



EDITORIAL

As we settle into the winter months and despite all of the chaos of February and June, the year continues to progress at 'light speed' and one wonders where the days go.

General Manager, Jan Crooks retired in late May and she began a three month international journey with husband Kevin. Our final afternoon with Jan, her extended family, and the staff and families of Mortlock McCormack Law was a great way to bid farewell.

In the same breath, we welcomed her replacement, Shayne Te Aika. Previously working in the Defence arena, Shayne brings on an extensive management and leadership portfolio to our firm. Additionally, Vanessa Absalom-Mueller joins us in her first year as a practising solicitor.

Across June we farewelled Jason Ray and in July we farewell Simon Ford who has been associated with Simon Mortlock Partners and Mortlock McCormack Law for near on eight and a half years. Simon is embarking on an exciting new journey in the business environment. We wish both Jason and Simon success in these opportunities.

Now fully operational in our Clarence Street office, every day is abundant with new opportunity. We hope you find some worthy points of interest across our July Newsletter.

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Mediation



Mediation and other forms of alternative dispute resolution are becoming increasingly part of our justice system enabling parties to settle disputes co-operatively outside the Court arena.

Mediation is a process in which an independent mediator works with the parties in a dispute to help them define what are the real issues, then explore options for a mutually acceptable resolution. What is important in the process is that it is the parties who negotiate with each other and decide what they agree on, not a third party such as a judge or an arbitrator where there can only be a winner and a loser.

What is also implicit in the process is that the negotiations are, by agreement at the beginning, treated as being without prejudice, ie. confidential so that anything said at the mediation cannot be used later if agreement is not reached.

One of our Partners, Hugh Cottrell is a trained and qualified mediator and has been acting in this role in the Matrimonial/Family Law arena in Christchurch for the past two years and has completed over

100 mediations. He is very enthusiastic about the process in that, provided the parties come to the mediation with an open mind, prepared to listen to the arguments of the other party and prepared to consider a compromise, agreement can be reached speedily as to either the substantive issue which is in dispute, or as to a constructive way forward.

With a success rate of around 90%, Hugh comments that it is a very rewarding process for the parties for the following reasons:

- Minimal formality.
- Can be set up at short notice.
- No need to involve Lawyers.
- Is comparatively cheap and cost effective.
- Is constructive in that in a confidential environment. It empowers people to resolve their own disputes.
- The parties invariably come away from a mediation in a positive frame of mind, both feeling that there has been a satisfactory outcome.

The mediation process lends itself to all manner of disputes, large or small, eg. relationship property, care arrangements for children, disputes over Wills, disputes with neighbours, contractual disputes, etc.

If the mediation is not successful, the parties are still able to move the dispute into the Court arena.

Hugh is prepared to provide more information on the process and costs involved for anyone who might be interested in taking advantage of the mediation process.



SNIPPET

A KING OR A QUEEN – THE LAW OF SUCCESSION

Following the recent marriage of Prince William and Kate Middleton, the expectation of children in the future raises the question of succession for the future King or Queen of New Zealand.

Succession to the British Throne is passed on by "male-preference primogeniture". The rule has been in place for over 300 years and means male children are preferred over female children and an older child is preferred over a younger child of the same gender.

The British Government is currently consulting with Commonwealth countries about changing the laws on Royal Succession to enable an older sister to succeed over a younger brother.

Recently our own Prime Minister, Hon. John Key, has said he agrees that the current rules, which could block the succession of a first born daughter of Prince William and Kate Middleton, are "old fashioned". However, because the British Monarch is also head of state of Canada, Australia, nine countries in the Caribbean, three in the South Pacific as well as New Zealand, it would have to be approved by all these countries.



EMPLOYMENT LAW UPDATE

In the case of *Costley v Waimea Nurseries Limited* [2011] NZERA Christchurch, the Employment Relations Authority ("ERA") found that Mr Costley was unjustifiably dismissed for using drugs at work because Waimea did not disclose to Mr Costley information that was relevant in reaching their decision to dismiss him.

It was reported to Waimea's nursery manager, Mr Jameson, that Mr Costley and another employee (Api) may be consuming drugs during their lunch breaks. Mr Jameson met with each employee separately and told them of his suspicions. Api confessed that he and Mr Costley were smoking marijuana at lunch time. Mr Costley was not told about Api's admission or the identity of the person who raised concerns about their suspected drug use.

The ERA found that by not disclosing Api's admission to Mr Costley, Waimea had withheld the piece of information that was most relevant to the decision to dismiss, and that this was a breach of s4(1A)(c) of the Employment Relations Act 2000.

This decision serves as a timely reminder that employers must follow a fair procedure when disciplining or dismissing employees including providing the employee with any relevant information that may be relied on by the employer in reaching their decision.

Sleeping on the Job

In *Idea Services (an IHC subsidiary) v Phillip Dickson* CA 405/2010, the Court of Appeal affirmed the decision of the Employment Court that Mr Dickson was working throughout his sleepover and was therefore entitled to the minimum wage for the period of his sleepover.

Mr Dickson worked for Idea Services Limited as a community service worker providing care and support to people with disabilities who live in community homes. A requirement of his position was that Mr Dickson sleep overnight in the home so that he could deal with any issues that arose during the night and for security purposes. He was paid \$34.00 per sleepover, and \$17.66 per hour for any time during which he was required to be actively working and tending to the needs of the residents. If there were no incidents during the night Mr Dickson would receive \$34.00, which amounted to between \$3.40 and \$4.30 per hour depending on the length of the sleepover.

Mr Dickson claimed that he was entitled to the minimum wage prescribed under the Minimum Wage Act 1983 (the 'Act') for every hour of his sleepover. This claim was upheld at both the Employment Relations Authority and the Employment Court.

The Court of Appeal was required to consider whether sleepovers constitute "work" for the purposes of section six of the Act which states: "every worker who belongs to a class of workers in respect of whom a minimum rate of wages has been prescribed under this Act, shall be entitled to receive from his employer payment for his work at not less than that minimum rate."

The Court of Appeal agreed with the Employment Court that three factors must be considered in order to determine whether the sleepover constituted "work":

- the constraints placed on the employee's freedom to do as he or she pleases,
- the nature and extent of responsibilities placed on the employee, and
- that benefit the employer receives from having the employee perform the role.

Mr Dickson had significant restraints placed on him when sleeping over, important responsibilities that he had to attend to with respect to both the home and the residents, and the employer derived a correspondingly significant benefit. The Court of Appeal therefore agreed that in this instance all of these factors applied to a significant degree and therefore Mr Dickson's sleepovers constituted work for the purposes of the Act.

The Court of Appeal rejected Idea Services Limited's alternative argument that the Act was breached only if the employee's average rate of pay over a pay period was less than the prescribed minimum.

This decision will have a great impact on the disability services sector. Ralph Jones, chief executive of Idea Services Limited is quoted as saying this decision would cost the organisation about \$176 million in back payments. Idea Services Limited have lodged an application for an appeal against the Court of Appeal decision, and the outcome is likely to be newsworthy.

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Earthquake Insurance Issues?

Below is a simple chart to work through some of the options. If you still have specific queries or require further advice, our resident experts Simon Mortlock, Prue Robertson or Sue McCormack will be happy to assist you.

GREEN ZONE

Your repair/rebuild process can begin. You or your legal advisor can deal with EQC and your insurer.

ORANGE ZONE

Further Government assessment is required on your property to determine if it is in the green or red zone.

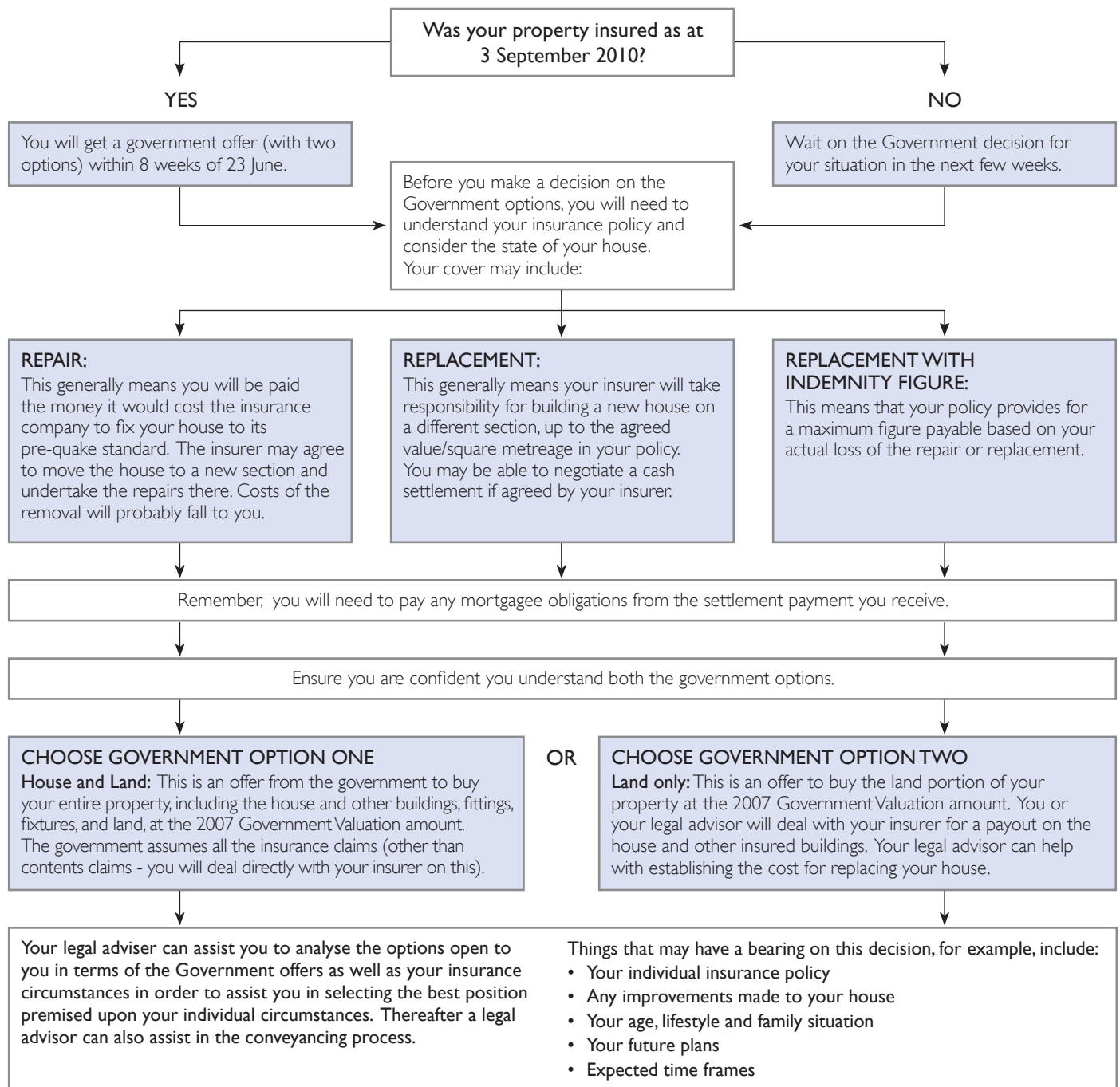
RED ZONE

Follow the Chart below.

WHITE ZONE

This area is still undergoing assessment. When assessed, your property will be in either the green or red zone.

RED ZONE FLOW CHART



Pre-1990 Exotic Forests

For anyone who has pre-1990 exotic forestry plantations on their property of at least 1ha (and subject to other conditions), it is important that they find out what their options are in respect to either collecting free Tax-Free Carbon Credits or opting out of the Emissions Trading Scheme, then make a decision as soon as possible noting the guidelines below.

The options are:

1. Apply for a one-off free allocation of the Tax-Free Carbon Credits ("NZUs") of up to 60 NZUs per hectare. For example, 10ha of qualifying exotic forest (eg. Radiata, Douglas Fir, Willows, Poplars, etc) attract up to 600 NZUs. NZU's currently sell for around \$18 each. If you apply, you will be part of the scheme and you will need to comply with the

obligations and penalties associated with harvesting trees in the future. You have until the end of November this year to file your application.

2. Do nothing. Under the Emissions Trading Scheme, if you choose this option, your pre-1990 plantation will have to be replanted within 4 years of future harvest. If not, the land will be deemed to have been de-forested for which the landowner will face a penalty and be required to

surrender carbon credits at the then going rate. This is the same scenario as under paragraph 1 above, except you do not have the one-off allocation as a form of compensation.

3. Apply for a De-forestation Exemption. If you apply for such an exemption you can do what you like with the land that holds the forestry with no repercussions. You have until the end of September to file this application.

Quite clearly decisions relating to pre-1990 forestry needs to be made now and we are able to provide you with advice and assistance. If you would like to know more about what is involved, contact our Associate Kent Yeoman.

Consumer Law Update

A Consumer Law Reform Bill (the 'Bill') will be introduced to Parliament later this year to update and simplify consumer law. This is in recognition of the fact that the laws covering layby sales, door to door sales, unsolicited goods and services, and the regulations for auctioneers have not been reviewed for some time.

The Ministry of Consumer Affairs (the 'Ministry') released a detailed discussion paper on Consumer Law Reform in June 2010. Extensive consultation has taken place since that time and, together with submissions received, has resulted in five additional papers being produced by the Ministry.

The Bill will reform the Consumer Guarantees Act, the Weights and Measures Act, the Layby Sales Act, the Fair Trading Act, the Door to Door Sales Act, the Auctioneers Act and the Unsolicited Goods and Services Act. Each Act has been reviewed taking into consideration:

- its history, original purpose and ongoing relevance, and
- any gaps in the law, and the effectiveness and overall enforceability of the Act.

It is beyond the scope of this article to describe all of the reforms proposed, however, listed



below are some that may be of interest:

- The Fair Trading Act will be amended to update and simplify consumer law related to layby sales, unsolicited goods and services, door to door sales, and the regulation of auctioneers. It is proposed that infringement notices for minor breaches of the Fair Trading Act will be issued by the Commerce Commission.
- The Consumer Guarantees Act will be amended to require greater disclosure to consumers on express warranties and provide consumers who take up cover under express warranties a statutory cooling off period.
- Changes will be introduced to product safety protections. The Minister will be empowered to issue Government Product Safety Statements that will provide some guidance on acceptable product safety.

Notification of product safety recalls will be mandatory and recalls will be published on the Ministry website. Goods that are recalled may be required by the Ministry to be destroyed and a supplier may be asked by the Ministry to stop selling a product if it has been implicated in a serious incident.

- The law related to auctions will be updated. The Consumer Guarantees Act "acceptable quality" provisions will apply to goods sold by auction, online, and to those sold by tender. The Auctioneers Act will be repealed and minimum standards will be set for the registration of auctioneers and the conduct of auctions.
- Unsubstantiated claims will be prohibited under the Fair Trading Act. The Ministry anticipates this measure will assist the Commerce Commission in enforcing the Fair Trading Act as well as assisting consumer confidence and good market conduct.
- The jurisdiction of the Disputes Tribunal will be extended to cover complaints about deceptive and misleading conduct and to provide for the full range of remedies available under the Fair Trading Act.

To keep up to date with the Bill and the proposed changes readers may wish to visit the Ministry website www.consumeraffairs.govt.nz.

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