receive a second warning.
- **Strike three** occurs when the offender commits a third qualifying offence. The offender must be sentenced to the maximum sentence for that offence with no parole.

For murder and manslaughter the maximum sentence will be life imprisonment with life meaning life (i.e. until the prisoner dies). There are a range of maximum sentences including 14 years for aggravated robbery, kidnapping, and attempted murder and 20 years for sexual violation. Preventative detention will still be available if a longer sentence is required.

The legislation was supported by both the National Government and the ACT Party who are concerned about violent crime and wish to send a strong message to recidivist offenders and those embarking on a life of crime. It is anticipated that the law will improve public safety by locking up offenders for a longer period and improve public confidence in the justice system. It is also hoped the new law will relieve victims of the stress of attending parole hearings, and the anxiety and uncertainty of not knowing when offenders will be released on parole.

Critics argue the 'three strikes' law will remove judicial discretion and ignore factors



that should be considered when assessing sentencing such as premeditation, an early guilty plea, and an offender who is remorseful. Dr Richard Ekins, Senior Lecturer at Auckland University's Faculty of Law, has highlighted instances where inconsistencies may occur:

- Two men who commit an unpremeditated aggravated street robbery would ordinarily receive a sentence of 18 months to 3 years. If one of the men has previously had two strikes then he has to be sentenced to 14 years in prison – the maximum penalty for aggravated robbery.
- An armed robber, with no prior convictions, may brutally assault a victim while his accomplice, with two previous strikes, may be merely the getaway driver. In sentencing, the judge will have no discretion with the getaway driver – he will receive the maximum sentence with no parole while the armed robber may be punished less severely.

No doubt there will be ongoing debate about the merits and efficacy of the 'three strikes' law into the future. Watch this space for updates.

# Restructuring: The Three D's

With the continuing effects of the economic downturn 'kicking in', interest rates potentially on the increase, commentators predicting a flat or falling property market, and changes in the budget, another wave of individuals may be contemplating downsizing, debt reduction or disposal of assets. This article highlights some of the legal issues to be mindful of.

## Downsizing

Downsizing for property investors usually involves the sale or transfer of a rental property or two. Some issues to consider are:

- If the property is held by a company or trust the sale needs to be in the best interests of the company or the beneficiaries of the trust.
- There may be 'depreciation recovered' on the sale that is subject to tax.
- To avoid gifting issues valuations may be required if the parties are not dealing at 'arms length'.
- With the sale of shares in a company (rather than the sale of the asset itself), or amalgamation of one company with another, there are 'minimum continuity of shareholding' requirements to ensure tax losses and imputation credits are retained and not forfeited. There could be tax losses to be set off against taxable income or dividends to be paid to use imputation credits before the sale of shares where the 'minimum continuity of shareholding' may be broken.

## Debt Reduction

Debt reduction may raise further issues. The cost of breaking fixed interest rate loans may be significant. The lender may not be prepared to accept repayment of a particular loan only and may require all sale funds to be re-paid. The lender also may not co-operate in the release of a security such as partial discharges of mortgage or the release of personal guarantees. New criteria may be imposed on the re-draw of funds.

## Dispositions

Commercial property dispositions raise a number of issues including:

- The GST status of the transaction and whether GST is payable.



- The 'associated persons' rules, (affecting dealers and developers), that impact on taxable gains that would otherwise escape the tax net.
- Commercial tenants may be looking to change premises not only to reduce costs but also as a result of lease inducements, incentives (such as rent free periods) or lease surrender payments. Whether these are deductible expenses or not depends on how the deal is structured and the tax profile of each party.

Often in fixing one problem by a disposal you can create another. For example, the transfer of a leaky property to a trust or company amounts to a change of ownership. Whilst this may have estate planning benefits, it will prejudice any claim the trust has in regard to the leaking property, as it will break the causative link against the territorial authority. Acquiring the property with knowledge of the leak may amount to contributory negligence. If the transferor has already lodged a claim with the Weathertight Homes Tribunal this must be terminated.

With some projects put on hold, it is important to check that resource consents are still valid. A resource consent will lapse on the date specified in the consent unless it is implemented or an application is made to extend the lapse period. Some consents, such as water and discharge consents, will need to be transferred (e.g. if you are disposing of a beach property). Sometimes restructuring may involve a change of building use (e.g. disposing of flats to a company that operates serviced apartments) that may require notice of a change of use to the territorial authority.

## NEW ARRIVALS AT MMLAW



**Kent Yeoman** LLB BSc

Kent recently arrived back in New Zealand after spending 6 years in the UK and has joined MMLaw as an Associate in the Corporate/Commercial team. While in the UK, Kent provided a wide range of contractual related advice and associated negotiations and procurement advice. Kent is married with one child and is enjoying being back in Christchurch. MML is very pleased to welcome Kent to the team.



**Susan Lyall** BA LLB

Susan has recently joined MMLaw as an Associate working closely with Hugh Cotterill and providing valuable experience to our litigation team.

Susan commenced her legal career in 1994 and spent the next 8 years working in litigation teams in the North Island and here in Christchurch. Family law is Susan's main focus including relationship property, relationship disputes, care of children, adoption, domestic violence and child support. After having some time out of the workforce to raise her young family, Susan has returned to the practice of family law.

## SNIPPET

## THE CASE OF THE NUDE CYCLIST

A committed cyclist and naturalist convicted of offensive behaviour for cycling while nude, (wearing only a helmet and a heart rate monitor) recently successfully appealed his conviction.

The High Court held that 'offensive behaviour' is behaviour that involves 'substantial offence' and 'arouses anger, resentment, disgust or outrage'.

The Judge held that the cyclist's actions did not meet the necessary threshold because the complainant was only 'quite' disgusted.

It was also held to be relevant that it occurred on a relatively quiet rural road and the complainant confirmed that she had not been able to see his genitals. The opportunity for exposure to his nakedness would therefore be considerably less than would be the case for example, when a person walks naked along a suburban street.

The Judge emphasised this does not mean that nude cycling cannot constitute offensive behaviour. In other circumstances the Court would need to consider whether that type of behaviour could arouse real anger, resentment, disgust or outrage in the mind of a reasonable person. It is a question to be assessed on the particular facts of each case.



This year's Launchpad graduation was held at the Copthorne Hotel in Christchurch. Master of Ceremonies was Garry Moore with Emma McFaul the guest speaker. Emma completed her launchpad year with Simon Mortlock Partners in 2000 and went on to study law. She is currently a solicitor with Arthur Watson Savage in Invercargill.

Many of our clients have first-hand experience of Launchpad having taken on a student and guided them through to the completion of their scholarship. Launchpad was established as a Trust in 2000 with the direct input and support of this firm which continues today. Students graduate with a Certificate in Applied Business Practices and many go on to further study or more challenging roles. Over 500 students have graduated in Christchurch during the past ten years.

The photograph attached shows Emma seated with Morgan Kelly (middle) and Bianca Nuku (left), two former Launchpad students. Morgan is a Registered Legal Executive and Bianca a Personal Assistant, both at MMLaw.

## Shake Up for Legal Aid

The Government hopes that proposed changes to the Legal Aid system will improve public confidence in the Legal Aid system and give taxpayers value for money.

Legal Aid is available under certain criteria to those who are unable to pay for legal representation. Its provision is based on the premise that all people should have the opportunity for legal representation. In 2009 there were 85,156 Legal Aid grants at a cost of \$131 million with administrative costs reaching \$20.4 million.

In late 2009 a damning report on the Legal Aid system was released by Dame Margaret Bazley. The report found a number of issues with the current system that were leading to system-wide failings. Some of these issues were:

- cumbersome administrative procedures,
- inflexible procurement provisions, which prevent the Legal Services Agency from reducing the administrative burden and taking advantage of efficiencies,
- poor relationship between the Legal Services Agency and the New Zealand Law Society; and

- the Legal Services Agency having a strong operational focus, rather than direction setting which would ensure legal services are efficient, effective and sustainable.

The report found the Legal Aid system was open to abuse by both lawyers and defendants. It recommended a number of changes that culminated in the Government announcing a comprehensive package of reforms. The reforms include:

- A requirement that lawyers demonstrate competency, based on objective criteria, to a selection committee to gain accreditation and a requirement to re-apply after a fixed term.
- A Performance Review Committee to consider concerns or complaints raised regarding performance and to impose sanctions.
- The functions of the Legal Services Agency will be moved into the Ministry of Justice and an independent statutory officer will grant Legal Aid.
- The Public Defender Service will be expanded into Christchurch, Hamilton and Wellington. This will decrease costs by providing criminal legal services through salaried staff rather than contracted lawyers.

- Transparency in decision making will be encouraged by the replacement of the Legal Aid Review Panel with a Legal Aid Tribunal.
- Consistent standards for all community law centres will be established.
- The duty lawyer scheme will be improved by an enhanced selection criteria and by appointing supervisors.
- A streamlined eligibility assessment process will be introduced for high-volume, low-cost criminal cases, and
- A change to the preferred lawyer process, which will identify when a person can choose a Legal Aid lawyer and when one will be selected for them to ensure that the lawyer is competent for the case.

There will be no changes to Legal Aid funding for Waitangi Tribunal claims, however, administrative functions will be improved.

In announcing the changes, the Hon. Simon Power MP stated that it is hoped the changes will provide quality services for those who need it, give taxpayers value for money and build public confidence in the Legal Aid system.

# Criminal Recovery (Proceeds) Act 2009

The Criminal Proceeds (Recovery) Act 2009 (the 'Act') came into effect in December 2009. The objective of the Act is to "provide a legislative framework for the confiscation of property from persons who have engaged in or profited from criminal activity". The underlying premise is a person should not be allowed to benefit from criminal activity. Since the Act's introduction the police have seized \$11 million of the identified \$36 million worth of assets they believe have been obtained through criminal activity.

The Act repealed the Proceeds of Crime Act 1991, and introduced a new civil forfeiture regime similar to those introduced in the last decade in Australia, Canada, Ireland and the UK. The Serious Fraud Office is now able to apply to the High Court to freeze a person's assets and then apply for a forfeiture order to seize the frozen money or assets. The Crown must

prove, on the balance of probabilities, that the person has benefited from significant criminal activity, whether the offending has been proven in Court or not. Unless the person can prove the assets in question have been acquired legitimately, they will be forfeited.

Where criminal gangs are stripped of their assets and the profits of their criminal activities, the recovered proceeds are returned to the Crown which has stated it will use them to fund anti-P initiatives, expand police and customs initiatives to combat gangs and provide additional drug treatment programs. The police say this will be a major step in assisting them to dismantle organized crime. It is also hoped that the stripping of assets will act as a disincentive to criminals and will disrupt their ability to finance future illegal activity.

## Mediation

For anyone who has ever been embroiled in any form of dispute, whether matrimonial, commercial or otherwise, it can seem that the cost of justice is prohibitively high. Lawyers cost money, filing documents in court is expensive and time consuming, and our courts are overloaded so the wait to appear in court is often long, and the outcome is uncertain. It is little wonder then that many people turn to mediation as a means of resolving disputes, small or large, in a cost effective and timely manner.

The justice system has recognised the effectiveness of mediation. The High Court, District Court and Family Court are all utilizing mediation as a way to promote early resolution of matters rather than proceeding through the court process. Mediation is used to resolve such issues as tenancy disputes, employment disputes, civil disputes, claims to the Health and Disability Commissioner, claims under the Human Rights Act, community issues, environmental issues, and property disputes to name just a few.

For those of you who wish to resolve matters through mediation, below is a brief outline of what you can expect.

1. Depending on the type of dispute, mediation may be ordered by the court following the initial filing of an application. Alternatively, parties may agree that they will endeavour to resolve their differences through mediation and the parties themselves will choose a mediator.
2. There are many capable mediators in New Zealand (LEADR NZ and AMINZ, amongst others, may be contacted for a list of accredited mediators in your area). Hugh Cottrell of Mortlock McCormack Law is an accredited mediator with a particular interest in all matrimonial disputes.
3. You may retain your lawyer to assist with the mediation process if you choose, or you may attend mediation by yourself. Whether you wish to retain your lawyer will often depend on the legal complexity of the issue.



4. Mediation will generally cost somewhere between \$3,000 to \$5,000 plus GST per day, however you should check this fee out with your mediator. The fee will usually be split between the parties and is therefore less expensive than litigation.
5. The mediator will often meet separately with each party prior to mediation to gain an overview of the issues, discuss the mediation process with you and have an 'agreement to mediate' document signed.
6. Everything that occurs and is said at mediation is confidential to the parties except in circumstances where the parties agree otherwise.
7. On the day of the mediation the parties will meet together with the mediator. The mediator will make a brief opening statement and then each party will have an

opportunity to make an opening statement setting out how they see the problem. The mediator will then identify the issues and the parties will agree on an agenda.

8. The parties will then be invited to address each agenda item and the mediator will assist the parties in this process. This is an opportunity to air grievances and express feelings, as well as discuss the facts and the merits of each party's case.
9. At any time during the process the mediator may wish to meet with a party individually to discuss issues in more depth and generate options for resolution. Anything that is said at that time is confidential and will not be repeated or referred to by the mediator when the parties meet together again.
10. There may be several independent sessions or none at all depending on the needs of the parties.
11. The mediator's role is to assist the parties to explore the issues and develop options for resolution, not to make a decision for the parties. If the parties reach agreement this will be recorded in writing and if there are already court proceedings involved by consent the agreement can be made into a Court Order.

Hugh Cottrell has been appointed by the Family Court over the past 15 months to act as a mediator in a pilot scheme dealing with matrimonial problems. He reports that with a success rate in excess of 50% he fully endorses and recommends the process. He says that the participants endorse mediation because they resolve the dispute on their terms rather than a Judge.

If you are interested in finding out more about mediation please contact Hugh.

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