

New MEMA Laws around dirty play

Rugby World Cup 2011 – Jumping
on the brand wagon

MIKE MCMELLON



Your Lawyer – Not Just a Necessary Evil



Stephen Christensen
Chairman of Partners,
Anderson Lloyd

We are sometimes asked by business people what they should look for or expect from their lawyer. My reply is that your lawyer should provide you with expert advice you can confidently rely upon, and in a way which adds value to your business.

Legal services should be secured from a provider who:

- has demonstrable expertise in the area in which you need advice. All lawyers are not equal, and no lawyer is a specialist in every area. If you need legal advice on a new franchise opportunity, an employment dispute, and a limited licence because you have been caught speeding once too often, you should be ensuring that your lawyer or law firm has the necessary expertise in all these areas, or is able to access that specialist knowledge.
- is a trusted advisor to you. Your lawyer should not only understand law, they should also understand your business and your personal aspirations.

Your lawyer should be someone you can confidently go to with an issue or an opportunity, knowing that they have your best interests at heart, and will work hard to achieve the outcomes you desire.

- provides value for money. If you see your lawyer as just a 'necessary evil', and an expensive one at that, then you are missing something in your professional relationship! Your lawyer should be adding value to your business.

At Anderson Lloyd we work hard to ensure our lawyers provide advice which meets these requirements. Our many loyal clients, and our increasing number of new clients, are testimony to the fact that we must be doing something right!

Happy reading.

Welcome to the Autumn issue of Connect



Carol Patton
General Manager,
Lawlink

We have just returned from the Lawlink conference in New Plymouth. Each year we have a conference to ensure our lawyers and managers are updated with current information, and to renew friendships throughout the Group.

Conferences ensure that Lawlink firms have all the tools in place to help their clients achieve their objectives. The theme for this year's conference was 'Fit for the Future' and speakers provoked delegates to think about their businesses and their bodies to ensure fitness across all aspects of work and personal lives.

It is with much sadness that we have recently lost two special people from Lawlink. Martin Montague was well known in the Wellington and Lower Hutt legal circles, and passed away suddenly late November.

In February Gerard Kilpatrick of Webster Malcolm & Kilpatrick passed away. Gerard had been legal editor of Connect for most of the past 20 years and made an enormous contribution to Lawlink.

Articles in this edition discuss issues such as who can you leave Maori land to; the Rugby World Cup and ambush marketing, simplifying and streamlining resource consent applications, and becoming a trustee of a charitable trust.

Rugby World Cup 2011 – Jumping on the brand wagon



Next year the spectacle that is the Rugby World Cup ('RWC') returns to New Zealand for the first time since the All Blacks won the inaugural event in 1987. Rugby New Zealand has estimated that RWC 2011 will pump more than \$500 million dollars into the New Zealand economy with the New Zealand Government taking a whopping \$112 million in additional tax revenue.

In this article Mike McMellon, a partner at Pitt & Moore Nelson, talks about how laws introduced to protect the organisers and official sponsors of events such as RWC 2011 might impact your business.

Major Events Management Act 2007

The third largest sporting event in the world (behind only the Olympics and the FIFA World Cup), it's predicted that the seventh RWC will attract to New Zealand over 60,000 international visitors and 2,000 of the world's media. Television viewer numbers are expected to exceed **4 billion**. Make no mistake, this is the big time.

Audiences of that magnitude mean event organisers can charge a premium for exclusive sponsorship rights. But before parting with the big bucks, sponsors need to know competitors can't assert or imply an association with the event. And they need to know their brand won't be lost in a sea of marketing noise.

So, before granting hosting rights, it's not unusual for bodies such as the International Rugby Board ('IRB') to insist that host countries ensure official sponsors are protected from unauthorised commercial activity; activity that would undermine the value to be derived from exclusive sponsorship rights.



Mike McMellon
Partner,
Pitt and Moore

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For these and other articles, visit our website at www.lawlink.co.nz where our 'Articles' section contains articles from this issue and previous issues of Connect. You will also find our client brochures Corporate Governance, Your Business and the Law, Family Trusts and Estate Administration on our website.

With this in mind, the previous government introduced the Major Events Management Act 2007 ('MEMA'). MEMA put in place a raft of legal protections for the organisers and official sponsors of events designated by the New Zealand Government as 'major events'. To date only five events have received such a classification. RWC 2011 is one of them.

Ambush marketing

In short, MEMA makes ambush marketing illegal. Ambush marketing occurs when an official sponsor's rights are undermined by an unauthorised business having either:

- its brand or product associated with the event (Ambush Marketing by Association); or
- a commercial presence at the event (Ambush Marketing by Intrusion).

So how might this affect your ability to exploit a MEMA designated 'major event'? Following are observations made in the context of the RWC 2011.

Ambush marketing by association

The MEMA introduces the concept of 'protection periods' for major events. The RWC 2011 protection period commenced over 18 months ago on 11 September 2008. It ends on 21 November 2011.

During the RWC 2011 protection period, you can't, unless authorised, represent an association between RWC 2011 and any goods or services, brand of goods or services or person who supplies goods or services. Authorisation to make such a representation must come from Rugby World Cup Limited ('RWCL'), the organisers of RWC 2011.

Application of this restriction extends to:

- any person who pays for, commissions or authorises the representation; and
- any person who receives consideration or payment for the placement or location of the representation.

Example: Without RWCL consent, *Ad-liberty Impact Marketing* has T-Shirts made saying 'Ad-liberty Rugby World Cup 2011'. Students are paid to distribute the T-Shirts around town. *Ad-liberty* and the students may have committed offences under MEMA.

Example: Without RWCL consent, *Ad-liberty* runs a promotion with a radio station. Tickets to RWC 2011 games are to be presented as prizes. *Ad-liberty* and the radio station may have committed offences under MEMA.

Example: Without RWCL consent, *Ad-liberty* pays a group of people to attend a RWC 2011 game wearing *Ad-liberty* branded clothing. The stunt is intended to draw attention to *Ad-liberty's* business. Offences may have been committed under MEMA both by way of Ambush Marketing by Association and by Intrusion (see below).

You should be aware that a large number of words and images associated with the RWC 2011 have, under MEMA, been declared 'major event words' and 'major event emblems'. A (very) few examples are 'Rugby World Cup', 'RWC' and the image of the Webb Ellis Cup.

If, without RWCL's consent, you use in your marketing any of those words or images, or something deceptively similar, the courts can **presume** you've wrongfully represented an association with the RWC.

Example: Without RWCL consent, *Ad-liberty* introduces an image of the Webb Ellis Cup into its letterhead and places a cardboard cut-out of that trophy in its shop window. These actions may in themselves be offences under MEMA.

If you sell goods or offer goods for sale knowing there has been an unauthorised representation of association between those goods and the RWC then you will be in breach of the law. This appears to be the case even if it wasn't you who made the representation.

Under MEMA, a criminal conviction for Ambush Marketing by Association carries a maximum fine of \$150,000.

Ambush marketing by intrusion

MEMA allows the Government to declare 'Clean Zones', 'Clean Transport Routes' and 'Clean Periods' to prevent unauthorised advertising and street trading at or near a major event venue or along motorways, state highways and/or railway lines leading to the venue. At the time of writing, no RWC 2011 Clean Zones, Clean Transport Routes or Clean Periods have been declared for RWC 2011.



All unauthorised advertising and street trading in a 'Clean Zone' or a 'Clean Transport Route' is illegal during a 'Clean Period'. The ban also applies to certain advertising located outside the Clean Zone that can be seen from within it.

The ban applies to all street trading and advertising, not just street trading or advertising that attempts to represent an association with the event.

Street trading includes selling merchandise and the giving away of goods, for example, promotional giveaways. It does not include operating an existing business during a 'Clean Period' from existing premises where those premises are within a 'Clean Zone'.

Examples:

Italy plays in Nelson on 20 September 2011. Trafalgar Park and the streets around Trafalgar Park are declared 'Clean Zones' between 12.01 am and 11.59 pm (the 'Clean Period').

Example 1: At 1.00 pm *Au-fait au-lait* starts selling coffee from a coffee cart on the footpath within the Clean Zone during the Clean Period. The café doesn't normally trade there. RWCL has not consented. An offence under MEMA may have been committed.

Example 2: At 11.00 am *Dachshunds* starts selling hot dogs from private property adjacent to the Clean Zone during the Clean Period.

Application of the restriction on advertising extends to:

- any person who pays for, commissions or authorises the advertisement; and
- any person who receives consideration or payment for the placement or location of the advertisement.

MEMA imposes wide powers on enforcement officers to cover up, or seize, items that breach MEMA.

Under MEMA, a criminal conviction for Ambush Marketing by Intrusion carries a maximum fine of \$150,000.

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Email mike.mcmellon@pittandmoore.co.nz
Website www.pittandmoore.co.nz



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Summary

Businesses need to be alert as to which events are MEMA designated 'major events'.

During the RWC 2011 protection period (11 September 2008 to 21 November 2011), businesses need to ensure advertising, marketing and sponsorship campaigns do not breach MEMA laws banning Ambush Marketing by Association. In particular businesses should avoid unauthorised use of RWC 'major event words' and 'major event emblems'.

Closer to the time, businesses need to ensure they have a clear understanding of those areas designated 'Clean Zones' and 'Clean Transport Routes'.

They'll need to ensure that their trading, advertising and promotional activity does not breach MEMA laws banning Ambush Marketing by Intrusion.

This article is a general overview of some of the issues arising out of the Major Events Management Act 2007. This article should not be used as a substitute for legal advice tailored for your specific circumstances. The writer recommends you obtain legal advice before taking action in relation to any matter addressed in this article.

During the RWC 2011 protection period, you can't, unless authorised, represent an association between RWC 2011 and any goods or services, brand of goods or services or person who supplies goods or services. Authorisation to make such a representation must come from Rugby World Cup Limited ('RWCL'), the organisers of RWC 2011.



Resource consent applications from a submitter's perspective



Jaime Bright
Solicitor,
Harkness Henry

Jaime Bright, a solicitor with Harkness Henry, provides some advice regarding the process involved in making submissions on a resource consent application and appearing at a council hearing.

A colleague of mine, who works with the Resource Management Act 1991 ('RMA'), is about to be directly affected by the Act. After purchasing her home a few years ago, she now faces the possibility of a pub/nightclub being constructed on a neighbouring property.

This is not an unusual situation. Construction, development and establishing new businesses are a reality wherever you may live. Luckily, as my colleague is familiar with the RMA processes she is well aware of the standards an applicant must meet.

However, many people are not aware of the restrictions on development and the standards that an applicant must meet. By active involvement in the resource consent application process, submitters can play a role in ensuring that developers are required to meet all applicable standards.

Persons considering making submissions need to be conscious of the benefits that can be achieved by consulting an RMA specialist at an early stage to ensure all relevant issues and standards are considered.

This article provides an overview of the resource consent process from the perspective of submitters. It includes the steps leading up to, and including, the council hearing.

Do I have to be consulted by the applicant?

In short, no. Consultation, although good practice, is not a statutory requirement for applicants. Quite often, applicants will consult with affected neighbours prior to filing their applications. This helps them to identify and address any concerns.

Sometimes an applicant will ask that an affected party sign an approval form. These should be treated with caution. It is prudent to have a lawyer review the application and the approval form before making any decision to sign. By signing an affected party approval form that person prevents the council from taking into account any effects of the application on that party or the property of the affected party. However, it is important to note that an affected party can withdraw their approval prior to a decision being made, but the withdrawal must be in writing.

How do I get involved?

If you are deemed by the relevant council to be directly affected by the applicant's proposal you will be notified of the application. Alternatively you may become aware of an application

through the public notification process. If you do not receive a full copy of the application in the post, you may request a copy from the council or may view a copy at the council offices.

To get involved you must make a submission to council on the application. The submission must be made within 20 working days after the notification. This should outline whether you support or oppose the proposal and your reasons. An RMA lawyer can either assist you or prepare the submission on your behalf. It is important to note that, throughout the progress of the application, you are restricted to submitting on the issues you raise in this initial submission. For example, if you oppose an application strictly because of noise effects, you will not be able to raise the issue of traffic effects at a later stage.

Do I want to be heard at the council hearing?

Once submissions have been made and the council has had an opportunity to assess the application, it will set a hearing date. Submitters will be notified of the date and venue.

Submitters can elect to present an oral submission at the hearing or can advise that they do not wish to be heard.

It is fair to say that submissions have more impact if they are presented in person at the hearing, with written copies provided. This enables the decision-maker to review the submission throughout the decision-making process. It also gives them the opportunity to ask questions and clarify issues.

Prior to the council hearing, a council officer prepares a report on the application. This report sets out whether the council officer recommends that the application be granted or declined. The report outlines the reasons for this recommendation and gives specific reference to the issues raised by submitters in their submissions. Submitters receive a copy of this report. In the oral submission the submitters can comment on the content of the report.

What happens at the council hearing?

A council hearing will either be run by councillors or by a hearings commissioner or commissioners. Sometimes the hearing panel

comprises a combination of councillors and hearings commissioners.

At the council hearing the applicant will present its case first. This involves giving submissions and presenting any evidence. Councillors or the commissioner may ask questions of the applicant and their witnesses. Cross-examination by submitters and their representatives is not permitted, except for questions of clarification which should be addressed to the chairman.

At the conclusion of the applicant's case, submitters present their submissions and if they have expert witnesses, may get these experts to present their evidence. Again, councillors or the commissioner may ask questions in order to clarify issues.

Once all the submitters have been heard, the applicant has a right of reply. This gives the applicant the opportunity to address any issues raised in the submissions. Submitters cannot comment at this stage.

Sometimes the hearing is adjourned to enable a site visit to take place. If a submitter lives on a property that neighbours, or is close to the application site, the councillors or the commissioner may elect to visit the submitter's property in order to get an understanding of the potential effects of the proposed activity. This is not an opportunity to 'get in the ear' of the decision-maker.

Council has 15 working days after the conclusion of the hearing to serve its decision on the applicant and the submitters. After that, both the applicant and/or the submitters have 15 working days to lodge an appeal against the decision.

Submitters have an automatic right to appeal any decision due to their status as a submitter, whether or not they attended the hearing.

How can an RMA specialist assist?

Although RMA lawyers are often instructed when council decisions are appealed to the Environment Court,

it is important to make sure that the original submission to the council covers all relevant issues and protects potential appeal rights.

An application for resource consent can only be declined by council if the criteria under the RMA are not met. Often a submitter has concerns that are not, in fact, RMA related issues. Therefore, although a submitter may feel very strongly about such issues, the submission will not have the desired effect on the decision-maker. An RMA lawyer can identify what issues will have the most impact and relevance and formulate a submission accordingly. It is important that this initial submission covers all the relevant issues, as any submission presented at the hearing and any consequential appeal is constrained by the content of the submission.

At the council hearing, an RMA lawyer can assist by preparing and presenting legal submissions.

Remember that a submitter only gets one chance to be heard by the decision-maker so this oral statement needs to be carefully crafted to respond to the applicant's evidence and to anticipate the applicant's reply.

An RMA lawyer can also identify and instruct any expert witnesses that would assist the submitter's case.

Presentation of a strong case at the council hearing cannot be underestimated. Although it will not always guarantee that an application for an undesirable development will be declined, it will almost always result in a substantial improvement to the quality of an application, either through changes to design or through conditions that are able to be imposed by the council.

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Email jaime.bright@harkness.co.nz
Website www.harkness.co.nz

Simplifying and streamlining of resource consent applications

The Resource Management (Simplifying and Streamlining) Amendment Act 2009 came into effect on 1 October 2009, bringing a number of changes aimed at 'simplifying and streamlining' a number of resource management processes.



Amanda Douglas
Partner,
Wynn Williams & Co

Amanda Douglas, a partner at Wynn Williams & Co, looks at a selection of the practical consequences for resource consent applications.

Which applications are affected?

The Amendment Act applies only to applications and processes lodged or started after 1 October 2009.

Some of the amendments which will impact on the resource consent process include:

Notification

Previously, there was a presumption that all applications would be notified unless the adverse effects on the environment **would be minor** or the proposed activity was a controlled activity. That presumption has been removed and replaced with a new regime.

Now, an application must be publicly notified if the proposal will have or is likely to have adverse effects on the environment that are **more than minor**, or if the applicant requests notification.

Although on the surface the highlighted wording changes appear subtle, these terms have been interpreted by the courts previously. The intention of the amended Act is that there will need to be adverse effects which are greater than minor before a resource consent application is notified. There will be a higher threshold to meet in order for an application to be notified.

The matters to be considered by the local authority when making the decision whether to notify a resource consent have also been amended.

Adverse effects impacting on adjacent neighbours are now more relevant to the question of limited notification (notification only to a smaller group of adversely affected persons) rather than public notification (full notification to the community).

The intention of the Amendment Act relating to notification is that fewer applications will be notified, and that applications will be dealt with more seamlessly.

Further information and stopping the clock

Under the former law every time a council made a 'further information request' the time limits within which applications were to be processed stopped running. In order to address concerns about these delays, the Act has been amended so that the 'clock can be stopped' no more than twice for information requests from the council – once before the closing date for submissions and once after. Any such request incorporates a time limit for reply.

If the applicant does not provide information within the required time period, the consent authority must consider or assess the application with the information that it has. Previously the application would have remained on hold for long periods awaiting information. If the council has to consider an application lacking in information, the chances are that the application will be turned down due to the inadequacy of information. So, as well as imposing tighter time frames on councils, the amendments are also requiring applicants to be diligent in pursuing their applications.

Consistent with that approach, the Amendment Act also provides that in the case of an application made before August 2005 where the applicant has not responded to 'further information requests', the application will lapse on the later of 1 October 2010 or 12 months from the date on which the request was made. Some councils may write to those applicants affected by this provision, but there is no obligation to do so.

The onus is on applicants with pending applications to ensure an application does not lapse.

Extending time

Councils have the ability to extend the time frames set out in the Act for certain steps relating to resource consent processing. However, new provisions have been included to limit such extensions in relation to resource consent applications. Now, time periods can only be doubled by the council if there are special circumstances or the applicant agrees. The applicant must approve any greater extensions and certain criteria set out in the Act must also be met. The intention is to ensure that resource consent applications will be processed more quickly.

Officers' reports

Reports by council officers or consultants on behalf of the council may now incorporate material from the Assessment of Environmental Effects lodged with the application. This will hopefully reduce the length of officers' reports and, possibly, the costs that the applicant pays (as part of the council charges) for the preparation of and for the peer reviews incorporated into those reports.

Decision makers – independent commissioners

Both applicants and submitters may request that an independent commissioner be appointed to hear a resource consent application. This must be done promptly after submissions close on a notified application. The person making the request will be responsible for the **additional** costs of appointing the commissioner over and above the ordinary hearing costs. Before a submitter exercises the new 'right', the associated additional costs need to be considered.

End of hearing

In order to address the practice of hearings being adjourned, rather than closed, the Act has been amended to deem that a hearing is closed 10 working days after the applicant's right of reply. Previously, many hearings were only adjourned after a hearing, so the 15 working day time frame for issuing a decision did not start to run and decisions were often delayed. By deeming the hearing to be closed, that time will start to run earlier and decisions should be made in much shorter time frames.

Fees discounts

The Amendment Act provides for a discount policy reducing council fees if the council is responsible for failures to meet the required time periods. This is intended to provide an incentive to councils to meet the time frames in the Act. Regulations will be introduced to implement these changes.

Direct referral to the Environment Court

Until now, all resource consent applications had to be made to a local authority. The Act now allows an applicant to request a council to bypass the hearing before the council and for an application to be lodged directly with the Environment Court. However, the agreement of the relevant council is required for this to occur. This option is only available for applications for resource consents or changes or cancellation of conditions which involve limited notification or public notification.

Prosecutions – contravening consents

Finally, a word of warning. As well as increasing fines for offences under the Act (which include contravening the requirements of a resource consent), a resource consent could now be affected if there is a conviction for an offence under the Act. The amendments enable the court, on a prosecution, to order a review of the resource consent where

there has been a conviction relating to that resource consent. It is more important than ever to meet the requirements of a resource consent at all times!!

The amendments referred to above are only a selection of the amendments to the Resource Management Act made by this Amendment Act. If you are embarking on the resource consent application process, it is a good idea to seek advice about the current state of the relevant legislation and its impact on your proposal.

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Email amanda.douglas@wynnwilliams.co.nz
Website www.wynnwilliams.co.nz

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Becoming a trustee of a charitable trust



Matthew Peplow
Senior Associate,
Harkness Henry

Matthew Peplow, a senior associate with Harkness Henry, looks at the duties and obligations of a trustee of a charitable trust.

There are nearly 25,000 charities registered under the Charities Act 2005 in New Zealand with the Charities Commission. Most of these organisations operate as charitable trusts. By their nature, most charitable trusts are dependent for success upon the energy and commitment of their trustees.

This article outlines some of the issues you need to think about if you are asked to become a trustee of a charitable trust.

As a minimum, you need to consider:

- the legal duties you will take on as a trustee;
- the obligations you assume in relation to investments;
- how the trust is governed;
- potential liabilities you could incur as a trustee; and
- whether the purpose of the trust is worthy of your time and effort.

The legal duties of trustees

Trustees of all trusts (including charitable trusts) are subject to a wide range of legal duties. Duties are created both by the trust deed which governs the trust and by the general law relating to trusts. These duties continue for any trustee until they resign, although in certain circumstances they can continue even after resignation.

The primary duties of a trustee are to:

- comply with the terms of the trust deed that created the trust;
- act honestly and loyally; and
- act in the best interests of the trust.

Before accepting appointment as a trustee of a charitable trust, you should begin by familiarising yourself with the terms of the trust's deed.

The deed will set out your powers and obligations as a trustee. If the terms of the deed are not clear to you, you should discuss the terms with the existing trustees and (if still in doubt) obtain legal advice from your lawyer.

When reviewing the trust's deed you should particularly focus on:

- what is the trust's purpose;
- what powers you will have as trustee;
- whether there are any limitations on the trust's activities (limitations to a geographical area, for example);
- what the procedures are for administration of the trust (for example, how frequent are the trustees' meetings?); and
- how the deed deals with the remuneration and expenses you can be paid.

Additionally, all trustees have an obligation to:

- treat the trust's potential beneficiaries impartially;
- ensure proper accounts are kept;
- exercise care, skill and prudence when carrying out duties as a trustee;
- actively advance the charitable purposes of the trust (this means that you must act in a way you honestly believe will advance, and not harm, the trust's charitable purposes);
- take reasonable steps to ensure that you have the skills and knowledge required to guide and monitor the management of the trust;

- exercise your powers yourself (you will not be able to delegate your duties to third parties unless specifically permitted to do so by the trust deed); and
- ensure that any payments by the trust are made to the correct beneficiary (if a beneficiary is overpaid, it is possible that you will be personally liable to account to the trust for the overpayment).

As a trustee you will need to be actively involved with the trust – you should not simply rubber-stamp the decisions of the other trustees or accept, without question, the recommendations of professional advisers. Although it will sometimes be prudent to seek the opinion of professionals such as valuers, investment advisers, accountants or lawyers, you (and the other trustees) will ultimately be responsible for all trust decisions.

In addition to these general obligations, trustees also have some specific obligations relating to the investment of trust funds.

Your investment obligations

Until 1988 the law specified a range of investments in which trustees could invest. This list could be adjusted in the trust deed but, in general terms, if the trustees of a trust invested in the legally specified investments, they would be unlikely to have any personal liability for any loss arising from those investments.

Since 1988, trustees have been able to invest trust funds anywhere they choose. However, there is a price to pay for this investment freedom: trustees can face personal liability for investment losses if they fail to invest prudently.

To act 'prudently' means to 'exercise the care, diligence, and skill that a prudent person of business would exercise in managing the affairs of others' (section 13B of the Trustee Act 1956).

Furthermore, trustees who are in the business of acting as a trustee (accountants, lawyers and others who regularly act in that capacity) need to exercise a higher degree of care, diligence and skill than other trustees.

The Trustee Act sets out the issues you will need to consider when exercising powers of investment. These include (but are not limited to):

- the desirability of diversifying trust investments;
- the risk of capital loss or depreciation;
- the likely income return;
- the effect of the proposed investment in relation to any tax liability of the trust; and
- the likelihood of inflation affecting the value of the proposed investment or other trust property.

The importance of making prudent investment decisions highlights the need for charitable trusts to have robust governance procedures in place.

How is the trust governed?

The trustees of a charitable trust are responsible for governance of the trust even if staff are employed. Governance involves responsibility for:

- human resource issues;
- developing strategy and policy;
- budgeting and planning;
- ensuring that the trust complies with its legal obligations; and
- monitoring and supervising the trust's management.

How the trustees perform these responsibilities will depend upon the qualities and strengths of the individual trustees and the governance structure of the trust. The following factors can also be relevant:

- whether the trust has managers responsible for implementing the decisions of the trustees;
- the number and role of 'independent trustees' who do not deal directly with management;
- the existence and nature of any committee structures;
- the delegation policies adopted by the trustees; and
- how meetings are conducted (teleconferences, face-to-face meetings etc).

The key point is that the trustees need to monitor, review, debate, question and listen to advice from management or external advisers and develop from that information an appropriate strategy to meet the trust's objectives. This includes an obligation for trustees to identify problem areas.

The chairperson has a particularly significant role in trust governance. The chair is responsible for:

- maintaining a positive relationship with the management staff;
- developing the culture and values of the trustees as a whole;
- maintaining the competence of the other trustees; and
- resolving any dysfunction arising amongst the trustees.

Charitable trusts should also have a policy in place to ensure that conflicts do not arise between the duties of any trustee and that trustee's personal interests. Conflict of interest policies should include:

- maintaining a register of the personal interests of trustees which could conflict with the interests of the trust (to help ensure that all such interests are disclosed at all times); and
- ensuring that if any conflict of interest does arise, the conflicted trustee is not involved with any decision relating to the relevant matter.

Well organised governance helps to ensure that the trust is run efficiently and that the trust and its trustees comply with their legal obligations. Appropriate governance also has an impact on the potential personal liability of the trustees.

Your personal liability as a trustee

Generally, if you are a trustee of a trust you will be personally liable for the trust's obligations to third parties. This means that you will be personally liable to satisfy the trust's contractual obligations and other legal obligations such as tax payments. These obligations can be significant. If you accept appointment as a trustee of a charitable trust you therefore need to take steps to limit your personal liability. Some of the options available to you are:

- The trust could seek registration under the Charitable Trusts Act 1957. Registration as a charitable trust under this Act creates an incorporated trust board. The incorporated trust board then becomes liable for the obligations of the trust rather than the individual trustees themselves. This protects the trustees from personal liability in a way similar to the protection from personal liability available to directors of companies. Registration under the Charitable Trusts Act 1957 is different from registration under the Charities Act 2005 with the Charities Commission and requires a separate application.
- You need to ensure that your right of indemnity from the trust assets has not been excluded by the trust deed. A right of indemnity allows you to use trust assets to meet the obligations you incur on the trust's behalf.
- You need to ensure that the trust does not incur obligations and you do not incur obligations on the trust's behalf that cannot be satisfied from the trust's assets. If you do, you may be personally liable to satisfy those liabilities.
- In contracts, you can limit the liability of the trustees to the assets available in the trust.
- You should obtain insurance to cover any liabilities you incur in your capacity as a trustee. If authorised by the trust deed, the trust may be able to pay the premiums for this insurance for you.

Although you can limit your personal liability you cannot exclude it completely. If you breach your obligations as a trustee or commit fraud you may still face personal liability. You therefore need to take active steps to ensure that you meet your obligations as a trustee.

Is the purpose of the trust worthy of your time and effort?

It can be gratifying to be asked to act as a trustee of a charitable trust. However, before you accept such an offer it is worthwhile to consider not only the details of what will be required of you as a trustee, but also the nature of the trust itself. Are you interested in or passionate about the goals and activities of the trust? Do the purposes of the trust align with your own goals, talents and interests?

Becoming a trustee is a significant commitment, generally undertaken for little or no financial reward. Before accepting an offer of trusteeship, take time to consider whether the purpose of the trust is worthy of your time and effort.

Conclusions

There are a wide range of reasons for becoming a trustee of a charitable trust: you may want to give something back to your community or you may want to promote a cause that is important to you. Whatever your reason, it is important that you understand the legal implications of becoming a trustee before you accept appointment. This article provides a general overview of those obligations. If you have any specific questions about becoming a trustee of a charitable trust you are involved with, seek detailed advice from your Lawlink lawyer.

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Email matthew.peploe@harkness.co.nz
Website www.harkness.co.nz



Although you can limit your personal liability you cannot exclude it completely. If you breach your obligations as a trustee or commit fraud you may still face personal liability. You therefore need to take active steps to ensure that you meet your obligations as a trustee.



Jo Douglas
Solicitor,
AWS Legal

Testamentary guardianship

Have you considered who will make decisions regarding your children's care if you die? In this article Jo Douglas, a solicitor with AWS Legal, discusses one of the main concerns for nearly all parents when making a will.

The Care of Children Act 2004 provides for this by allowing parents to appoint testamentary guardians for their children. This is usually done by adding a clause into your will but it can be done by a specific deed for that purpose as well.

How does a testamentary guardian assume their role?

The appointment of a testamentary guardian can take place either before or after a child is born. Any such appointment will have no effect until the parent appointing the testamentary guardian dies.

If at the time of his or her death the parent appointing the testamentary guardian is legal guardian of his or her child, the person appointed automatically assumes all the rights of a guardian. The testamentary guardian will have sole guardianship if the parent was the child's sole guardian at the time of death. If the parent shares guardianship with others the testamentary guardian will exercise their guardianship jointly with the child's existing guardians.

A parent who is not a legal guardian of a child can also appoint a testamentary guardian but the person they appoint does not automatically acquire guardianship on the death of that parent. Instead the person named as testamentary guardian can apply to the court to be appointed a guardian. In deciding to appoint the named testamentary guardian the court must consider the best interests of the child.

The testamentary guardian continues in his or her role until the child turns 18, marries, enters into a civil union or lives with another person as a de facto partner, whichever comes first.

What is the role of a testamentary guardian?

A testamentary guardian has all the rights and responsibilities of guardianship. These are set out in the Care of Children Act which specifies that a guardian is responsible for contributing to all aspects of a child's development, as well as important matters affecting the child including, but not limited to:

- the child's name (and any changes to it);
- changes to the child's place of residence that may affect the child's relationship with his or her parents and guardians;
- medical treatment for the child (if that medical treatment is not minor in nature);
- where and how the child is to be educated;
- the child's culture, language and religious denomination and practice.

A testamentary guardian does not, however, automatically have a role in providing day-to-day care of a child simply by virtue of their appointment. It is common for parents to express such a wish in their will. They need to be aware that such a clause is only an expression of their wishes and does not guarantee that a testamentary guardian will have day-to-day care of children on a parent's death.

To assume day-to-day care the testamentary guardian would need the consent of all the existing surviving guardians. If this is not forthcoming they can apply to the court under the Care of Children Act for a parenting order specifying day-to-day care.

What factors should a parent consider when appointing a testamentary guardian?

It is important to consider who would be best placed to make the decisions listed above. Most parents will want to choose someone whose views align with theirs on such matters. It is also sensible to appoint someone who is likely to have an ongoing involvement in the child's life over the duration of their childhood.

If a parent is confident in the parenting ability of their child's other parent they may choose not to appoint a guardian on their own death, if the other parent survives them. Instead, they can provide in their will that a testamentary guardian is only appointed if the child's other parent does not survive them.

There are, however, often reasons for a parent to appoint a joint guardian to exercise guardianship with the surviving parent on their death. This can be particularly relevant for separated parents. If the child's other parent has not been substantially involved in his or her life, it may be prudent to appoint an additional testamentary guardian who knows both the parent and the child well to allow for consistency of care to remain in the child's life following the death of a parent.

There is, of course, nothing to stop the child's other parent applying to the court to have that testamentary guardian removed, but they would need to show it was in the interests of the child to do so. This may prove difficult if they have not had a significant role in the life of the child to date.

Parents who have had limited involvement in their child's life should also consider seriously the option of appointing a testamentary guardian. This can be important to ensure that the child has ongoing contact with both sides of the family.

It should also be noted that *only* legal parents, that is natural or adoptive parents, are able to appoint a testamentary guardian for a child. It is not a right extended to step-parents even if the step-parent is exercising day-to-day care of a child. This is an important consideration for reconstituted families and care should be taken to ensure that the parents in such families include provisions for testamentary guardians which are going to meet the ongoing needs of the children within that family unit.

© AWS Legal
Email jo.douglas@awslegal.com
awslegal.com
Website
www.awslegal.com



They were Agents, now they are Salespeople

The Real Estate Agents Act 2008 is now in force. We have heard regular sound bites of information on the new REINZ Sale and Purchase Agreement and now we have competing versions of sale and purchase agreements in the marketplace.



Caroline McLorinan
Associate,
Auld Brewer Mazengarb & McEwen

The effect of the Real Estate Agents Act 2008 ('the 2008 Act') is wider than the transactional relationship between the agency, the purchaser and the vendor. Caroline McLorinan, an associate from Auld Brewer Mazengarb & McEwen explores the impact the 2008 Act has had on agreements between agencies and their salespeople. As a result, in the public arena, the relationship between the public and salespeople should change.

Employee or independent contractor?

Despite case law and the explicit wording in the previous Real Estate Agents Act 1976 ('the 1976 Act') that real estate agents could be engaged as independent contractors, real estate agents (now salespeople) regularly sought determinations from the Employment Relations Authority as to whether their status was that of an employee or an independent contractor.

Section 51 of the 2008 Act contains the same wording as the 1976 Act in that the contract between the agency or branch manager and the salesperson needs to be specific and refer to the salesperson as being engaged as a contractor



(in a contract for service) in order for the agency to gain the protection of the 2008 Act. While the 2008 Act refers to the relationship as employer and contractor, lawyers have always considered the use of the word employer to be confusing.

It is now possible for a salesperson to be engaged as an employee so the agreement between the agency and the salesperson, if it is to be a contract for service, needs to be carefully drafted.

A hearing in the Employment Relations Authority to determine the true nature of the relationship can be time consuming and costly. The express ability to **employ** salespeople is new under the new legislation.

The agency has the same liability for the salesperson if there are any acts or omissions by the salesperson whether the salesperson is an employee or an independent contractor.

There are added obligations on the agency if it employs salespeople in terms of rights the salesperson would then have. Legislation such as the Holidays Act 2003 and the Employment Relations Act 2000 would then take effect.

Language changes

The most significant language change which may filter through to the public is the use of the word 'agent'. The agent under the 2008 Act is now the licence holder of the agency. This will be the agency itself (for example ABC Realty),

or an individual if the company does not meet the criteria required by the 2008 Act. The person you deal with directly over selling and buying a house is more likely to be a 'salesperson' rather than an agent even though the vendor will still contract with the agency.

The difference has come about because there has been a change to the licensing and classes of licence. There are three types of licence under the new Act – agency (or agent), branch manager and salesperson.

It also appears that, unless specified otherwise in a contract between an agent and a salesperson, a salesperson can work as a salesperson for one agent and apply (if suitably qualified) for a licence to operate as an agent independently at the same time. While highly unlikely, if it does ever happen, this may well create confusion for the general public.

Changed obligations on salespeople

For the public the most significant changes are the obligations salespeople now have to vendors and purchasers.

The information that has to be supplied by the salesperson to the vendor and purchaser is now significantly increased.

The vendor will now receive more information in writing regarding payment structures for the salesperson, Approved Guides in relation to agency and sale and purchase agreements for residential property prepared by the Real Estate Agents Authority (REAA) and the ability to cancel an exclusive agency deal within a short time frame of signing.

Agents, salespeople and branch managers must disclose if they receive any other benefit from a sale.

The vendor will be asked to sign a declaration saying they have received the Approved Guides.

The purchaser is still going to be dealing with the agency which acts solely on behalf of the vendor. While this concept is not new, now salespeople and the agency have obligations to provide the REAA Approved Guide relating to sale and purchase agreements to the purchaser at the time of signing any offer to purchase a property. The purchaser will also be asked to sign a declaration that they have received this.

Having recently undergone the process of purchasing a property under the new legislation I was interested to note that only some agents are using the new REINZ sale and purchase agreements. I was dutifully handed the REAA Approved Guide by the salesperson and signed a declaration that I had been given the information.

Such obligations, in the interest mostly of information sharing, should ensure that vendors and purchasers feel more secure in their dealings with salespeople and the agency itself.

The need to comply with these further obligations ideally should be incorporated into the agreements between the salesperson and the agent. Agents and salespeople should also check their contracts with their insurers for insurance purposes.

In summary

The wider effect of the 2008 Act should still filter down to the public. It is also an opportune time for agencies to review their internal processes when engaging both employees and contractors.

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Email caroline.mclorinan@abmm.co.nz
Website www.abmm.co.nz





I've got it, I don't want it, can I sell my Māori land?

Māori land is of great importance to Māori. In 1993 Te Ture Whenua Māori Act was passed to reflect this. It made the process for selling Māori land more difficult. This was necessary to meet the new legal aim of retention of Māori land.



Cara Bennett
Associate,
Langley Twigg

In this first article from Cara Bennett, an associate with Langley Twigg, Cara advises on whether Māori land can be sold.

More difficult? Yes.
Impossible? No!

If you have a buyer and you follow the process you can sell Māori land.

The process is essential. If the process is not properly followed the sale transaction can be invalid. To make the process safer and easier for you, you should obtain professional advice as soon as you decide to sell.

I have decided to sell, how do I go about it?

If you own the whole land, advertise it for sale in the usual way. Make sure any real estate agent knows that the land is Māori land.

Be prepared for nervous buyers who have little knowledge of Māori land. The more you know about dealing with Māori land the better you can reassure a purchaser (and a real estate agent!).

Be mindful of your obligation to offer the land to the Preferred Class of Alienees ('PCAs'). PCAs get the option to purchase Māori land ahead of others.

PCAs do not get a discount. They simply have the ability to purchase the property at the price that could be met on the open market.

Who are the PCAs?

The preferred class comprises the following:

- children and remoter issue (grandchildren) of the seller;
- relatives of the seller who are associated with the land through bloodline links and Māori customary principles;
- other owners in the land (if any) if they are members of the hapū (sub-tribe) associated with the land;
- the trustees of any of the above;
- descendants of any former owner of the land who is or was a member of the hapū associated with the land.

Selling to the PCAs

If a PCA wishes to purchase the land, then you can sell to them at the open market price. Just because they have the legal right of first refusal does not entitle the PCAs to a discounted value.

If you have a competing offer from a person who is not a PCA, the PCAs need to meet that offer.

I have found a buyer, what next?

An agreement for sale and purchase should be prepared in the usual way. It is important that this agreement contain a condition regarding Māori Land Court approval.

When selling Māori land you must get Māori Land Court approval to the sale. This is generally done by or in conjunction with the purchaser. Your legal adviser can make sure you have an appropriate contract.

Once the contract is signed by both the vendor and the purchaser, an application is made to the Māori Land Court for confirmation of the sale.

The Court must grant confirmation if it is satisfied that:

the documentation has been prepared in accordance with the Court rules

- By using a legal adviser from the outset you can make sure this is done.

the sale is not in breach of any trust to which the land is subject

- This is to make sure that the interests of any trusts are protected and that only legitimate sales proceed.

the consideration is adequate

- The Court looks at the relationship between the buyer and the seller and any matters particular to the sale. It may be necessary to give the Court a valuation or to apply for exemption from giving to the Court a valuation.

- By law the Court must make sure you are getting an appropriate value for your land. If the sale price is significantly below market value the Court will want to make sure that there are special reasons for this.

the purchase money has been paid or secured

- The Court wants to make sure that once it grants confirmation that you will actually get your money. The solicitors involved on both sides of the agreement will put an arrangement in place to satisfy the Court.

the PCAs have been offered the right of first refusal

- You must demonstrate to the Court that you have offered the first right of refusal to the PCAs and that they are not going to purchase the property. Generally, an advertisement will be placed in the local newspapers giving that first right of refusal. The advertisements can then be given to the Court as evidence of the offer to the PCAs.

If none of the PCAs wish to purchase the property and all other headings have been satisfied then the Court must confirm the sale.

Words of warning

A PCA may wish to purchase the property but may not realistically be able to do so. They may express an interest and be given time by the Court to find finance. This can slow down the process. Be prepared for delays!

You must file the application for confirmation within three months of the signing of the agreement. If you do not do so, the Court may refuse to consider your application.

Expect questions! The Court will not make orders until it is satisfied it has all the facts and it will want to make sure you know and understand what you are doing.

Be in it for the long haul. This is not a short procedure and will take some time to be resolved.

Persevere. Arm yourself with knowledge of the process and enjoy the ride!

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Email cara@langleytwigg.co.nz
Website www.langleytwigg.co.nz

'Money Matters' Construction Contracts Act 2002

One of the key objectives of the Construction Contracts Act 2002 was to facilitate regular and timely payments between the parties to a construction contract.



Emma Burke
Associate,
Anderson Lloyd

This article by Emma Burke, an associate with Anderson Lloyd, looks at whether the Act has achieved this objective.

The Act

Section 3 provides that the purpose of the Act is to reform the law relating to construction contracts and, in particular:

- to facilitate regular and timely payments between the parties to a construction contract; and
- to provide for the speedy resolution of disputes arising under a construction contract; and
- to provide remedies for the recovery of payments under a construction contract.

The Act applies to every construction contract that relates to carrying out construction work in New Zealand. It is not possible to contract out of the Act which means that all parties to a construction contract will be bound by its provisions.

The Act provides that the parties to a construction contract are free to agree a mechanism for determining the number of payments under the contract, the amount of each payment and the date upon which each payment becomes due.

If the parties to a construction contract do not agree on a payment mechanism, sections 15 to 18 of the Act set out a default process for determining what payments need to be made and when such payments fall due. These sections provide that at the end of each payment period (usually each month) the contractor is entitled to issue to the principal a 'payment claim', identifying the work completed during that payment period and the amount claimed by the contractor. The principal must respond to a payment claim by either paying the claimed amount within 20 working days or, if the principal does not agree with the amount claimed by the contractor, by issuing a 'payment schedule' setting out the amount the principal believes is due to the contractor. This is called the 'scheduled amount'.

The principal must show in the payment schedule how the scheduled amount was calculated and give reasons for the difference between the amount claimed by the contractor and the scheduled amount. If the contractor disputes any or all of the reasons given by the principal for non-payment of the claimed amount, the dispute may be referred to adjudication.

Before the Act was introduced it was not uncommon for principals to withhold payment indefinitely until a dispute relating to the amount claimed was resolved or until the principal received payment from the developer, leaving the contractor with a cash flow problem and in some cases forcing the contractor into liquidation. The Act had an immediate impact in this area by facilitating timely payments and providing an efficient process for resolving disputes, and also by making conditional payment provisions ineffective and unenforceable. An example of a conditional payment provision (more commonly known as 'pay when paid' or 'pay if paid' provisions) is one that makes the obligation of one party (party A) to pay an amount owed to another party (party B) conditional on party A receiving payment from a further party (party C).

Since the Act was introduced, a body of case law covering a range of payment-related matters has been accumulating. It appears that the courts will not have any sympathy for parties who do not strictly meet the requirements of the Act in issuing payment claims and payment schedules, and making payment by the due date.

Furthermore, the courts will not look favourably on principals who attempt to withhold payment without giving clear and justified reasons for doing so.

Payment claims

In general terms, a claim will be enforceable only if it is specifically identified as a payment claim under the Act. However, recent case law indicates that a non-complying claim may still be valid if the accompanying documents make it apparent that it is being made under the Act.

The court in Welsh v Gunac South Auckland Limited¹ held that a single payment claim that did not expressly refer to the Act, but which was in the middle of a series of complying documents, should be interpreted as part of that series.

Similarly, Justice Cooper in Winslow Properties Limited v Wooding Construction Limited² held that a payment claim was deemed to be valid because the covering letter identified the particular claim as number 18 in a sequence of complying claims.

Due date for payment

Section 18 of the Act provides that – unless the parties agree otherwise – progress payments become due 20 working days after the payment claim was served. But section 14 gives parties to a construction contract the contractual freedom to agree payment terms, including the due date for payment.

In Marsden Villas Limited v Wooding Construction Limited³, Justice Asher concluded that any time frame for payment that the construction contract specifies must take precedence over the default position set out in section 18. Suaniu v Hi-Qual Builders Limited⁴ established that if the construction contract does not mention a due date for payment, section 18 will apply. In that case, the contractor was not entitled unilaterally to impose a due date for payment that was inconsistent with the time frame specified in the Act.

Service of payment claims

Section 20(1) of the Act states that the payee may serve the payment claim on the payer (that is, the principal under the construction contract). But *Winslow* established that if the contract allows for notices to be served on the engineer, the contract overrides the Act. The principal in such a case cannot try to avoid paying on the grounds that they did not receive the payment claim personally.

In similar cases where disputes have arisen in relation to service of notices, the general approach by the courts has been that a document will be deemed to have been served on a party if the court is satisfied that the document has come to the attention of that party.

Payment schedules

Both the Act and recent case law has indicated a shift in who bears the consequences of delayed payment. The courts have, through strict application of the Act, made it clear that if the principal fails to issue a payment schedule within the time frame prescribed by either the Act or the construction contract, then they must pay the entire amount claimed (at least in the interim), regardless of the merits of their dispute.

In *Marsden*, Justice Asher noted that errors in a payment claim, or the fact that it was not submitted in accordance with the construction contract, would not necessarily invalidate it. In the Judge's opinion, the appropriate place for addressing such issues was in the payment schedule.

Under section 21(3) of the Act, the payment schedule must indicate:

- how the payer calculated the scheduled amount;
- the payer's explanation for any difference between the scheduled amount and the claimed amount;
- in a case where the difference is because the payer is withholding payment, the payer's reasons for withholding payment.

The courts have acknowledged that the legislation was specifically designed to prevent principals withholding payment without giving clear reasons and supporting evidence.

If a principal wants to pay anything less than the full amount in response to a progress claim, they must strictly comply with section 21(3) of the Act. Seemingly conflicting judgments have been issued in relation to the principal's ability to withhold payment, but on one principle the courts are agreed: this is that unless the principal unequivocally denies liability for the entire payment claim, they will be acting contrary to the Act by seeking to withhold payment of the total amount claimed and reserving the right to review their position at a later date.

Similarly, a principal cannot use general and/or unspecified allegations of defective or incomplete work as grounds for withholding payment or paying less than the amount indicated in the progress claim. The principal will need to quantify the defective or incomplete work before the Act can sanction such withholding.

Strict compliance will prevent disputes

It appears that the Act, and the court's approach to interpreting and applying it, has made some progress in facilitating cash flow and providing for a regular and timely payment procedure.

Recent decisions of the courts send a clear message.

Strict compliance with both the Act and the express provisions of the construction contract is the only way for principals and contractors to ensure that payment claims and schedules will be legally enforceable, and to prevent disputes about amounts withheld.

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Email emma.burke@andersonlloyd.co.nz
Website www.andersonlloyd.co.nz

1 (unreported) HC Auckland
CIV-2006-404-7877, 11 February 2008

2 (unreported) HC Auckland
CIV-2006-404-4969, 14 December 2006

3 [2007] 1 NZLR 807

4 (unreported) HC Auckland
CIV-2008-404-1576, 26 June 2008

A squatter's guide to securing ownership of land



Trudy Miller
Solicitor,
Anderson Lloyd

In this article Trudy Miller, a solicitor with Anderson Lloyd, canvasses the ways in which a person in possession of abandoned land can acquire ownership.

Have you ever seen property you particularly liked but couldn't track down the registered proprietor to purchase it? Or have you stumbled across vacant land and set up camp on it? Perhaps planted some trees or grazed some sheep?

There is abandoned land all around us. Land becomes 'abandoned' when, after due inquiry, the registered proprietor or any other person with a legal right to possess the land cannot be located.

In most cases, the registered proprietor of the land will have been dead for many years. Such an example recently reported in the media is the story of abandoned land in Cardrona Valley, Central Otago¹.

The land was purchased by gold miners and hoteliers in the late 19th century but subsequently abandoned when the stores of easily accessible gold in the area dried up and they moved to more promising areas. The land was still in the original registered proprietors' names even though they were all long dead.

This article will guide you through three ways in which an occupier may be able to acquire ownership of abandoned land:

- through making an 'application for certificate of title based on possession', also known as an adverse possession application;
- through the sale of 'abandoned land' by a local authority; and
- by Public Trust becoming the manager and selling the 'unclaimed property'.

All of these options involve public notification. This carries the risk that the registered proprietor of the land or one of his or her descendants will come forward to claim it.

Adverse possession application

Under section 3 of the Land Transfer Amendment Act 1963, an adverse possession application can be made by an occupier of land who can show that they have had at least 20 years of 'continuous exclusive possession' without the registered proprietor's consent.

The application is lodged with Land Information New Zealand ('LINZ') and must set out the period of personal possession by the applicant, any period of prior possession by their predecessors, illustrate the manner in which the land has been occupied (for example, if it has been fenced), and list any improvements on the land made by the occupier.

The application must also include a statutory declaration by someone who knows the occupier, the land in question and its history. That person must also be able to verify that the length and manner of possession set out in the application is correct. Statutory declarations are often made by a long-term neighbour or real estate agent with expertise in the related area.

If the adverse possession application is accepted by LINZ, the Registrar of Land ('the Registrar') will advertise the application in the local newspaper and give notice to any person he or she believes has an estate or interest in the land.

The application will be refused (or limited) if the registered proprietor or a descendant (or any person with another interest in the land) lodges a caveat within the time limit given in the notice. A caveat prevents the Registrar from dealing with the land until the caveat is withdrawn. If a caveat is successfully lodged by, say, a descendant of the registered proprietor, the Registrar must give them time to establish their claim and register as the registered proprietor.

If no registered proprietor or descendant comes forward, the Registrar will proceed with the application. The occupier will be required to get a survey certificate and a new title will then be issued in their name. A major benefit of this option for an occupier is that they do not have to pay a purchase price for the land but there are costs associated with making the application.

Sale of 'abandoned land' by a local authority

Under sections 77 to 81 of the Local Government (Rating) Act 2002, a local authority has the power to sell land if rates have not been paid for at least the previous three years.

The local authority must give public notice of its intention to have the land declared abandoned and to sell or lease the land. If a descendant of the registered proprietor comes forward, they may get the land transferred into their name provided they pay the rates owing on the land.

If no one objects to the land being declared abandoned by the time the notice period expires, the local authority can apply to the District Court for an order declaring the land to be abandoned and authorising the local authority to sell or lease it.

A local authority that is authorised to sell abandoned land must first attempt to sell it by public auction or public tender.

If the land does not sell, it may then be sold privately as long as the sale price is not less than the reserve. For an occupier, the downside to this process is that there is a good chance that someone else will end up with the land due to the public sale requirement (even though it may seem to the occupier that they have a better right to it).

This option is typically a quicker way to gain ownership of land than by an adverse possession application. However, there is no guarantee that an occupier will be able to get the local authority to agree to proceed with an abandoned land sale – these sales do not occur very often.

Sale of 'unclaimed property' by Public Trust

Section 99 of the Public Trust Act 2001 gives Public Trust the power to become manager of land if the registered proprietor is dead and after 'due inquiry' it is not known whether there is anyone in New Zealand with authority to deal with the land.

If the land is valued at \$40,000 or less, due inquiry will involve finding evidence of the registered proprietor's death and any will they may have made. Public Trust will then advertise its intention to become manager of the land in the local newspaper and in the *New Zealand Gazette*. If no responses are received, Public Trust can appoint itself property manager.

If the land is valued at \$40,001 or more, the process is much more extensive. A higher standard of research and advertising is required and the search for possible descendants can take up to a year or more. For land of this higher value, Public Trust must apply to the District Court to be appointed property manager.

Once it becomes property manager, Public Trust can sell the land privately. Where Public Trust sells the land to the occupier, it may reduce the sale price to take into account any improvements that the occupier has made. The proceeds of the sale are held on trust for the descendants, and if not claimed within 20 years, they go to the Crown Bank Account.

In the case of the Cardrona Valley abandoned land, Public Trust was appointed to track down the descendants of the registered proprietors. It found descendants for most of the properties, but there were a handful for which no descendants could be found and were subsequently put up for sale².

Conclusion

Just because you possess land for a long period of time does not mean that you automatically become the legal owner. If you suspect that some of the land you are in possession of is not legally yours or you want to acquire some land but cannot track down the registered proprietor, we recommend that you seek advice from your Lawlink lawyer regarding the appropriate course of action to take.

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Email trudy.miller@andersonlloyd.co.nz
Website www.andersonlloyd.co.nz

- 1 *Otago Daily Times* 'Wanted: owners of abandoned land' James Beech, 31 January 2009
- 2 *Otago Daily Times* 'Abandoned sections up for tender' Marjorie Cook, 30 May 2009

There is abandoned land all around us. Land becomes 'abandoned' when, after due inquiry, the registered proprietor or any other person with a legal right to possess the land cannot be located.

I want a will, is there a way?



Cara Bennett
Associate,
Langley Twigg

In this second article, Cara Bennett looks at the importance of having a will especially with regard to Māori land.

Often underrated, the will is the cornerstone of all estate planning. Wills deal with your assets after your death. They need to be carefully drafted to ensure your wishes are carried out.

If you have interests in Māori land, failure to deal with these properly in your will may mean your wishes are not carried out.

If you do not leave a will, the Māori Land Court will make orders dealing with your Māori land – regardless of your wishes. The law will then decide for you who inherits your interests in Māori land. If you do not leave a will your spouse can obtain a life interest. A de facto partner may not be so lucky.

Who gets my Māori land if no will?

- Your children will inherit your Māori land equally.
- If a child has died then their children will take their parent's share.
- If you do not have children or grandchildren then your brothers and sisters will share your Māori land interests.

Even the smallest interest in Māori land will be divided among those persons named above. This can mean that a small share becomes significantly smaller!

I want to decide. What do I do?

Make sure you have a suitable will. Your lawyer needs to know that you have Māori land and what you want to do with it. You do not have to know all of the land you are an owner in.

Think about what you want to do with your Māori land. Do you want to avoid fragmentation? Do you want to put the land in a trust? Do you want to retain a bloodline?

Once you have thought about these issues ask your lawyer to prepare a new will for you.

Talk through any of these issues with your lawyer if you are unsure as to what is best for you.

What is fragmentation?

Fragmentation occurs when a share in Māori land gets divided up into smaller parts. This will occur by law if you do not leave a will and have more than one child.

It can have the effect of making shares in land uneconomic. Some Māori incorporations will not transfer shares unless there is a minimum shareholding.

The only way to avoid fragmentation is with an effective will.

Why can't I do what I want?

The focus of Te Ture Whenua Māori Act 1993 is retention of Māori land. To help with retention the law limits who you can leave your Māori land to. This is to help Māori land stay in Māori hands and to keep land within families.

Who I can I leave Māori land to?

- Your children.
- Your grandchildren.
- Your great-grandchildren.

- Any person who would be entitled to benefit if you did not leave a will.
- Other people who are related to you by blood, and are members of the hapū (a sub-tribe) associated with the land.
- Other owners of the land who are members of the hapū associated with the land.
- Any whāngai children you might have.
- Any trustee of any of the above people.

If you attempt to leave your Māori land interests to anyone outside of these categories that attempt will be void and your Māori land will be dealt with as if you did not leave a will.

Who are whāngai?

A whāngai is a person adopted in accordance with Māori tikanga (customary principles). They are not formally adopted through the Family Court but are adopted in a customary way. It can be difficult to determine whether a person is a whāngai and the Court may want to hear evidence.

A tamaiti whāngai (whāngai child) is cared for within the wider family. It is an informal arrangement, not a legal one. The birth parents remain the legal guardians of the child.

Whāngai are not generally able to inherit on an intestacy. Whāngai will have real difficulty in inheriting Māori land in the absence of a will.

What about my spouse?

If you want your spouse to benefit from your interests in Māori land then you need a properly drafted will.

Unless your spouse or partner fits within one of the above categories they cannot inherit your Māori land. This is unlike what happens with general land.

You can leave your spouse a life interest. This means your spouse can receive the income from the land and can participate in decision-making. The shares in land are to be retained for your children or the other beneficiaries in your will.

What do I do?

Think of what you want to happen with your Māori land after your death.

Then see your lawyer who will help prepare a will for you that will meet your objectives.

© Langley Twigg
Email cara@langleytwigg.co.nz
Website www.langleytwigg.co.nz

Anderson Lloyd

Connections

Highest number of women partners

A recent survey of New Zealand's 20 largest law firms (carried out by LawFuel publisher, John Bowie) has identified Anderson Lloyd as the firm with the greatest percentage of female partners. The average amongst those top 20 firms is 17 per cent with Anderson Lloyd achieving an impressive 35 per cent.

Chairman of Partners, Stephen Christensen said the firm had not made specific efforts to promote women to partnership. Rather, Anderson Lloyd had simply gone about recruiting and retaining talented people who suited its business and who enjoyed working there.

Mr Christensen said the number of female partners meant that the firm better reflected the ways in which its clients worked and the realities of present-day business life. There had only been one or two female partners a decade ago but the numbers had gradually increased.

The firm had in recent years worked hard to promote policies offering more flexibility and whilst that might have assisted more women to combine careers with family life, overall it was simply about creating an environment in which everyone had the opportunity to reach their potential. An ongoing commitment to excellence and to pursuing challenging and stimulating work were key factors.

Mr Christensen said that as a result of having more women partners there was a greater breadth to discussions, with the level of detail being both different and better. 'You've got more points of view being brought to bear. That has added to the overall quality of the partnership.'

(Extracts taken from article published in Law News)

New associate announced

Anderson Lloyd has announced the appointment of Emma Burke as the firm's newest associate.

Since joining the firm in March 2009, Emma has become an integral part of our Commercial team, with high technical ability, personal integrity and commitment to the firm and its clients.

Emma works with a number of our key clients and is a fantastic example of the great people we have.



Right: Emma Burke

Lawlink is a network of 18 independent law firms, located throughout New Zealand, who compete in different marketplaces.

As independent firms, members see the value in sharing ideas, resources and business processes. They benefit from enhanced buying power, as well as access to best practice and a broader network of experts. Each firm is proud to maintain its individual brand identity while enjoying the advantages of Lawlink membership.

Our member firms say that Lawlink is more than a national network – it is a 'family' where there is always someone in the network to turn to.

The Lawlink network links over 430 lawyers and 400 support staff. The board sets the strategy which is executed through the national office.

By sharing expertise and know-how, Lawlink firms can enhance the service they provide to their clients. The role of the national office is to connect our members and facilitate this sharing of information. We do this by

managing the Lawlink precedent collection, and offering access to an extensive range of electronic library resources and our research services.

Lawlink also helps member firms to realise economies of scale in terms of procurement and looks for opportunities to grow our firms' businesses.

The members of the Lawlink Group reserve the right to distribute this magazine at their discretion.

The information contained here is of a general nature and should be used as a guide only. Any reference to law and legislation is to New Zealand law and legislation. We recommend that before acting on it, you consult your nearest Lawlink firm.



Check out our website
www.lawlink.co.nz

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IMAGINE IF THE FRENCH HAD DRAFTED THE RESOURCE MANAGEMENT ACT... OH LA LA



Anderson Lloyd may be the largest South Island-based law firm, and Resource Management may be one of our four areas of specialty (alongside Corporate and Commercial, Litigation and Property and Personal Client Services), but even we shudder to think what it might have been like working with the RMA, Gallic edition, on a daily basis.

Fortunately, it never came to pass. But imagine if the French had claimed the South and left the North Island to the British. That's the premise for *Le Sud*, a rollicking political satire that will tour through the various South Island Arts Festivals over the next 2 years.

Le Sud!

Le Sud commissioned by the Festival of Colour and supported by Creative New Zealand

It's our pleasure to be the exclusive sponsor of this wonderful play that highlights in its own particular way how good we have it on this side of the Strait. As for why we've chosen such an extensive and ambitious sponsorship, we can only say what we might have said under such a regime: **A la façon du Sud (it's a South Island thing).**

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