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NEWSLETTER

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INSIDE THIS EDITION

Your duty of disclosure to your insurer

Have you ever had that nagging feeling that your insurer might, just *might*, find a reason not to pay out on a claim?

We all deal with different kinds of insurance; house, contents, life, health, travel, mortgage, income protection, professional liability, public liability, earthquake, builders risk, and, if you want to believe, some foreign providers even offer a policy protecting against alien abductions.

No doubt you read your insurance policies in detail and are aware of the circumstances in which your claim can be refused (for example if you snow-ski overseas, injuries that occur while off-piste are typically excluded from travel insurance).

Duty of disclosure
In New Zealand the insurer has a right to refuse a claim if you, the insured party, failed to disclose something that may have influenced their decision as a prudent insurer to offer you insurance in the first place. This is known as your duty of disclosure. You are obliged to update your insurer with relevant information every time your policy is renewed or varied.

Breach of the duty may have disproportionately harsh results
Your failure to disclose a material circumstance allows your insurer not only to refuse a claim, but to treat the contract of insurance as never having existed. A flow on effect is that successful claims you have made in the past could also be reversed.

The problem we face is that the consumer would typically only become aware that their policy is void when they make a claim, as this is usually the only time the insurer makes a thorough investigation of

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your particular affairs. Some examples where policies were cancelled for non-disclosure include:

- Home insurance claim for fire damage denied because insured party did not disclose a previous (although unrelated) criminal conviction.
- Income protection insurance claim denied after historical medical records showed insured party had previous (yet reportedly minor) undisclosed stomach pain that his General Practitioner concluded resulted from stress.

What the insured must disclose is inherently uncertain

An insurer will usually ask you many questions to determine your premiums and level of cover, however the questions they ask are non-exhaustive and do not excuse you of your duty of disclosure.

Difficulties arise because the ordinary consumer does not have a sophisticated knowledge of insurance law. An ordinary consumer might diligently and honestly complete a detailed insurance application, overlook some piece of information they have no idea would be relevant to the insurer (and was not asked for by the insurer), pay years of premiums only to find when making an eventual claim that their policy is void.

The New Zealand Law Commission has been unsuccessfully advocating to ease the obligations on the consumer since the late 1990s to bring us more in line with the legal position in the UK and Australia. The simple advice under the current regime is to review your new or existing policy document carefully and disclose everything you possibly can to your insurer and let them decide what is relevant. If this results in a higher premium – you can take comfort knowing you are now less likely to have a claim rejected due to non-disclosure.

Makeover for trust law proposed

The Law Commission feels a new framework is needed to provide a clear and robust approach for trusts in the 21st Century. They are undertaking a three part review of trust law in New Zealand and presented the first report to Parliament on 11 September 2013.

The Law Commission report focuses on the essential nature of trusts and recommends the introduction of a new Trusts Act ('new Act') to replace the Trustee Act 1956, which the Commission believes has become outdated. A selection of the recommendations in the report are summarised below:

Core trust concepts

- That the new Act provides a statutory definition of "trust", setting out the specific requirements necessary for a trust. It is hoped a clearer definition will assist the courts in addressing possible "sham" trusts.
- That the new Act clearly sets out the duties of trustees. While not creating new duties per se, the purpose is to make the law clear and accessible. The new Act would introduce six mandatory duties and 11 default duties, which will apply unless the trust deed indicates otherwise.
- That trustees be barred from limiting their liability or receiving an indemnity for gross negligence, which aligns with the current position in cases of dishonesty or wilful misconduct.

Trustees

- That provisions be enacted that broadly empower trustees. The Commission believes the current Act unduly restricts trustees' powers, and that the duties on trustees will be sufficient to control any inappropriate use of trustees' powers.
- That trustees be able to invest funds, with discretion to determine whether the return is "income" or "capital". The focus is on the overall return, meaning investment managers can also be appointed.
- That the rules relating to changing trustees be amended, as the current legal framework is difficult and often necessitates the court's involvement.

Court powers and jurisdiction

- That the court be given wider powers in its role of overseeing trusts and reviewing trustees' decisions.
- That the District Courts have the same jurisdiction as the High Court to deal with trusts, provided the amount involved is within the court's monetary limits. The report also recommends the Family Court have jurisdiction in certain cases.
- Promotion of Alternative Dispute Resolution in the new Act, as well as an increased role for the Public Trust to alleviate dependence on the courts.

General trust issues

- That the rule against perpetuities for new trusts be extended from 80 to 150 years.
- That the Property (Relationships) Act 1976 be amended to enable the Family Court to make orders compensating a partner by way of trust assets, where their claim would otherwise have been defeated.

While many of the recommendations simply clarify the existing law, the Commission recognises the new

regime will widely impact the estimated 300,000 – 500,000 trusts currently in New Zealand.

Whether the Government approves the report remains to be seen. In the meantime, the Commission will continue with the final two stages of review, which relate to charitable trusts and corporate trustees. For a full list of the proposed changes refer to the Commission's website: www.lawcom.govt.nz/publications.

Health and safety reform on the horizon

The Health and Safety Reform Bill ('the Bill') proposes amendments to our current health and safety regime. One proposal is the replacement of the Health and Safety in Employment Act 1992 ('current Act'), with a new Health and Safety at Work Act ('proposed Act'). This article focuses on three major proposed changes for employers.

1) Duties of a "person conducting a business or undertaking" (PCBU) - the proposed Act introduces the broad concept of a PCBU to cover the many different working relationships in the New Zealand workplace. It follows the Australian health and safety model, and requires a PCBU to ensure the health and safety of their workers and other people affected, as far as is "reasonably practicable", replacing the current requirement to take "all practicable steps". "Reasonably practicable" means, "that which is, or was, at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters", and the proposed Act also outlines relevant matters for consideration. It is considered that this will provide PCBUs with greater clarity as to their duties.

The proposed Act also introduces the concept of an officer of a PCBU. People who come under the definition of an officer include: directors of a company, partners in a partnership, people making decisions affecting the whole or a substantial part of the business of a PCBU, and people in similar positions to a director or partner. Officers will be under a positive and personal duty to undertake necessary due diligence and ensure the PCBU complies with its health and safety obligations. Employers and others who come under the definition of an officer will need to take particular care to ensure they make the positive steps necessary to fulfil this duty.

2) Worker consultation - the proposed Act promotes worker participation in health and safety in the workplace. It requires all PCBUs to have worker participation practices – at present this is only a requirement where there are 30 or more employees, or where an employee or union has requested it. The PCBU can satisfy this requirement by having a health and safety representative elected, or having a health and safety committee established.

Health and safety representatives have powers outlined under the proposed Act, for example, they can issue provisional improvement notices – at present, only health and safety inspectors can do this. This will change workplace health and safety dynamics, as a member of staff will now have the same power as an independent inspector to require health and safety changes to be made in the workplace. PCBUs may also request that an inspector, who may confirm, change or cancel the notice, be appointed to review a notice.

3) Harsher penalties for breaches - the proposed Act increases the maximum penalty for offending by a body corporate to a fine of $3,000,000, while for an individual the maximum penalties are a fine of $600,000 and/or five years imprisonment.

The Bill is expected to be introduced to Parliament early this year, where it will begin the select committee process, and related public consultation. This process may see amendments made to the proposed Act, which at this stage is scheduled to come into force by 1 April 2015.

Review of burial and cremation laws

In the immortal words of Benjamin Franklin, "the only certain things in this life are death and taxes". Whilst taxes are an oft considered subject, death is less so. It is often only with the passing of a loved one that the legal framework surrounding death is considered, including the requirements around how the remains of our loved ones are dealt with.

The law governing burial and cremation in New Zealand is the Burial and Cremation Act 1964 ('the Act'). The Act has remained untouched since it was passed almost 50 years ago. The Law Commission is currently undertaking a wide ranging review of the Act, and has published an Issues Paper entitled "The Legal Framework for Burial and Cremation in New Zealand: A First Principles Review" ('the Review'). The Review considers the Act and whether the law meets the diverse needs of New Zealanders around burial and cremation, and also more significantly, considers issues not addressed by the Act, such as

how family disputes around burial and cremation should be resolved.

The issue of family disputes around burial was thrust into stark relief in the case of *Takamore v Clarke* [2012] NZSC 116. When James Takamore died suddenly in 2007 a dispute arose between Mr Takamore's long term partner Denise Clarke and Mr Takamore's Tuhoe whanau about where he should be buried. As Mr Takamore's executor and partner, Ms Clarke wanted to bury him in Christchurch where he had lived with her and their two children for 20 years. Mr Takamore's whanau wanted him buried in the Bay of Plenty with other members of his family. Mr Takamore's whanau took Mr Takamore's body and buried him in the Tuhoe urupa. A bitter court battle ensued all the way to the Supreme Court. The Supreme Court found in Ms Clarke's favour, ordering that she could have Mr Takamore buried in a place of her choosing. The *Takamore* case highlighted the gaps in the Act where situations like this arise.

Such situations could be avoided with specific provisions enacted to address disputes of this nature. The Review contemplates enacting a new regime to clarify which individual or group should have the authority to make decisions when a serious burial dispute arises within a family, and factors that must be taken into account when making a decision. The Review also contemplates giving the Family Court jurisdiction if a decision is challenged, to make burial orders, require mediation to attempt to resolve the dispute, and to refer cases involving tikanga to the Maori Land Court for resolution.

The Review examines another significant area of the law relating to the establishment and management of cemeteries, including making provision for burial on private land - for example, generational farms. The proposal is that burial on private land be brought under the umbrella of the Resource Management Act 1991, and be subject to resource consent application. The Review sets out various requirements where a resource consent is granted for burial on private land, including the burial to be noted on the Land Information Memorandum and certificate of title, and a covenant required to ensure the land remains undisturbed.

Snippets

Redundancy pitfalls for employers

An employer may make an employee redundant on the basis that there is a genuine work-related reason or business decision for that redundancy. It must be about the employee's position, not the employee personally.

In *Totara Hills Farm v Davidson* ('*Totara*') the courts demonstrated that they may examine the reasons behind such a business decision, to ensure it was fair and reasonable in the circumstances, and not a cover for some other reason for the dismissal.

In *Totara*, the Employment Court determined that although the redundancy did relate to a genuine business decision (to save costs), the savings would not actually be achieved by the dismissal. Because of this, the dismissal was held to be unjustified.

Totara highlights the burden on employers to ensure that when they make an employee redundant that not only should it be the result of a genuine business decision, but also that the redundancy will actually achieve the intended results of that decision.

Update – the NZ Emissions Trading Scheme

In 2008 the Forestry sector became the first to enter into the New Zealand Emissions Trading Scheme (ETS). The Energy and Mining sector followed in 2010 and the Waste sector in 2013. Biological emissions from the Agriculture sector were due to become part of the scheme in 2015, but this has recently been postponed indefinitely.

New Zealand is somewhat unique in the developed world because more than half our greenhouse emissions come from biological emissions from the Agriculture sector, which cannot be reduced using current technology without reducing productivity.

Including Agriculture in the ETS would result in most emitters having to purchase carbon credits to offset their emissions, as they cannot actually reduce their output (the aim of the ETS), thus increasing costs to the industry. This would put both the industry and New Zealand at a disadvantage because our economy relies on Agriculture more than most other developed countries do.

This postponement is expected to continue until there are suitable technologies available to reduce emissions and our international competitors are taking similar steps.

If you have any questions about the newsletter items, please contact us, we are here to help.