



Welcome to this, our first newsletter. With your agreement, newsletters will be distributed four times a year in February, May, August and November

At Mortlock McCormack Law, we work with a range of people, from personal clients to corporate entities and we will try to make the information contained in this newsletter current, informative and applicable to as wide a range of people as possible. We will also occasionally profile individuals and projects we think you may be interested in.

In this issue, Green Leases are discussed. In today's market, business is being defined by economic and environmental issues. Business leaders are more committed to applying sustainability principles and sustainability is often central to an organisation's vision. Home-owners are also turning their minds to matters such as energy saving and recycling. It is timely therefore to put our minds towards documentation that will assist to clarify the important principles involved.

We hope you enjoy reading this first issue and welcome any feedback you may have for future articles.

Green Leases - The Way of the Future

Worldwide focus on environmental sustainability has given rise to a green building movement that aims to incorporate environmentally sustainable design principles into the building process and maintain those principles after the building has been built.

When a building is completed, and the tenant moves in, what measures need to be put in place to ensure ongoing commitment to environmentally sustainable design principles? Addressing these issues has resulted in the introduction of the Green Lease concept.

Green Lease Schedule

It is predicted that the concept of the green lease will become a standardised schedule to accompany standard commercial lease documents. At this stage, however, drafting is done on a case by case basis. The schedule would incorporate obligations of landlords and tenants to comply on an ongoing basis with environmentally sustainable design principles. A collaborative approach is required by landlord and tenant to ensure that the principles are complied with over the term of the lease.

Contents of Schedule

A green lease would include the following:

- binding promises
- remedies
- incentives for both parties to improve environmental performance
- ongoing requirements such as:
 - obtaining Green Star NZ ratings
 - cleaning with environmentally friendly products
 - reducing energy/water use
 - recycling
 - having an environmentally friendly fit-out and building management process

The landlord would be obliged to ensure that target ratings are achieved and maintained for the term of the lease. The tenant would make a similar undertaking in relation to its fit-out.

Management committee

A management committee is required in accordance with the green lease schedule. There should be a binding agreement to comply with obligations under a 'green management plan' and a review by the management committee at least every two years. A process for remedial



action should be included, with disputes referred to a 'green expert'.

Landlord/Tenant benefits

The scheme will provide benefits for both landlords and tenants. The benefits for tenants include:

- Reduced outgoings (likely to include: water, electricity, waste management, air-conditioning).
- Ability to provide an excellent working environment
- Enhancement of reputation

Landlords would benefit as they are able to attract quality tenants and increase returns over the long term.

Environmentally sustainable buildings

Some of the factors requiring consideration when constructing environmentally sustainable buildings include:

- a comfortable, productive and healthy environment
- low energy use/greenhouse gas emissions
- sustainable/healthy transport options
- low water use
- recycling

More prescriptive green leases are likely to emerge over time. What could be perceived by developers/landlords as un-welcomed increased costs in the short term may eventually provide long term cost benefits associated with putting in place environmentally sustainable design principles.

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Protect your Business from Bad Debtors

Owners or managers of 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 remain at high levels the pressure grows for everyone to cut costs and make savings. One common response from debtors is to delay paying creditors – including you. Effectively they are using you as a low cost source of 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.

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.

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 key is to take care with your procedures and documentation at the outset of transaction. 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.

Employment Relations (Flexible Working Arrangements) Amendment Act 2007

The Employment Relations (Flexible Working Arrangements) Amendment Act 2007 was given Royal Assent on 26 November 2007 and came into force on 1 July 2008.

The Bill was designed to address the perceived need of employees with young families who were simply dropping out of the work force rather than obtaining more flexible working arrangements to meet the needs of their family.

A Department of Labour survey found that most employees felt unable to broach the need for more flexible working arrangements with their employers because they felt they would be penalised for doing so. By providing a statutory framework this Act seeks to protect those employees who wish to choose how to balance work and family life.

Who may apply?

Any employee who is responsible for the care of any person and who has been working for their employer for not less than 6 months may make an application under the Act. There are no requirements that the employee be related to the person they are caring for and there is no definition of what the 'care' may involve.

What are flexible working arrangements?

The employee may apply to vary their conditions of employment related to their hours of work, days of work, and/or place of work and this request must be in writing. The request made will entirely depend on the needs of the employee in caring for another person.

What information must be supplied?

The employee must specify:

- how they wish to vary their conditions of employment
- whether the request is to permanently vary their conditions of employment or for a specified period of time
- how the variation will allow them to provide better care for the person they are caring for,
- what changes the employer may need to make if the employee request is approved.

Can more than one request be made?

If a request is made the employee is not entitled to make another request under this part of the Act for another 12 months.

What the employer must do

The employer does not have to accept the request. The employer must notify the employee within 3 months whether their request has been approved or refused and, if refused, notify the grounds for refusal and provide an explanation of the reasons for their decision. If the employee is dissatisfied, he or she may refer the matter to mediation. If that does not resolve matters, the problem can be referred to the Employment Relations Authority for a determination.



What are the grounds for refusal?

The Act sets out the following broad grounds for refusal:

- a detrimental impact on the quality or performance of work
- additional cost
- inability to reorganise work
- inability to recruit additional staff
- insufficiency of work
- planned structural changes
- detrimental effect on ability to meet customer demand
- the potential to undermine the terms of a collective agreement where the request relates to working arrangements to which the collective agreement applies

What if the employer does not respond?

If the employer has not complied with their obligations under the Act the employee may refer the matter to a Labour Inspector for assistance in resolving the matter. The employer may be fined up to \$2000 by the Employment Relations Authority.

A review of the operation of these amendments must be carried out by the Minister of Labour as soon as is practicable after 1 July 2010.

Enduring Powers of Attorney - Significant Changes

Enduring Powers of Attorney involve an individual, 'the donor', placing trust in a person, 'the attorney', to act competently in the donor's best interests. The donor of such a power who becomes mentally incapable is dependent on some other trusted person to make decisions for him or her.

The Government realises the current legislation is inadequate and has enacted the Protection of Personal and Property Rights Amendment Act 2007 ("the Act"). The Act arises out of the Law Commission Paper "Misuse of Enduring Powers of Attorney" which received Royal Assent last year and comes into force on 26 September 2008.

The Act makes the interests of the donor paramount. Where the donor has lost capacity and decision making is taken over by an attorney, the donor still has the right to be consulted about their views. The Act places an obligation on the attorney to encourage the donor to develop the donor's competence to manage his or her own affairs in relation to his or her property.

New witnessing requirements

The Act introduces new witnessing requirements for all new Enduring Powers of Attorney. A lawyer, legal executive, or an officer of a Trustee Corporation must act as the witness. Legal executives are able to witness if they have at least 12 months experience, hold a current annual registration certificate issued by the New Zealand Institute of Legal Executives, and are employed by and under the direction and supervision of a lawyer.

The witness must explain to the donor the effects and implications of the Enduring Power of Attorney and his or her rights, and certify in the prescribed form that this has been done. At the time of signing, the witness must certify that he or she has no reason to believe that the donor lacks mental capacity and that the witness is independent of the attorney.

New definition of mental capacity

A donor is deemed mentally incapable if he or she lacks the capacity to:

- make a decision about a matter relating to personal care and welfare
- to understand the nature of decisions about matters relating to his or her personal care and welfare
- to foresee the consequences of decisions about matters relating to his or her personal care and welfare, or
- communicate decisions about matters relating to his or her personal care and welfare.

A prescribed form has been issued for Health Practitioners to certify as to incapacity. The form must be used on all occasions when the donor's capacity is in question.



Partners Andrew Logan and Tony Herring discuss recent changes to witnessing requirements

Proper Records to be kept

The attorney must keep proper records of each financial transaction entered into by the attorney while the donor is mentally incapable.

Suspension

The Act allows the donor who has been, but is no longer, mentally incapable to suspend the attorney's authority to act by giving written notice to the attorney. The suspension does not revoke the Enduring Power of Attorney and can be reviewed by a Court. However, an attorney whose authority is suspended cannot act unless a Health Practitioner has certified, or the Court has determined, that the donor is mentally incapable.

Easier access to Courts

A wider range of people can now apply to the Court regarding an attorney's actions. Any of the following people may apply to the Court to review a decision:

- the donor
- a relative or attorney of the donor
- a social worker
- a medical practitioner
- a trustee corporation
- the principal manager of any place that provides hospital care, rest home care or residential disability care
- any welfare guardian who has been appointed for the donor
- a person authorised by a body or organisation contracted by the Government to provide Elder Abuse and Neglect Prevention Services
- any other person, with leave of the Court

In Conclusion

It is hoped the Act goes some way to limiting situations in which it might be possible for Enduring Powers of Attorney to be misused or abused. Although compliance costs will inevitably be increased, this is considered a small price to pay to increase protection for a vulnerable donor. © 2008

These things are important to us: relationships | professional excellence | integrity | social responsibility

Hamish Douch · Marcus Elliott · Tony Herring · Andrew Logan · Sue McCormack · Simon Mortlock

SNIPPETS

IT'S NOT EASY BEING GREEN: Commerce Commission Warns

With rising fuel prices and increased awareness of our 'carbon footprint', being Green has become all the rage – or perhaps more appropriately - envy. It should come as no surprise then that advertisers have pounced upon what is being dubbed 'greenwashing' as an essential tool for marketing. Indeed some have taken to it with such fervour; that in their bid to out-green the competition, the accuracy of the claims may be left wanting.

This has become a focus for the Commerce Commission who in issuing warnings recently noted that the "growing trend to greenwashing by businesses is cause for concern if the green, eco-friendly or sustainability claims are false or misleading". The Commission will be keeping a close eye on the issue, and where necessary, enforcement action will be taken under the Fair Trading Act.



Sale of Liquor (Objections to Applications) Amendment Bill

Arising from the increasing concern of the effects of alcohol and alcohol abuse in the community, the proposed bill seeks to amend the Sale of Liquor Act 1989 in two significant ways. Firstly, an applicant for a liquor on-licence or off-licence will be required to undertake an evaluation of the social impacts on the community if the licence were granted. Secondly, any person or party may object to an application for an on-licence or off-licence. The objector must also be able to provide evidence of an adverse effect upon them if the application is granted.

The Liquor Licensing Authority will have additional powers to dismiss objections that it considers are without foundation. However, if the bill is passed, the process of obtaining a liquor licence will undoubtedly become much more cumbersome.

The Bill has had its first reading and public submissions are invited. The closing date for submissions is 15 August 2008.

More than Just a Solicitor

You will know Abigail Little, Aliza Eveleigh and Christine Gabagat as solicitors at Mortlock McCormack Law. The Christchurch community sees them as so much more.

Abigail Little

Abigail Little is known as an accomplished commercial solicitor, equestrienne, snowboarder and self-professed connoisseur of dark chocolate and espresso. The St Albans Community Neighbourhood News knows Abigail for her column on legal issues in that area.

Abigail is passionate about small business and is currently developing a 'business health check' process to assist business owners to review their businesses and systems on a strategic level. This process aims to identify and address those issues that are not always apparent in day-to-day life of a business.

Aliza Eveleigh

If you have read the Christchurch Star on Friday you will have seen our resident 'legal eagle' columnist Aliza Eveleigh with her weekly responses to legal questions posed by Christchurch residents. Aliza is well known for her practical, plain English advice for those with legal problems.

Aliza is an ardent advocate in her role as a litigator both in the office and Courtroom. This same commitment is evident in her roles as a Child Youth and Family caregiver, a mother and a volunteer for the Citizen's Advice Bureau and Christchurch City Mission Night Shelter kitchen.

Christine Gabagat

Christine Gabagat is famous for two things, her passion for shoes, and her naturally vivacious and eloquent character.

Wearing a pair of fabulous shoes, Christine may not look like your typical expert on farming law, but don't let the façade fool you. Christine has a quarterly column in the Straight Furrow, a leading New Zealand's rural publication, designed to provide farmers with expert knowledge and opinion. In this role she has discussed topics such as existing use rights and asset protection.

Christine not only assists in drafting and making submissions for her specialist area of resource management, but also in her volunteer work for the Civil Defence Force and the Christchurch City Mission Night Shelter kitchen.



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