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HEALTH AND SAFETY CHANGES

In December 2002 the Health and Safety in Employment Act 1992 ("Act") was amended, bringing in tough new provisions for workplace safety. Those provisions came into effect on 5 May 2003.

The effects of the Act are far-reaching and employers (and others) will need to ensure compliance. The key changes are set out below.

Employee Participation

The Act requires increased employee participation in health and safety processes. If you employ more than 30 employees, or where one of your employees has requested it, you must develop an employee participation scheme.

There is now an entitlement to paid leave for representatives to undergo health and safety training. Suitably trained representatives can also now issue hazard notices.

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Volunteers

Employers are liable for their employees. The definition of employees now includes volunteers undertaking work on a regular and ongoing basis (where the work performed is an integral part of the person's business), along with people receiving on-the-job training or work experience.

Employees "on loan" are also the responsibility of the person for whom the work is being performed.

Landlord's Obligations

Don't think the Act only applies to employers. The owner of a building must now take all practicable steps to ensure that no hazard is, or arises in the workplace of the building he or she owns.

How Happy is Your Workplace?

One of the most far-reaching changes may be the inclusion of physical or mental harm caused by work related stress. Employers need to look closely at the work environment for their employees. Employee fatigue can also be treated as a hazard!

No Insurance

An employer can no longer insure against liability under the Act. If you already have insurance cover in place, the policy has no effect. Indemnifying another party for their liability under the Act is also prohibited.

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BOY RACERS **5**

If you have insured against liability, have a close look at your policy. You may want to seek a refund.

Enforcement

Penalties under the Act have been significantly increased, with maximum penalties of imprisonment of up to two years and/or a fine of up to $500,000, where a person has taken action which was reasonably likely to cause serious harm to a person (up from one year or a fine of not more than $100,000).

In other situations a person can be liable for a fine not exceeding $250,000 and it is not necessary to prove that the person intended to take the action alleged to constitute the offence.

Furthermore, inspectors can issue infringement notices (effectively an instant fine) of up to $4,000, where a person or company fails, despite prior correspondence or notices, to take steps to remove a hazard.

Summary

The key changes of which you need to be aware are:

- Increased Employee Participation (reflecting the good faith requirements in the Employment Relations Act).
- Land owners are affected.
- Employee work-related stress is an employer's responsibility.
- Employers cannot insure against OSH claims.
- Higher penalties for breaches of the Act.

Our Suggestion

Ensure any potential hazards in the workplace (defined as anywhere the work is performed) are identified and dealt with, and that you are aware of your obligations as an employer or employee. Don't leave it until you are on the receiving end of enforcement action.

HIRING STAFF – WHAT TO ASK?

As an employer you may wonder what you should ask during the employment process. In a recent case, a company's pre-employment questionnaire asked "Do you have any medical problems of any kind? If yes, please detail what and when". The employee disclosed a problem with her hip joint, but failed to disclose irritable bowel syndrome and a pre-cancerous condition in her mouth. She was dismissed for failing to disclose those conditions.

At the Employment Court it was held that the question was too broad and did not relate to the employee's ability to perform her job. Consequently, she was under no obligation to disclose all her medical problems and the dismissal was unjustified.

In another case a couple applied for jobs with the IRD but failed to disclose that they had committed benefit fraud on pre-employment forms which requested that convictions be disclosed. They were prosecuted and convicted after commencing employment. The IRD dismissed the employees.

At the Employment Court it was held that:

- Conduct before the employment relationship began could not amount to serious misconduct.
- Employees were not obliged to volunteer information and could not be dismissed for remaining silent.
- The duty of good faith owed under the Act did not apply as the duty did not exist when the agreement was entered into.

The dismissals were upheld, however, because the Court applied the principles of equity and the employees were well aware of the IRD's policy on fraud.

If you are an employer – play it safe and be very careful with the wording of your pre-employment questionnaires. Give us a call if you require assistance.

THE COURTS – A SAFE HAVEN FOR LAWYERS?

What can you do if your lawyer fails to act in your best interests, provide adequate advice, or exercise reasonable care in respect of your Court proceedings?

At present, not very much!

The Safe Haven

In New Zealand lawyers involved in court work (usually known as barristers) are immune from being sued for negligence for their conduct at a Court or Tribunal hearing or for any work they complete that is directly related.

Known as 'barristerial immunity' this safe haven for lawyers was established in New Zealand in 1974 for reasons of public policy and to protect barrister's obligations to the Court, including:

1. A barrister's duty to their clients is secondary to their duty to the Court.
2. A barrister's general obligation to act for any person who is able to pay his or her fees, subject to some very narrow exceptions.
3. Claims of negligence against a barrister would inevitably prolong litigation because of the need to retry the original proceeding.

The Haven Exposed?

Barristerial immunity was recently questioned by the New Zealand High Court. In that case the claimants sued their lawyers for advice they received in the course of civil court proceedings. The lawyers denied negligence and claimed barristerial immunity. The claimants argued that their lawyers should not be allowed to hide behind the immunity.

The Court found that barristerial immunity still applies in New Zealand and the lawyer's advice could not be tested because of it.

However, the Court did determine that there had been sufficient changes since 1974 to justify a review of barristerial immunity. The Court concluded that there was a continued need for immunity in family and criminal court proceedings, but that the need in respect of civil court proceedings was no longer clear for reasons including:

1. The need for evidence to be given orally has been reduced by the increase of written statements from witnesses and legal submissions being exchanged between the parties to the proceedings before any hearing.
2. The introduction of case management (particularly in civil matters) has reduced the possibility of legal error.
3. The Bill of Rights Act appears to have lead to an increased expectation that the law will provide a remedy for a wrong.
4. Legal aid has resulted in an increase in family law matters before the Court. This type of litigation involves complex and emotional issues that means the removal of immunity could lead to numerous but unjustified claims of negligence.

What Now?

It is likely that the Court of Appeal will need to finally determine the future of barristerial immunity. It is something that we all should keep an eye on in these times of increasing litigation.

WHAT TO DO WHEN TRUSTEES CAN'T AGREE

Trustees are appointed under a person's will, or under a deed of trust. Unless otherwise stated in the will or deed, trustees must act unanimously. What options are available to trustees if they cannot agree on a matter?

Often the result of the trustees' failure to agree on a course of action is that the status quo prevails. If that inactivity constitutes a breach of trust the Court may intervene, but if it does not, the Court has no right to intervene.

Court Relief

Fortunately, there may be relief for trustees under section 66 of the Trustee Act 1956 ("*Act*"). Under that section any trustee may apply to the Court for directions concerning any trust property or the exercise of any power vested in the trustees. Section 51 of the Act allows the Court to appoint a new trustee or trustees, either in substitution for or in addition to any existing trustee or trustees.

Life Tenancy Under a Will

Trustee disputes sometimes arise when the life tenant under a will and one or more of the residuary beneficiaries are appointed executors and trustees. A life tenant is someone who has an interest in an asset under a will during their lifetime, but on their death the asset will revert to other beneficiaries – called residuary beneficiaries.

That was the case in *Rolton v Hudson*. Mr Rolton (the life tenant) was appointed a trustee of Mr Hudson Snr's will and was entitled to occupy a house owned by him and Mr Hudson Snr. The other trustee was the deceased's son (Mr Hudson Jnr) who was one of the beneficiaries that would inherit the house on Mr Rolton's death.

The terms of the will allowed Mr Rolton to request the trustees to sell the house and buy a substitute property. He and Mr Hudson Jnr could not agree on the value of the property and an offer which Mr Rolton considered reasonable was not accepted by Mr Hudson Jnr. After four years, no progress had been made.

Mr Rolton applied to the Court for directions under section 66, or alternatively an order under section 51 appointing a new trustee in substitution for the existing trustees. As the matter progressed, Mr Rolton concentrated on the latter order which was eventually granted and a solicitor appointed as the sole trustee in the estate.

Balance of Power

An important consideration then when considering the appointment of executors and trustees under the terms of a life-interest will, is to ensure that there is a balance of power between the parties. While this may lead to a deadlock in decision-making and an application to the Court under section 66, it does avoid the situation of one person having a dominant position over another.

Conclusion

It is not uncommon for trustees under a Trust to be in dispute at some time. The trustees must take care to consider the interests of the beneficiaries and the maintenance of the Trust fund as paramount and not to let personal issues cloud their judgment in their capacity as trustees. Trustees have the ability to make application to the Court under section 66 to resolve a dispute, or to have themselves replaced as trustees under section 51 of the Act.

CONSTRUCTION CONTRACTS ACT 2002

The Act came into force on 1 April 2003 and aims to address the major problems in the construction industry. The Act came about from a need to address power imbalances between developers, main contractors, and subcontractors mainly to solve problems with payments and dispute resolution.

The Act affects anyone who is involved in the construction industry, either providing or receiving services. If you arrange or perform any kind of construction

work to be undertaken, you may be affected.

What is Construction?

Construction is very widely defined, and covers types of work that you may not expect to be covered. It includes (naming a few):

- Construction, installation, alteration, or demolition to: any building or structure affixed to land.
- Any works to form part of land including roads, waterways, electricity, water and gas reticulations, and industrial plant.
- Fittings for heating, lighting, air-conditioning, security and communication systems.
- Landscaping, painting and decorating, and site excavations.

If you engage a contractor to revamp your office, install a new air-conditioning or phone system, engage a landscaper or decorator, the Act will apply.

Key Aspects

The following are the key aspects of the Act.

- Pay if paid clauses are banned.
- An entitlement to periodic payments, and the right to suspend work on giving 5 working days notice, if payments haven't been received.
- A fast track disputes procedure – the right to refer a dispute to an adjudication process.
- A right to place a charge over the construction site if money is outstanding.
- The Act only applies to contractors – not contracts between employees and employers.
- There is no contracting out of the provisions of the Act.

Pay if Paid – No Longer

Subcontractors have greater measures of protection under the Act. Any provision in a contract which makes payment conditional upon the other party receiving payment is unenforceable.

Default Provisions

Unless a contract expressly deals with progress payments, the following will apply to all construction contracts (except residential construction contracts):

- Right to progress payments for work - contractors are entitled to payment on a monthly basis ("Pay Period") for work carried out unless the contract provides otherwise.
- Set procedure for payment - a payment claim may be given by a contractor at the end of the Pay Period, and if so, must be paid within 20 working days of receipt.

The Act sets out a very specific procedure for dealing with or responding to payment claims – if you don't follow the correct procedure – you will miss the boat!

Adjudication

Where there is a dispute either party may refer a claim to adjudication. Adjudicators may be appointed by agreement or a nominating body.

Residential Construction Contracts

The Act recognises the fact that most homeowners will be unaware of the implications of the Act. Most people will assume that it applies only to industrial or commercial construction contracts.

As a consequence, the default provisions for progress payments, the right to suspend work or to put a charging order over the person's property, do not apply to Residential Construction Contracts unless specifically dealt with in the construction contract.

Conclusion

If you are involved in the construction industry or a construction project it may be a timely reminder to check your contracts and provisions to ensure they are in line with the new Act.

BOY RACERS

Recent media coverage has made most people aware of the Land Transport (Unauthorised Street and Drag Racing) Amendment Act 2003 ("Act") that came into effect on 1 May 2003.

The most controversial part of the Act is a provision allowing impounding of motor vehicles.

Where an enforcement officer believes that a person has used his or her vehicle in a race, in an unnecessary exhibition of speed or acceleration on a road, or without reasonable excuse causes his or her vehicle to have a sustained loss of traction, the police may impound the person's vehicle for 28 days.

There is a right of appeal to the police where the vehicle's owner was not aware, and could not reasonably be expected to know, that the operator of the vehicle would be carrying out any of the above activities, or took reasonable steps to prevent such activities.

Other penalties (depending on the offence) include up to three months imprisonment, a fine of up to $4,500, and disqualification from holding or obtaining a drivers license for a period of six months or more.

We will need to wait and see before deciding if the Act will make any difference to "racing type" activities on our streets. Just remember you must have a good reason for doing a burnout!

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