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In a Seashell: The Marine and Coastal Area (Takutai Moana) Act 2011

On 24 March 2011, the Marine and Coastal Area (Takutai Moana) Act 2011 (the 'Act') was enacted to repeal and replace the Foreshore and Seabed Act 2004.

The call for change has been motivated by an independent Ministerial Review of the Foreshore and Seabed Act 2004, which deemed the 2004 Act unfair, as it failed to recognise the rights of all New Zealanders and was discriminatory against Maori. The new Act is the product of approximately two years of consultation between the Attorney General, on behalf of the Government, and iwi groups. According to the Attorney General Hon. Christopher Finlayson, the new Act is a "just and durable resolution to the issue, and recognises the rights of all New Zealanders in the common marine and coastal area."

"Marine and coastal area" is defined in section nine of the Act and broadly encapsulates the area that is bounded by the line of mean high-water springs and the outer limits of the territorial sea. It also includes the beds of rivers, airspace, subsoil, bedrock and other matter that are part of the coastal marine area.

The new Act repeals the 2004 Act as it grants courts the jurisdiction to recognise customary rights where such rights can be proven under the Act. However, the granting of a customary title under the Act is distinguished from a private (fee simple) title, as the land

comprised under a customary title is subject to public access and cannot be sold.

In summary, the Act:

- applies to the area formerly known as the foreshore and seabed, which will be known in the future as the marine and coastal area;
- creates a common space in the marine and coastal area (the common marine and coastal area) which allows the interests and rights of all New Zealanders in the marine and coastal area to be recognised in law;
- does not affect existing private titles in the marine and coastal area;
- guarantees and, in some cases, extends existing rights for navigation, ports, fishing and aquaculture,
- provides tests for applicant groups to meet, to demonstrate customary marine title in areas where they have had exclusive use and occupation since 1840 without substantial interruption.
    - This recognition will include the right to go to the High Court (or negotiate an out-of-court settlement with the Crown) to seek customary marine title for areas with which groups such as iwi and hapu have a longstanding and exclusive history of use and occupation.
    - Similar to private (fee simple) title, customary marine title gives rights to: permit activities requiring a resource consent, some conservation activities, protection of wahi tapu (sacred areas), ownership of taonga tuturu (Maori objects) found in that space, and ownership of non-Crown minerals. It also gives the customary title holder the right to create a planning document setting out objectives and policies for the area.
    - Groups such as iwi, hapu and whanau will also be able to gain recognition and protection for longstanding customary rights that continue to be exercised. Their association with the common marine and coastal area in their rohe (home territory of a specific iwi) will also be recognised through a right to participate in conservation processes, which formalises existing best practice in coastal management.

Sleeping on the Job

In *Idea Services (an IHC subsidiary) v Phillip Dickson CA 405/2010,* the Court of Appeal affirmed the decision of the Employment Court that Mr Dickson was working throughout his sleepover and was, therefore. entitled to the minimum wage for the period of his sleepover.

Mr Dickson worked for Idea Services Limited as a community service worker providing care and support to people with disabilities who live in community homes. A requirement of his position was that Mr Dickson sleep overnight in the home so that he could deal with any issues that arose during the night and for security purposes. He was paid $34.00 per sleepover, and $17.66 per hour for any time during which he was required to be actively working and tending to the needs of the residents. If there were no incidents during the night Mr Dickson would receive $34.00, which amounted to between $3.40 and $4.30 per hour depending on the length of the sleepover.

Mr Dickson claimed that he was entitled to the minimum wage prescribed under the Minimum Wage Act 1983 (the 'Act') for every hour of his sleepover. This claim was upheld at both the Employment Relations Authority and the Employment Court.

The Court of Appeal was required to consider whether sleepovers constitute "work" for the purposes of section six of the Act which states:

"every worker who belongs to a class of workers in respect of whom a minimum rate of wages has been prescribed under this Act, shall be entitled to receive from his employer payment for his work at not less than that minimum rate."

The Court of Appeal agreed with the Employment Court that three factors must be considered in order to determine whether the sleepover constituted "work":

- the constraints placed on the employee's freedom to do as he or she pleases,
- the nature and extent of responsibilities placed on the employee, and
- the benefit the employer receives from having the employee perform the role.

Mr Dickson had significant restraints placed on him when sleeping over, important responsibilities that he had to attend to with respect to both the home and the residents, and the employer derived a correspondingly significant benefit. The Court of Appeal, therefore, agreed that in this instance all of these factors applied to a significant degree and, therefore, Mr Dickson's sleepovers constituted work for the purposes of the Act.

The Court of Appeal rejected Idea Services Limited's alternative argument that the Act was breached only if the employee's average rate of pay over a pay period was less than the prescribed minimum.

This decision will have a great impact on the disability services sector. Ralph Jones, Chief Executive of Idea Services Limited, is quoted as saying this decision would cost the organisation about $176 million in back payments. Idea Services Limited have lodged an application for an appeal against the Court of Appeal decision, and the outcome is likely to be newsworthy.

Consumer Law Update

A Consumer Law Reform Bill (the 'Bill') will be introduced to Parliament later this year to update and simplify consumer law. This is in recognition of the fact that the laws covering layby sales, door to door sales, unsolicited goods and services, and the regulations for auctioneers have not been reviewed for some time.

The Ministry of Consumer Affairs (the 'Ministry') released a detailed discussion paper on Consumer Law Reform in June 2010. Extensive consultation has taken place since that time and, together with submissions received, has resulted in five additional papers being produced by the Ministry.

The Bill will reform the Consumer Guarantees Act, the Weights and Measures Act, the Layby Sales Act, the Fair Trading Act, the Door to Door Sales Act, the Auctioneers Act and the Unsolicited Goods and Services Act. Each Act has been reviewed taking into consideration:

- its history, original purpose and ongoing relevance, and
- any gaps in the law, and the effectiveness and overall enforceability of the Act.

It is beyond the scope of this article to describe all of the reforms proposed. However, listed below are some that may be of interest:

- The Fair Trading Act will be amended to update and simplify consumer law related to layby sales, unsolicited goods and services, door to door sales, and the regulation of auctioneers. It is proposed that infringement notices for minor breaches of the Fair Trading Act will be issued by the Commerce Commission.
- The Consumer Guarantees Act will be amended to require greater disclosure to consumers on express warranties and provide consumers who take up cover under express warranties a statutory cooling off period.
- Changes will be introduced to product safety protections. The Minister will be empowered to issue Government Product Safety Statements which will provide some guidance on acceptable product safety. Notification of product safety recalls will be mandatory and recalls will be published on the Ministry website. Goods which are recalled may be required by the Ministry to be destroyed and a supplier may be asked by the Ministry to stop selling a product if it has been implicated in a serious incident.
- The law related to auctions will be updated. The Consumer Guarantees Act "acceptable quality" provisions will apply to goods sold by auction, online, and to those sold by tender. The Auctioneers Act will be repealed and minimum standards will be set for the registration of auctioneers and the conduct of auctions.
- Unsubstantiated claims will be prohibited under the Fair Trading Act. The Ministry anticipates this measure will assist the Commerce Commission in enforcing the Fair Trading Act as well as assisting consumer confidence and good market conduct.
- The jurisdiction of the Disputes Tribunal will be extended to cover complaints about deceptive and misleading conduct and to provide for the full range of remedies available under the Fair Trading Act.

To keep up to date with the Bill and the proposed changes readers may wish to visit the Ministry website www.consumeraffairs.govt.nz.

Copyright (Infringing File Sharing) Amendment Bill

The internet has totally revolutionised the entertainment industry. Downloading music and movies, also known as file sharing, has become common practice in this day and age. However, it is sometimes easy to forget that behind that one click on the "download" button lies someone's art, their work and source of income which, when downloaded without permission, is in breach of our copyright laws.

The Copyright (Infringing File Sharing) Amendment Bill (the 'Bill') was passed into law by Parliament on 14 April this year. The Bill repeals a section of the Copyright Act 1994 and replaces it with two new sections which specifically deal with illegal peer to peer file sharing.

A review of section 92A of the Copyright Act 1994 concluded that the enforcement measure was ineffective in its current state and its repeal and subsequent replacement is intended to offer greater deterrence for illegal file sharing through the implementation of a three-step notice regime. Previous concerns over an ad-hoc approach to the suspension of internet accounts and a lack of judicial oversight have been addressed with the new Bill requiring either the Copyright Tribunal (the 'Tribunal') and/or District Court to assess matters and oversee the formulation of proportionate remedies.

The Three-Step Regime

The Bill provides an overview of the 'Infringing File Sharing' regime and states that the purpose of the amendment is to "provide copyright owners with a special regime for taking enforcement action against people who infringe copyright through file sharing."

The regime itself is based on a notice system where three kinds of infringement notices will be sent to offending account holders before enforcement ensues. The first notice is a detection notice. It is followed by a warning notice, and finally an enforcement notice. The notices are to be issued to the account holder by the Internet Protocol Address Provider (IPAP); which was formerly known as an Internet Service Provider (ISP).

Penalties

If an account holder continues to infringe after receiving all three notices, the copyright owner is able, under the new Bill, to apply to the Tribunal or District Court for relief and enforcement options.

The Bill also permits the Tribunal to award damages against the account holder, the sum of which is to be determined by the Tribunal. The amount ordered can be up to $15,000, and is to be based on the level of damage or loss sustained by the copyright holder.

Alternatively, the copyright holder will be able to apply to the District Court for a suspension of the account holder's internet account. The District Court may, after considering both parties arguments, make a suspension order requiring an IPAP to suspend the internet account of an offender for up to six months. The suspension order is supposed to be reserved for more serious offenders.

Account holders are able to challenge the infringement notices and can request a hearing if they feel they should not be penalised.

ISP Definition Amended

The new amendment has also redefined an internet service provider and the former acronym of an 'ISP' has been replaced with 'IPAP', which stands for Internet Protocol Address Provider. The new definition is a broader one which encapsulates some organisations which are not traditional ISPs such as businesses and universities. The amendment bestows upon such organisations similar responsibilities as a traditional ISP and requires such organisations to send notices to infringers in the same manner as a traditional ISP.

Snippets

The media recently released news of a decision which was handed down on 28 May 2011 in respect of a recent court case in which we acted for a client suing his financial planner. This may set a new benchmark for suits against financial planners. The Defendant has appealed the decision, so watch the space.

Ruling sets new bar for advisers

Financial planners believe a recent court case that ruled against an adviser has set a New Zealand precedent for the industry.

Nigel Tate, president of the Institute of Financial Planners, said the case was not causing panic among advisers but would be reviewed seriously.

"It's a New Zealand precedent, I think.

"I don't think it will set a lot of alarm bells ringing, but I think what it will do is set a point for us to focus on."

The case involved a retired Wellington public servant, Neil Armitage, and his adviser, Carey Church of Moneyworks, who has 20 years of experience.

The Turangi-based adviser assessed Mr Armitage's tolerance for investor risk as being at least "at the high end of balanced" and directed most of his money towards ING funds, some of which were later frozen, and finance companies including Bridgecorp.

Mr Armitage claimed losses of $292,000, saying that Mrs Church and Moneyworks had breached a duty of care in the spread and risk level of his portfolio and that of his family trust.

Mrs Church is appealing against the High Court at Wellington decision.

Mr Tate said it was easy to see in hindsight that some of the complicated financial products in the portfolio were highly risky but this was not clear at the time.

"A lot has changed in the last five years."

In his judgment, Justice Robert Dobson dismissed the claim that Mr Armitage did not fully understand the relationship between risk and high interest.

However, he said Mrs Church should have treated the newly retired Mr Armitage more conservatively and recommended a much wider range of fixed interest options.

Justice Dobson said a competent financial planner would not have completely ignored the market for listed bonds and similar fixed interest products. He found Mrs Church had breached her duty to provide competent advice by concentrating too much money in finance companies, failing to offer broader fixed interest advice and recommending ING's COF fund as a component of the fixed interest part of the portfolio.

He found on the balance that Mrs Church's advice "was not negligent", and that she could not be held liable for Mr Armitage's "cash flow crisis".

The judge also found fault with Mr Armitage, who pulled his money out of some of his ING investments before investors were paid out.

He also concluded from the evidence that Mr Armitage might not have been inclined to always follow Mrs Church's advice, and apportioned costs accordingly, awarding Mr Armitage just over $148,000.

Mr Armitage's lawyer, **John Dean**, said the ruling had "set a benchmark for financial planners" as there had been very few local cases to draw on previously.

Mr Tate said it was unfortunate the ruling had come at the cost of an institute member but it would give advisers a valuable steer as to how the courts viewed the industry's new standards.

He said he knew Mrs Church personally. "Even the adviser would concede things could have been done better because she's that sort of person, she's a bit of a perfectionist."

Mrs Church's advisers said she would appeal on the grounds that her advice met industry standards of that time.

She would also appeal on the grounds that she was entitled to rely on the material provided by ING's credit opportunities fund (COF). Justice Dobson found that COF was not a fixed interest investment, even though the relevant document specifically stated that it was.