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INSIDE THIS EDITION

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If you have any questions about the newsletter items, please contact me, I am here to help.

EMPLOYMENT LAW UPDATE

On 14 May 2012, Cabinet approved a number of changes to our employment law including some of those projected during National's pre-election campaign. The motivation behind these changes, as stated by Labour Minister Hon. Kate Wilkinson, is to improve efficiencies by creating a more level playing field for both employers and employees. Some of these changes are outlined below.

FLEXIBLE WORKING HOURS

The right of employees to request flexible working hours will be extended to all employees from the beginning of their employment term. Currently, an employee is only able to request flexible working hours if they have been employed for more than six months or if they are caregivers. Kate Wilkinson states that the change is intended to better reflect the changing dynamics of workplaces and "help employees find the work-life balance that works for them and their family".

TIMING OF COLLECTIVE BARGAINING

Unions are currently able to initiate bargaining from 60 days before a collective agreement expires. Employers on the other hand cannot initiate bargaining until 40 days prior to expiry. The 20 day advantage presently provided to unions is to be removed by allowing employers to initiate collective bargaining at the same time as the unions. This change has been motivated by concerns that such a head start could create an imbalance in bargaining.

COLLECTIVE AGREEMENTS

Employers will no longer be required to provide new employees with the applicable collective agreement employment terms (as negotiated by their union) for the first 30 days of employment. Employers will instead be able to provide an individual employment agreement to new employees from the commencement of employment. Such

change is aimed at providing individual employees with greater choice from the outset and the freedom to decide whether or not they wish to join a union.

REQUIREMENT TO CONCLUDE COLLECTIVE AGREEMENT
Employers will no longer be required to conclude a collective agreement unless there are genuine reasons to do so; provided the requirement of bargaining in good faith is upheld. The motivation behind the change is to remove situations of unproductive and endless negotiations that may put businesses at risk.

MULTI-EMPLOYER COLLECTIVE AGREEMENT
Employers will also be able to opt out of multi-employer collective bargaining before negotiations for such agreements are commenced.

STRIKES & LOCKOUTS
Unions and employers will be required to provide notice of an impending strike or lockout. Such notice is currently only required for industries that provide "essential services" such as healthcare. Partial strike action will also attract partial reduction in pay for employees.

CONCLUSION
While these changes are aimed at better aligning the power balance between employers and employees, there has been some concern over the practical implications of some of these changes. A workable balance will need to be struck to ensure the ideals are carried through into the everyday practice of employers.

The changes are expected to go before Parliament later this year followed by calls for public submissions. It will be interesting to see how these changes are received.

ENDURING POWERS OF ATTORNEY

An Enduring Power of Attorney ("EPA") is a legal arrangement governed by the Protection of Personal and Property Rights Act 1988 whereby one person ("the donor") authorises another person ("the attorney") to act on their behalf. An EPA can, depending on the donor's wishes, either grant the attorney wide general rights or rights limited by conditions and restrictions imposed by the donor.

EPAs have in recent years become subject to much tighter controls, with stringent mandatory requirements imposed by The Protection of Personal and Property Rights Amendment Act 2007 ("the Act"), which came into effect on 26 September 2008.

The two types of EPAs are:

- EPA in relation to personal care and welfare – a donor may authorise their attorney to act in relation to the donor's personal care and welfare either generally or in relation to specific matters. These include matters such as medical treatment and selection/admission of the donor into residential care or a rest home.
- EPA in relation to property – a donor may authorise their attorney to act in matters concerning the whole or a specified part of the donor's property. Unless restricted, this EPA can be used for any "property" of the donor, including borrowing, operation of bank accounts, and almost all financial or property decisions the donor could otherwise make personally.

APPLICATION
An EPA for property can be immediately effective and continue when the donor no longer has mental capacity, or can become effective only upon the donor's mental incapacity. However, for a personal care and welfare EPA, an attorney cannot act unless the attorney believes on reasonable grounds that the donor is mentally incapable. For more significant matters, certification of mental incapacity from a relevant health practitioner or determination by a court is also required before an attorney is able to act.

In any event, there is an automatic presumption that the donor is mentally capable until the contrary is proven.

KEY REQUIREMENTS FOR EPAS
Witnesses - a lawyer, registered legal executive or an officer of a trustee corporation independent of the attorney must explain the effects and implications of the EPA to the donor to ensure he or she fully understands the scope of authority being ceded to their attorney, and provide certifications that this has occurred and witness the donor's signature.

The attorney's signature cannot be witnessed by the same person and so a separate independent witness is required. This can be another practitioner in the firm.

Consultation – changes under the Act also provide a donor with the ability to require their attorney to reasonably consult with or provide information to certain people named in an EPA before a decision is made. Despite such discussions, however, the ultimate decision will be at the attorney's discretion.

CONCLUSION
While the Act endeavours to provide donors with greater control over the powers they yield to their attorneys, the ultimate decision making will rest with the attorney. It is therefore critical for a donor to carefully consider who may be a suitable attorney. If you are considering an EPA, your lawyer will be able to discuss what powers are given to your attorney, and be able to prepare an EPA to best suit your circumstances.

THE ACCIDENT COMPENSATION CORPORATION

WHAT IS THE ACC?

The Accident Compensation Corporation (ðthe ACCö) is a New Zealand Crown Entity set up under the Accident Compensation Act 2001 (ðthe Actö) that is responsible for providing accident insurance for all personal injuries. The ACC scheme is administered under a ðno faultô system, which means that a person is able to get cover for an accident regardless of how the accident occurred or who caused it. This system effectively means that individuals forego the right to sue others for compensatory damages following an injury in return for receiving personal injury cover. ACCôs main purpose is to promote injury prevention measures, provide rehabilitation and fair compensation to those eligible under the Act.

BACKGROUND

The notion of a ðno faultô compensation system was first conceptualised in 1967 in the ñWoodhouse Reportò authored by Mr Justice Woodhouse (now the Right Hon. Sir Owen Woodhouse). The report was the result of a Royal Commission of Inquiry in respect of concerns regarding New Zealandôs previously inadequate worker compensation laws. This led to one of New Zealandôs most significant legal reforms with the establishment of the ACC, which first came into operation on 1 April 1974.

ELIGIBILITY

ACC cover is available for personal injuries sustained by all New Zealanders and visitors to New Zealand, regardless of the injured personôs employment, status or age. Cover also extends to New Zealand residents returning from overseas with an injury; provided that they have not been out of the country for more than six months (some exceptions to the six month rule can apply where an individual has been overseas for work purposes).

PERSONAL INJURY

Section 26 of the Act defines ñPersonal injuryò and includes:

- physical injury,
- mental injury suffered due to physical injury,
- mental injury caused by certain criminal acts,
- damage (other than wear or tear) to dentures or prostheses that replace part of the human body, and
- death due to a physical injury.

TYPES OF COVER

There are a number of different types of support that ACC is able to provide. These include:

Treatment ï most treatments are funded by ACC. There may however be instances where a surcharge is required. Some elective surgery and dental treatments may also be covered.

Ancillary services ï services such as emergency transport by ambulance and assistance with accommodation may be provided in certain circumstances.

Rehabilitation - social and vocational rehabilitation is provided by ACC to assist an individual to return to work as soon as possible.

Fair compensation ï weekly compensation for loss of earnings or loss of potential earnings is available for those entitled. Some individuals who have been permanently impaired as a result of a personal injury may also be entitled to a lump sum payment.

Death benefits ï where a person dies as a result of the personal injury, ACC may be able to help the family of the deceased by providing support such as funeral grants, weekly compensation to dependants and assistance with childcare.

For more information about the ACC and its services, please visit www.acc.co.nz .

VENDOR WARRANTIES AND REAL ESTATE

When you enter into an agreement to sell your property, it is almost certain you will be giving warranties to the purchaser. The scope of these warranties can often be underestimated and lead to significant financial woes for the vendor in the event of a breach. The Auckland District Law Society (ADLS) provides the most commonly used agreement, the ADLS Agreement for Sale and Purchase of Real Estate (ðthe Agreementö), with the warranties set out in clause six. It is important all vendors are aware of the content of these warranties. A brief summary of some of these warranties is provided as follows.

CHATTELS

All chattels listed in the Agreement must be delivered to the purchaser on settlement in the same state of repair as at the date on which the Agreement was signed. A recent change in the Agreement further requires that these chattels be in ñreasonable working order, where applicableò The vendor further warrants that all electrical and other installations on the property are free of any charge (for example, not subject to finance).

Any breach relating to chattels provides the purchaser with a right to compensation but does not entitle the purchaser to cancel the Agreement. A prospective purchaser should therefore carefully inspect the property to ensure all chattels included in the sale are of an acceptable standard and any issues are dealt with ahead of time.

WORK DONE TO PROPERTY

In relation to any works the vendor has done, or caused or permitted to be done on the property, they warrant that:

- any permit, resource consent or building consent required by law was obtained,
- to the vendor's knowledge, the works were completed in compliance with those permits or consents, and
- where appropriate, a Code Compliance Certificate was issued for those works.

This warranty will not extend to works done on the property by a previous owner, and purchasers are advised to carry out their own investigations rather than rely on the warranties. Extra vigilance must also be adopted where the property is a cross lease or unit title as these may be subject to additional requirements for any work carried out on the property.

Other warranties given by the vendor at the date of the Agreement include:

- the vendor has not received any notice or demand and has no knowledge of any requisition or outstanding requirement in relation to the property, and
- the vendor has not given any consent or waiver that directly or indirectly affects the property and that has not been disclosed in writing to the purchaser.

CONCLUSION

The 'fine print' of any agreement needs to be carefully considered and understood by all parties to the transaction. The implications and consequences of giving warranties that are not correct can be significant. If there are warranties that you cannot accurately give, amendments to the warranties will be needed before signing any agreement. Consulting a lawyer from the outset is highly recommended.

THE RISE OF LOOK THROUGH COMPANIES

WHAT IS IT?

A Look-Through Company ('LTC') is similar to a traditional limited liability company, however its income and losses are treated differently for tax purposes. The tax structure of an LTC allows the company to transfer income and expenditure to its shareholders directly. In other words, the shareholders of an LTC become liable for income tax on the company's profits while also being able to offset the company losses against any other income. There are many advantages to utilising an LTC, some of which are discussed in this article.

BACKGROUND

In 2010, the LTC was introduced to replace the former Loss Attributing Qualifying Company ('LAQC') and Qualifying Company ('QC'). The need for such a change as identified by the Policy Advice Division of the Inland Revenue Department centred mainly around issues relating to arbitrage opportunities and the lack of loss limitation rules.

KEY FEATURES OF THE LTC REGIME

LTCs are governed by Subpart HB of the Income Tax Act 2007 ('the Act'). Some of the features and requirements for an LTC are:

- Shares can only be held by a natural person, trustee or another LTC. Additionally, all company shares must be of the same class and provide the same rights and obligations to each shareholder,
- An LTC must have five or fewer owners (ownership interests of relatives within two degrees of relationship are combined),
- An LTC's income, expenses, tax credits, rebates, gains and losses are passed onto its shareholders. Such allocation to the shareholders will usually be in proportion to the number of shares they have in the LTC,
- Any profit is taxed at the shareholder's own marginal tax rate. The shareholder can use any losses against their other income, subject to the loss limitation rule, and
- The loss limitation rule ensures that the losses claimed by a shareholder accurately reflect the level of that shareholder's economic loss in the LTC.

Companies can elect to become an LTC, and existing LAQCs and QCs can elect to become an LTC without a tax consequence in the income years commencing 1 April 2011 and 1 April 2012. All shareholders of a company must elect for the LTC rules to apply in order for the conversion to be effective.

ADVANTAGES

Some of the advantages of utilising an LTC as opposed to other business structures are:

- An LTC allows a shareholder to hold an investment in defined shares with other parties. A trust on the other hand (generally a discretionary trust) would not provide for such definitive shares to be held,
- Shareholders have the ability to sell their shares or bring other investors into the LTC (provided the relevant LTC disposal provisions are followed under the Act),

- Added creditor protection is offered by the LTCs limited liability, and
- An LTC can be particularly useful where investors have varying tax positions.

For more information on LTCs, please speak to an accountant, lawyer or the Inland Revenue Department.

SNIPPETS

SOLICITOR V BARRISTER

A solicitor is a lawyer whose work predominantly involves transactional matters such as conveyancing, contracts and commercial work. A barrister on the other hand is a lawyer whose work is more court orientated, where they appear and conduct proceedings in court.

Typically these two functions have been distinct from each other, in that a lawyer is only able to practise as either a solicitor or a barrister. This division continues to operate in some jurisdictions, such as England and Wales.

However, in countries including Canada, New Zealand and most of Australia, the two functions are combined where a lawyer automatically qualifies to practise as both a barrister and solicitor. A lawyer in New Zealand therefore is able to switch between these roles and act in both capacities as required. The amalgamation of these professions arose during New Zealandôs colonisation period where a shortage of lawyers forced the creation of a hybrid that continues to operate today.

THE BIG SQUASH

The first car to fall prey under the colloquially dubbed ñboy racer lawsò, the Land Transport (Enforcement Powers) Amendment Act 2009 and the Sentencing (Vehicle Confiscation) Amendment Act 2009, was crushed on 21 June this year in Lower Hutt.

Section 129A of the Sentencing Act 2002 introduced a three strike approach for repeat offenders where a third offence would see their cars being sentenced to death by crushing!

While the first destruction of a car has taken some four years since the legislation first came into effect, there are approximately 116 drivers who are on their second strike. It is thus anticipated that busy times lie ahead for executioners.

The laws have so far proved to be a strong deterrent as street racing offences have reportedly decreased by 17 percent for the period 1 January to 31 October 2011.