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Autumn Issue

Roger Slade discusses the benefits of considering the longterm when establishing a family trust. Shelley Chadwick discusses Greenhouse Gas Emissions Trading, and Sally Cantrell provides a recap on the Credit Contracts and Consumer Finance Act 2003, and Nicole Ironside advises on the observance of Public Holidays.
New staff,introducing Sally Cantrell and Dean Russ.

Setting up a Family Trust : Long Term Benefits

Safeguard the future for your family



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There are a variety of reasons for establishing a Family Trust. Primarily, it is the wish to provide protection and flexibility.

A Family Trust should meet the 'needs and wants' of your family now, and into the future.

The following factors should be considered:

1. Protection of family property not only for the settlors but for other family members.

2. Protection from matrimonial/relationship property claims.
3. Protection from income/asset testing in relation to residential care subsidy entitlements.
4. Flexibility and possible minimisation of income tax.
5. Protection from possible creditor claims.
6. Potential protection against the reintroduction of death duties, capital gains tax or other tax amendment.

The above factors are commonly the primary motivators when people are considering a Trust.

The potential life of the trust is 80 years, therefore there is a need to consider the long term in relation to Trust and planning actions. For example, a Trust set up by parents could function and benefit second and third generations.

A significant benefit of a Trust established by parents is that it not only provides protection and flexibility to the parents, but provides solid protection for the trust assets for future generations, i.e. children, grandchildren and possibly great-grandchildren.

The subsequent generations are not the parties setting up the Trust and accordingly they can potentially gain a far greater benefit than the parents who initially established the Trust.

The common manner in which assets are passed on to the next generation is by way of Will direct to family, ie. passing to the family members.

Conventionally, children will receive in equal shares the assets of the surviving parent's estate.

As such, the parents' "inheritance" passes down into the hands of their children. *Continued over*

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Unfortunately when the children receive the “inheritance” it is vulnerable to being diluted by marriage or relationship break-ups (i.e. the premise of a 50/50 split on the break-up of a relationship). Therefore, the inheritance the parents expected to go to their child could be diluted by that share being claimed by departing partners on the break-up of a relationship.

Similarly, once the inheritance is into the hands of the children if they have the misfortune to suffer a business failure, then the parents’ inheritance could be consumed by the creditors of the failed business.

However, if the parents had established a Trust and transferred their assets, the parents’ inheritance is now ‘ring-fenced’ in the Trust. As long as the assets remain within the Trust this capital base can be available to the children and grandchildren under the discretions of that Trust without passing into their ownership. This avoids the vulnerability to marriage break-up or business failures or other matters.

When a surviving parent dies and there is an existing Family Trust and there are, say, three children, consideration needs to be given as to how the benefits of the parents’ Trust can be retained without the necessity of the three children’s separate family lines being combined into the one Trust structure.

For example, the following scenario could occur.

The first child might simply want direct access to cash and not be

concerned about retaining the protection established by their parents in the Trust. In that case there is a flexibility for the Trustees to distribute one third of the trust assets to that child.

The second and third children may wisely decide to retain the benefits of the Trust and continue the Trust structure set up by their parents.



However, they may not want to be holding their respective shares of the asset within the one Trust structure.

This objective can be effectively resolved by a power of resettlement which allows the Trustees of the parents’ Trust to resettle all or any part of the parents’ Trust assets onto another Trust for the benefit of one or more of the beneficiaries of the parents’ Trust. Alternatively, the Trust fund could be partitioned into funds earmarked for each child.

The benefit of utilising the power of resettlement is that the asset steps from one ring-fenced environment to another without losing any protection.

As such, the power of resettlement is an essential element of any well drafted Trust. This helps to ensure a family trust can operate as a long term inter-generational planning entity.

The only limitation on the resettlement action is the 80 year term established by the parents’ Trust which limits the total life of the Trust – including a resettled trust. For example, if the resettlement occurred 10 years after the parents’ Trust, the child’s “new” Trust would have a potential life of 70 years.

The above comments touch on just one aspect of a well structured Trust and planning action.

Should you want to discuss how a Trust formation and planning

action would relate to your needs and wants, your assets or your family structure, we can provide an initial free attendance to consider your particular circumstances which will enable you to make an informed decision.

For specialist assistance and advice, contact Roger Slade, Partner.

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Would you prefer to receive our newsletter via e-mail?

If so, please contact Sue Gardener, Partnership Secretary, Nelson Office

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Public Holidays

Can observance of a Public Holiday be transferred on another day?



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There are 11 days listed as public holidays in the Holidays Act 2003¹.

Whenever an employee works on a listed public holiday, they are entitled to time and a half. If the listed public holiday falls on a day that would normally be a working day for the employee, and the employee works on that day, then the employee is also entitled to another whole day off on a different day.

The position before a recent Supreme Court decision² was that the employer and the employee could agree that the employee would observe a public holiday on another day³. This agreement transferred the status of the public holiday from the day defined as a public holiday in the Holidays Act to

another day. For example, the employer and employee could agree that Christmas Day would be observed on another day.

If the employee worked on Christmas Day, then the employer would not be required to pay the employee time and a half for work performed on Christmas Day.

If the employee did not work on the day that the public holiday was transferred to (and this was usually the case) then the employer would avoid having to pay the employee time and a half for working on a public holiday.

The Supreme Court decided that employers and employees were no longer able to agree to transfer a public holiday from the days listed in the Holidays Act, to another day and that the 11 days listed as public holidays are and remain public holidays for all purposes. The agreement which an employer and employee can enter into is an agreement on the day that the alternative holiday will be observed.

In view of the Supreme Court decision, the position on public holidays can be summarised as follows:

None of the 11 listed public holidays in the Holidays Act

can be transferred to another day. Rather, public holidays are confined to those identified in the Holidays Act. Therefore an employee who works on any of those days must be paid time and a half for time actually worked on the day. If the public holiday falls on a day that would otherwise be a working day for the employee, then the employer must also provide the employee with an alternative holiday (a whole day off) for which the employee is entitled to relevant daily pay.

If the public holiday falls on a day that would not otherwise be a working day for the employee, the employer must pay time and a half if the employee works on the day. The employer does not have to provide an alternative holiday.

The only agreement that the employer and employee can reach on public holidays is agreeing upon when the alternative day will be observed.

If you have any questions regarding this article, please contact Nicole Ironside of our Nelson Office. (03) 548 1469 ▲▲

¹ Section 44(1) of the Holidays Act 2003

² *New Zealand Air Line Pilots' Association Industrial Union of Workers Inc v Air New Zealand Limited* [SC,14/11/2007]

³ This was by virtue of s44(2) of the Holidays Act 2003

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The New Zealand Emissions Trading Scheme

Greenhouse Gas Emissions Trading



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In September 2007 the Government announced details of a proposed New Zealand Greenhouse Gas Emissions Trading Scheme. On 4 December 2007 a Bill was tabled in Parliament which sets out the conditions under which this new trading market is proposed to operate. The proposed New Zealand Emissions Trading Scheme¹ hopes to effectively create a new market for trading of emission units. An emission unit is credited to a participant in the scheme for each tonne of greenhouse gas emissions they remove. Alternatively, a participant in the scheme may be required to surrender one emission unit for each tonne of greenhouse gas emissions they are responsible for emitting. Therefore, those who create emissions will need to trade with those who acquire emission units in order to 'pay' for their emissions.

Some business activities are obligated to participate in the Emissions Trading Scheme. Most are not required to do so until some time between 2009 and 2013. However, some forestry activities have been compulsorily included in the scheme commencing 1 January 2008.

¹ This proposed Legislation is at an early stage and still has a number of steps to progress through before it becomes Law.

The Bill applies to activities which create, or remove emissions of greenhouse gases. These activities are divided into two groups:

- (a) those which will be required to participate in the Emissions Trading Scheme; and
- (b) those which can voluntarily register as a participant in the scheme.

The types of activities which create greenhouse gas emissions, and which are required to participate in the Scheme are:

- Clearing pre-1990 forest land. There are specific criteria which will determine what forests this will apply to. The Emissions Trading Scheme applies to those activities from 1 January 2008.
- Liquid fossil fuels used for transport. The Emissions Trading Scheme will apply to this activity from 1 January 2009.
- Use of other types of fossil fuels such as coal, to apply from 1 January 2010.
- Some industrial processes, e.g. producing aluminum, or production of glass using soda ash, from 1 January 2010.
- Use of fertilisers. The import or manufacture of synthetic fertilisers containing nitrogen will be included from 1 January 2013.
- Waste disposal will also be bought within the scheme, from 1 January 2013.
- Some other agricultural activities, such as farming and dairy processing of milk, may also be brought within the Act at a future date.

There are a number of other activities which may elect to participate in the Emissions Trading Scheme, including forestry removal of post-1989

forest land, major jet fuel, coal and natural gas purchases may also be brought under the Scheme by choice.

The contents of the Bill which will refine the details of the Emissions Trading Scheme are currently being considered by Parliament's Finance and Expenditure Select Committee. The Committee is expected to report back on the Bill by 10 June 2008. At that time the Bill will be read in Parliament for a second time and be put to a vote. Until the Select Committee report comes back, the actual details of the Bill will not be finalised.



Please contact us if you would like to clarify how the Bill applies to any activities you have an interest in, which may be brought within the Scheme now or into the future.

We will be monitoring the progress of this Bill through Parliament and will provide a more in depth discussion of the Emissions Trading Scheme in a future article, when the provisions of the Bill are enacted.

If you have any questions regarding this article, please contact Shelley Chadwick of our Richmond Office. Shelley is a solicitor specialising in Local Government and Resource Management issues. (03) 543 8301 ▲

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Finance Industry – A Recap of the Credit Contracts and Consumer Finance Act 2003



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The Credit Contracts and Consumer Finance Act 2003 (CCCFA) has established a new regulatory framework for the consumer finance industry. The focus on the Act is domestic or consumer transactions, for example hire purchase contracts, and buy-back transactions of land.

The main features include:

Applies only to Consumer Credit

The CCCFA, for the most part, applies only to “consumer credit contracts” and “consumer leases”. The Act also applies to buy-back transactions of land. For a contract to be a consumer credit contract, the borrower must be a natural person who enters into a contract primarily for personal, domestic or household purposes. Consequently, except in relation to the oppressive contract provisions, “credit contracts” entered into:

- for business and investment purposes; and
- by companies, incorporated societies or other similar bodies

are removed from the scope of the CCCFA. Credit contracts with natural persons acting in their capacity as trustees of a family trust are excluded. Further, partnerships and sole traders will often be excluded as they often act for business or investment purposes.

Monetary thresholds no longer apply.

A broad range of leases included “Consumer leases” consist of leases where:

- the Lessor carries on the business of leasing goods;

- the Lessee is a natural person;
- the Lease is entered into primarily for personal, domestic or household purposes; and
- the Lease has a term of at least a year or includes an option for the Lessor to purchase the goods (at a price that is at or close to the market price of the goods at the time the option is exercised).

Disclosure obligations

There are strict disclosure requirements. In general terms, the nature of the transaction must be presented to the debtor in a clear manner.

Rules regulating interest, fees and payments

The CCCFA contains provisions which regulate the calculation of interest, fees, payments and early repayments in respect of consumer credit contracts and termination of consumer leases. For example, credit fees and default fees cannot be unreasonable. Guidelines as to what constitutes a reasonable fee are set out in the Act. In addition, third party fees or charges which are passed on to the debtor must not exceed the amount payable to the third party. Timing of payments is regulated – e.g. creditors cannot charge interest in advance and must generally accept partial pre-payment of the debt.

The aim is to enhance transparency and debtors’ ability to compare consumer finance products.

Debtor may seek hardship relief

A debtor may apply to a creditor, and ultimately the Court, to change the terms of a consumer credit contract on the grounds of unforeseen hardship. Those changes primarily relate to:

- extending the term (and reducing the amount of each payment); and
- postponing dates during a specified period.

The grounds of relief are limited.

Rules applying to land “buy-back” transactions

The rules include a disclosure regime, a requirement of individual

legal advice and the application of oppressive contract provisions. A buy-back transaction involves a home owner transferring his or her home to a company or an individual while retaining the right to remain in possession, usually by paying rent. A homeowner has the right to buy back the property at a later date and the new owner usually provides money or discharges a pre-existing debt of the home owner.

Oppressive conduct prohibited

The oppressive conduct provisions apply to all credit contracts in consumer leases and, therefore, catch credit contracts entered into for business or investment purposes as well as consumer credit contracts. A Court is able to re-open a credit contract where the contract itself is oppressive, or where the circumstances of the entry into (or the exercise of rights under) the contract are oppressive.

Commerce Commission

The Commerce Commission can enforce the CCCFA. Further, the Commerce Commission has been appointed as the public enforcement agency charged with promoting compliance with the CCCFA. Significantly, the Commission has the authority to prosecute creditors for breaches of the CCCFA, and take proceedings on behalf of debtors.

The CCCFA provides Courts with a wide range of remedies, including fines, statutory damages, injunctions and banning orders.

Getting advice

Seek legal advice. Contact us if you are unsure about compliance of the CCCFA.

Don’t forget the penalties for breaches are significant and include prohibiting certain persons from operating within the finance industry.

If you have any questions regarding this article, please contact Sally Cantrell of our Motueka and Richmond Offices. ▲▲

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Staff Announcements

Introducing two new solicitors



Sally Cantrell

Sally has been a practicing Solicitor in New Zealand for over 20 years, with extensive experience in property and commercial law. Sally focuses primarily in the areas of property, business/financing and estate planning. Originally from Christchurch, she has relocated to Nelson with her family. Her commercial and contract and security law experience is extensive.

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and



Dean Russ

Dean graduated from Otago University in 1991 and returned to his home city of Christchurch to begin practice with one of the city's larger commercial/litigation firms. He spent 6 years undertaking a wide range of civil and commercial litigation with a focus on insolvency and company litigation in the wake of the 1987 share market crash.

Between 1997 and 2002 Dean took on the role of litigation partner in a smaller firm environment continuing to handle large civil litigation projects and a range of criminal and traffic defence work before starting his own firm in 2003.

Dean remained focused on litigation in sole practice and at the time of his move to Nelson was not only acting for clients of his own firm but also regularly acting on behalf of clients of other firms throughout the country. In addition to his own litigation practice, Dean developed a significant general practice with many of his clients joining him on his move to Nelson.

Lured by the sunshine and lifestyle that Nelson has to offer, Dean and his family have made the move to Nelson with Dean joining the litigation team at FVM from 1 April 2008.

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