



EDITORIAL

Now that we are firmly embedded in our new premises at Level 2, 299 Durham Street, and well into the scheme of 'business as usual', it is timely that we provide a newsletter to you. It would be fair to say that our previous location is now but a distant memory and whilst our return to the CBD was four and a half years in the making, it was a significant milestone for Mortlock McCormack Law, along with our 10th anniversary on 1 April 2016.

Enjoy this latest newsletter. It is a mixture of internal updates and other matters that may be of interest.

**Shayne Te Aika**  
General Manager

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## Employment Standards Legislation Bill

Several sweeping amendments to the Employment Standards Legislation Bill took effect on 1 April 2016 with the intent of achieving fairer and more productive workplaces through the provision of enhanced protections and benefits across both employers and employees.

A quick guide to key changes are:

### Changes to Parental Leave

The Bill amends the Parental Leave and Employment Protection Act 1987 including:

- Extending the eligibility of parental leave to employees with non-standard working arrangements (casual) and employees who assume permanent primary responsibility for the care, development and upbringing of a child under the age of 6.
- Extended leave of 26 weeks is available to employees who have been employed by the same employer for 6 months (currently at 12 months).
- "Keeping in touch days" introduces flexibility by allowing an employee to work for up to 40 paid hours while on parental leave, by agreement.
- Paid parental leave increases from 16 weeks to 18 weeks.
- When a baby is born prematurely, a primary carer is entitled to additional parental leave entitlements for each week that the baby was born preterm.
- Employers who mislead or attempt to mislead the Ministry of Business, Innovation and Employment in relation to paid parental leave will face increased fines from \$5,000 to \$15,000.

### Zero Hour Contracts

"Zero hour contracts" are now prohibited. The following related amendments apply:

- Employers are required to ensure that an employee's agreed hours of work are included in the employment agreement.
- Employers are prohibited from requiring an employee to be available for work over and above their contracted hours unless the employment agreement provides compensation for that availability requirement.



- A provision requiring an employee to be available for work is only enforceable if there are genuine and reasonable grounds for that requirement and "reasonable" compensation is paid for that availability.
- If there is no availability provision in an employee's employment agreement providing for reasonable compensation, an employee is able to refuse to perform additional work.

### Unfair Employment Practices

Other changes to the Employment Relations Act will be made to address unfair employment practices. These are:

- Where an employee does shift work, the employment agreement must specify the notice period required if the employer proposes to cancel a shift, along with the compensation payable to the employee if that provision is not complied with. The level of compensation must be "reasonable".
- An employer is not able to prohibit an employee from having a second job unless the employer has reasonable and genuine grounds (these must be set out any employment agreement).

Additionally, the Bill makes changes to the Wages Protection Act 1983 and prohibits an employer from making "unreasonable deductions" from wages.

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## CONGRATULATIONS

**Partner, Kent Yeoman** on transitioning to equity partner at 1 April 2016. Kent has been with the firm for six years as an Associate and salaried partner. Kent's focus is commercial and business law, and he donates his personal time to the Laura Ferguson Trust (Canterbury) as a Board member. Kent is married to Nicaela and they have a young and busy family.

**Partner, Andrew Logan** on appointment to the Board of the New Zealand Law Society in April 2016.

**Partner, Hamish Douch** on being appointed to the NZ Law Society Property Law Executive Committee. Hamish adds his experience in commercial property, subdivisions and conveyancing to the table.

**General Manager, Shayne Te Aika** on his recent governance appointment to the University of Canterbury Council for a three year term in March 2016.

**Legal Executive, Tania Cochran** on the pending birth in September of her second child. Tania will take maternity leave and extended leave out to September 2017.

**PA, Shantel Hape** on the birth of Preston, a brother for Mikae and Denzel. Shantel is now on maternity leave for the next six months. Shantel recently qualified as a legal executive.

**PA, Bianca Nuku** on achieving Canterbury Rep Womens (over 27) senior touch rugby in 2016. Bianca is a consistent representative in touch rugby in the last 10 years and has previously attained New Zealand representation. Bianca recently qualified as a legal executive.

## APPOINTMENTS

**Associate, Chris Egden** joined the firm in November 2015 having previously worked at CERA. Chris is experienced in commercial property matters and provides coaching and guidance to our younger professionals. Chris is married to Anna and their first child Lucy will be joined by a sibling in late September.

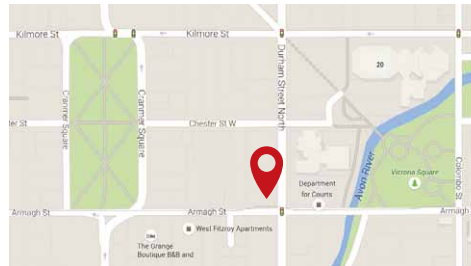
**Natasha McClure** was appointed as a law clerk in May. After admission in July, Natasha will achieve solicitor status. Natasha studied at Otago University and is focusing in the commercial property and conveyancing arena.

**Grace Hawthorn** was appointed as a law clerk in July and as a solicitor upon admission in October. Grace studied at Canterbury University and will focus on conveyancing.

**PA, Jessica Moore** brings strong PA experience to the firm to support Partner Sue McCormack and other authors across the office. Jess joined the firm in January.

**PA/LE, Morgan Gray** returns after a four year absence while focusing on raising her two children with husband Craig. Morgan supports a number of authors across the office in a PA role and her skill sets are complemented with a legal executive qualification.

# We Moved Location in November 2015



299 Durham Street North,  
Christchurch Central  
CHRISTCHURCH 8013

(Corner of Armagh  
and Durham Streets)

Haven't been to see us since before November 2015? We have moved back to the CBD to Level 2, 299 Durham Street – on the corner of Durham and Armagh Streets.

The main entrance to the building is located on Armagh Street. Metered parking is available on both sides of Armagh Street, and there is also a Wilson Car Park directly opposite our building on Armagh Street. Additionally, there are client parking spaces on site to the rear of our building – entry is by the drive way located on Armagh Street.



*Continued from page 1.*

## Enforcement of employment standards

As some employers still fail to meet minimum employment standards, the Bill seeks to raise compliance by:

- Requiring employers to keep sufficient records to demonstrate that they are complying with the minimum entitlement provisions.
- Tougher sanctions for serious breaches of those standards. The penalties are significant - up to \$50,000 for an individual, and for a body corporate, the greater of \$100,000 or 3 times the amount of financial gain arising from the breach.

- Increased powers and sharing of information between labour inspectors and regulators.
- Allowing employees to bring an action against an employer who fails to comply with the specified form and content of an Individual Employment Agreement.
- Making new orders available to the court such as a compensatory order to an aggrieved employee, and other orders that are related to employer breaches

Please contact Partner Tony Herring, or Solicitor Michael O'Flaherty if you wish to gain a better understanding of this legislation either as an employer or an employee.

# Health and Safety at Work Act 2015

## A Brief Overview

The Health and Safety at Work Act (HSWA) came into effect on 4 April 2016. Its aim is to encourage a pro-active and participative health and safety culture in the workforce, and at the workplace. A key component of health and safety is 'engagement' with all levels of the business workforce. Whilst many employers will associate health and safety matters to high risk environments, the principles and base foundation of the HSWA apply to every environment whether low, medium or high risk. For businesses and those in control of businesses you should have by now reviewed your health and safety policy and procedures to ensure that you comply with the HSWA.

Good systems, processes and active participation are crucial to successful management of health and safety in the work place. If this brief overview remains foreign to you, then there is a very real chance, either as an employer or employee, that you do not fully understand the Act and your individual and collective responsibilities.

### Duty Holders

Under the new Act, 'Officers' (people who are directors, partners, CEO's, managers or otherwise in control of a business or undertaking), are obligated to exercise due diligence to ensure their business is compliant with the HSWA. This includes taking reasonable steps to:

- Acquire and keep currency of knowledge of health and safety matters.
- Acquire understanding of the risks and hazards associated with business operation.
- Ensure the availability and use of resources to eliminate, isolate or minimise those risks.
- Ensure appropriate processes and plans exist for receipt and consideration of information pertaining to incidents, hazards, and risks.
- Ensure the business maintains appropriate processes to comply with business obligations to the HSWA.

### Worker Engagement

A key change to the HSWA revolves around the obligations of mutual consultation between the business and workers on health and safety. Relevant information must be made available to workers and they must have opportunity to express their views and contribute to decision making processes about health and safety. Engagement must be constant and workers have the right to be represented by elected individuals or through the establishment of a health and safety committee. Small businesses (less than 20 staff) that are not considered high risk may be exempt this particular requirement. High risk entities include forestry, fishing, mining, hunting, construction, heavy and civil engineering.

The HSWA promotes:

- Excellence in health and safety management.
- Dealing with health and safety in a systematic manner.
- Comprehensive Risk and Hazard Management, including hazards which result from a person's behaviour and stress related hazardous behaviour.
- An overriding requirement to act in Good Faith in regards to health and safety.
- The participation of workers in the processes of health and safety.

The new Act extends from older legislation to include:

- Due diligence duties for those that make indirect decisions that can affect the health and safety of workers (CEO's, board directors, general managers and the like).
- A worker participation model that provides for better levels of participation and helps workers to have the knowledge and accountability to keep their colleagues safe.
- A participation model that requires PCBUs to consult, co-operate and co-ordinate health and safety with other PCBUs when part of a supply or contract chain.



- An enforcement regime with graduated categories of offences and penalties to provide better guidance to the courts about appropriate fine levels.
- Co-operation between WorkSafe NZ and ACC to improve injury prevention and to increase ACC's flexibility in developing incentive programmes for employers and the self-employed.
- Allowing employees to take a personal grievance for adverse health and safety conduct.

### Penalties

The HSWA provides wider enforcement options and much tougher penalties. The extent of any penalty in respect to health and safety will depend on the level of seriousness and be measured against the responsibility of the duty holder. The Act establishes a three tier approach for offences and can range from low end penalties to potentially more serious levels.

#### Table 2. Serious Penalties

The majority of prosecutions for health and safety breaches identify failings in the areas of:

- Inadequate training and supervision.
- Failure to identify or control hazards.
- Failure to provide and maintain a safe system of work.

### Summary

The HSWA creates new obligations and regimes that businesses, officers and workers are required to adhere to. Breaches can be treated severely and personal liability is a significant and prominent feature of the HSWA.

Its never too late to act. We are available to assist in advising you on the requirements of HSWA and in particular your obligations and the obligations of your staff.

Offence	Individual who is not a PCBU or Officer (e.g. a worker or other person at a workplace)	Officer of a PCBU or an individual who is a PCBU (e.g. self-employed)	Anyone else (e.g. an organisation that is a PCBU)
Section 47 (reckless conduct in respect of duty that exposes an individual to a risk of serious injury, serious illness or death)	Five years in prison or \$300,000 fine, or both	Five years in prison or \$600,000 fine, or both	\$3 million fine
Section 48 (failure to comply with a duty that exposes an individual to a risk of serious injury, serious illness or death)	\$150,000 fine	\$300,000 fine	\$1.5 million fine
Section 49 (failure to comply with a duty)	\$50,000 fine	\$100,000 fine	\$500,000 fine



## Natasha McClure – Law Clerk and the most Recent Addition to our Staff

I completed my Bachelor of Laws and Bachelor of Science at the University of Otago at the end of semester one in 2015. I was lucky enough to then travel South East Asia with a few of my good friends and then around Europe and the United Kingdom with my parents and brother. I will be admitted to the bar in July 2016 after

completing my professional studies earlier that year.

I come from a sport orientated family, playing sport was a huge part of my life growing up. I played representative volleyball and netball right through school and coached junior school teams in both codes. I hope to give back to the community by starting a volleyball or netball

development programme at my old high school with a particular focus on encouraging young girls to attend University.

I am thoroughly enjoying my time at MML. The office environment is very unique and supportive and I am looking forward to seeing how far I have come as a solicitor at the end of the year.



# Trusts and Relationship Property

Associate Susan Lyall discusses a recent Supreme court decision in Clayton vs Clayton, regarding Trusts and Relationship Property.



The law of trusts and relationship property has again been challenged by the recently released Supreme Court decisions in Clayton vs Clayton. The Clayton cases involved disputes between Mr and Mrs

Clayton about their assets and the validity of two trusts when they divorced.

Mr and Mrs Clayton had been together for 20 years, had interests in various family trusts. On their divorce they faced the task of dividing their assets and after nearly 10 years of litigation, have finally settled their affairs.

Matters went all the way to the Supreme Court where it was argued for Mrs Clayton that the powers Mr Clayton held in one trust were property within the Property (Relationships) Act 1976 (PRA). Under the PRA property acquired by either spouse during a relationship is relationship property and there is a presumption that relationship property will be shared equally. Mr Clayton had very wide powers in the trust which included the power to appoint and remove beneficiaries, distribute capital, bring forward the vesting date and a broad resettlement power. The Supreme Court called these powers the "bundle of powers" and agreed with Mrs Clayton's argument that the bundle was property which could be valued in terms of the PRA. The Supreme Court said the value of the bundle of powers was the same as the value of the assets in the trust. The parties settled before the Supreme Court decision

was delivered but the decision recognised that Mrs Clayton would be entitled to assets of equal value to the assets held by this trust and controlled by Mr Clayton's bundle of powers.

In relation to a separate trust, the Supreme Court had to decide whether the trust was a nuptial settlement which fell within section 182 of the Family Proceedings Act 1980. A nuptial settlement is where property has been put into a trust during a marriage or in contemplation of marriage. The Supreme Court held that all that is required is a connection between the marriage and the settlement of the trust and if that connection exists, then the Court can divide the assets of the trust between the spouses on divorce. A majority of the Supreme Court held that had Mr and Mrs Clayton not settled their affairs, they would have divided the Trust equally into two shares.

### Why are these decisions so important?

- There has been a trend in the New Zealand Courts recognising that assets accumulated by partners in long term relationships will be shared equally, whether those assets are held in a trust or not. The Clayton decisions reinforce this trend.
- The decisions have the potential to affect many New Zealanders. In 2015 there were over 8,000 divorces granted by the Family Court. There is no record of the number of family trusts in New Zealand but some estimates put the figure at over 400,000. Many of these family trusts were set up in contemplation of marriage or during marriage and have had property settled into them during marriage.

- If property that would otherwise have been relationship property is settled into a trust during a marriage, then it is now likely the Courts will treat that property as relationship property.
- Additionally property that has traditionally been classified as separate may now be classified as relationship property. For example inherited property put in a trust during marriage may become relationship property simply by putting it in a trust during marriage. This may also apply to trusts set up for children to hold inherited property unless the trust deeds are drafted with this possibility in mind.

### What can you do to avoid these unintended consequences?

- Ensure trusts are set up correctly and for the purpose they are intended. Trust deeds must be drafted carefully to reflect the specific requirements of the settlors.
- Prior to transferring assets to a trust, seek advice on the broader consequences of the transfer.
- Section 182 of the Family Proceedings Act does not apply to de facto couples. This is under review by the Law Commission and may well be extended to cover unmarried couples.
- Consider a contracting out agreement under section 21 of the PRA. These agreements enable couples to set up their own rules for ownership of their property rather than the PRA automatically applying. Any agreement must be fair and reviewed regularly to avoid being set aside.

If you have any questions about your family trust or relationship property contact a member of our trust and relationship property team.

Clayton v Clayton [2016] NZSC 29 and Clayton v Clayton [2016] NZSC 30

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