

# FLETCHER VAUTIER MOORE

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### NEWSLETTER ▼ JUNE 2003

#### 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.

#### 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.

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,

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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.

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### 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.

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### 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.

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### **FREE CONSTRUCTION CONTRACTS SEMINAR**

We propose to have a series of functions advising those of our clients who may benefit from this legislation about the mechanism. We expect the presentation to take no longer than 15 minutes and we will follow that with nibbles and drinks.

If anyone wishes to register to attend a seminar please contact **Karen Russell** at our Nelson Office on 548 1469.

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### **A DIFFERENT SORT OF ET**

The use of e-mail as a business tool has become increasingly widespread in the last few years. This has given rise to the need to clarify rules relating to electronic communications, such as when a document:

Is "in writing", has been signed, and forms part of a contract.

The Electronic Transactions Act 2002 was passed on 10 October 2002. It clarifies uncertainty regarding electronic communications, and provides for certain paper-based legal requirements to be met using electronic technology.

### **Is It Compulsory?**

You have the right to elect to use a paper or electronic based system. Information which needs to be provided "in writing" can only be provided in an electronic form if the party receiving it consents to receiving it in that form. Consent can be inferred from conduct. Where a person uses e-mail to make an offer, they will be treated as having consented to acceptance by e-mail.

### **Receipt Of Information**

It can be important to determine when and where electronic communications are received or dispatched. The Act sets out default rules in relation to the receipt or dispatch of e-mails. Note that the default rules will not apply if the parties sending and receiving the e-mails have predetermined how those e-mails are to be treated.

The new rules will be important where time of notification of information by e-mail is important, or where it is important that a document is dispatched or received from or at a particular address.

### Time Of Receipt

An e-mail is received when, if a person has nominated an information system to receive that communication, it enters that system, or in any other case where it comes to the attention of the addressee.

A person takes a risk where they nominate an e-mail address for communications, but have an unreliable e-mail system, which delays receipt of the information. If they had not nominated an e-mail address, they would be deemed to receive the e-mail only once it came to their attention.

### Incorporation Of Terms

Additional terms can be incorporated into an electronic communication simply by reference to those terms, such as reference to a supplier's terms and conditions on a website. It is not necessary to attach the additional terms to the communications.

### Exceptions

Sometimes you cannot avoid using paper. Documents such as public notices, wills, codicils, and affidavits cannot be in electronic form.

### What Is "In Writing"?

Where there is a legal requirement for a document to be in writing, recorded in writing or given in writing, an electronic document will meet that requirement if:

It is readily accessible so as to be useable for subsequent reference;

and, Where information is provided, the person receiving it has consented to its supply in electronic form.

### Electronic Signatures

An electronic signature is simply a means of identifying a person and indicating their approval of the information. The signature has to be as reliable as is appropriate given the type of information and scope of the contract. Legal requirements for a signature to be witnessed can be met by the witness also providing an electronic signature.

### What Do You Need To Keep?

Where there is a legal requirement to retain electronic documents, that requirement will be met if the electronic form provides a reliable means of assuring the information's integrity is maintained, and the information can be readily accessed. If you wish to keep documents in electronic form you need to ensure the documents cannot be altered once stored. The origin, destination, and time of dispatch and receipt should also be kept.

### Impact

The Electronic Transactions Act is likely to have a significant impact on the way we do business in the future. This should be a timely reminder to analyse your practices and systems with regard to electronic communications. If you need assistance please contact us.

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## SHOULD I ACT AS GUARANTOR?

### What Is A Guarantor?

A Guarantor is a person who gives a promise or 'Guarantee' to a creditor or lender to be answerable for the debt or obligation of another (the principal debtor or borrower) if that other defaults.

Most guarantees provide that the creditor can call on the guarantor to pay the debt in full (if it is due) without requiring payment from the borrower and without exhausting the creditor's remedies against the borrower or any securities given by the borrower.

### Financial Position Of Borrower

Because a guarantee exposes a guarantor to potential liability for another person's debt without any direct benefit, logically nobody should give a guarantee. In practice however, the guarantor's decision to give a guarantee is determined by weighing up the following:

What is the borrower's ability to service and repay the loan? What is the creditworthiness of the borrower? What is the risk? What is the likelihood of the debt being called up?

### Your Obligations As Guarantor

If you choose to give a guarantee the following provides a summary of most standard guarantee documents.

Most guarantees are "All Obligations" guarantees, i.e. the guarantor is liable for all the principal debtor's obligations to the creditor and are not limited to the particular transaction which gave rise to the request for the guarantee. The guarantor's liability also extends to all debts that the principal debtor already owes to the creditor.

If the principal debtor has given the creditor a guarantee (i.e. is acting as a Guarantor) for yet another person or company, the guarantor will be liable for all claims against the principal debtor by the creditor relating to the other person or company.

If a guarantee is not limited in amount then it is unlimited.

Standard All Obligations Guarantees also provide as follows:

The creditor may make a demand on and bring court proceedings directly against the guarantor without bringing proceedings or making any demand against the principal debtor or any co-guarantor. In other words the creditor can choose the target - or which target he fires at first.

If the creditor's claim against the principal debtor is void or unenforceable, the creditor may still have a claim against the guarantor.

Where there are co-guarantors, the liability of each co-guarantor is joint and several so that each co-guarantor will be individually liable to the creditor for the whole of the guaranteed obligations.

The guarantee is terminated in respect of future guaranteed obligations only if the guarantor gives written notice to the creditor.

The guarantor will remain liable at least for the debts or liabilities which have accrued up to the giving of that notice.

A guarantor should receive a copy of the guarantee and all contracts between the creditor and the principal debtor to which the guarantee applies, at the time the guarantee is signed.

The interest rate, amount owing, terms of lending, security and other provisions which relate to the financial accommodation provided to the principal debtor may change and the guarantee will not be released by those changes. However the guarantor should have those details disclosed to him or her at the time the change is made.

Acting as Guarantor is standard fare in many commercial/lending transactions. However you should always be aware of the size of the sledgehammer the creditor is wielding. If you are asked to act as guarantor you should always seek professional advice to limit your exposure.

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## **eDEALINGS - THE NEW LAND TITLES SYSTEM**

To keep up with the rapid electronic changes to a Land Titles system that has been with us for over 100 years property lawyers have had to review their conveyancing practices and acquaint themselves with the electronic age - New Zealand is moving towards a paperless conveyancing society.

## **A Dinosaur?**

The current "manual" system of registration through the Land Titles Office is being phased out. Typically documents are signed by the client, certified "correct" for the purposes of the Land Transfer Act by a solicitor (a mechanism that is intended to indicate that the documents are bona fide) and then lodged at the LTO for registration. This process can often take weeks depending on the number of dealings pending. It is by its nature old-fashioned, time consuming and cumbersome.

## **Electronic Register**

Two important pieces of legislation: the Land Transfer Regulations 2002 and the Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002 have given legal effect to the electronic registration of instruments. The body responsible for registration of Land Title documents in New Zealand (Land Information New Zealand) has established an electronic Register of all titles and related memorials such as mortgages, easements, transfers, land covenants, encumbrances and plans. The old system of paper titles is now obsolete. A "fresh" title is issued each time there is a change of proprietor and is available online. For those wanting to research the history of ownership, an historical title may be inspected separately.

## **New Broom**

The idea is that when the electronic register is fully in place a solicitor will be able to prepare and lodge routine transactions electronically from his or her desk. A pilot scheme has been conducted in Christchurch and is

now available countrywide. A solicitor will be given a "digital certificate" which cannot be delegated to someone else. This will enable him or her to log onto the electronic register and sign documents then register accordingly.

### Checks and Balances

Various safety mechanisms and monitoring systems have been put in place by LINZ to ensure there is security and solicitors themselves will have to put in place systems such as providing a means of identifying a client and obtaining a written authority to act. Although paper titles may be obsolete and of no legal significance, solicitors will keep paper evidence of every transaction on file for many years. While the electronic dealings will perhaps make life seem simpler for the parties there will be an added responsibility on solicitors. The certifications solicitors will be required to make under the electronic system will be more significant than the "signing correct" procedure as at present. The safety net of Land Titles Office staff checking documentation will go.

The virtual lawyer may be becoming a reality but with that reality comes a responsibility. The format may be simplified but that does not mean the substance of the transaction behind the form is any less. As always look to professional advice.

### FIONA McCONNOCHIE Commercial Law Richmond Office



Fiona joins our Richmond team after commencing her legal career here in Nelson in the late 1980s. Until recently Fiona was Manager Client Services for International Finance Trust Company Limited in Vanuatu and practised principally in the field of commercial law.

Fiona is experienced in all commercial matters, including lease drafting, partnership agreements, company incorporation and administration, joint venture agreements, establishment and administration of family trusts, residential and rural conveyancing, sale and purchase of businesses, company charges, registrations under the Personal Property Securities Act, the administration of charitable trusts and all related matters.

Fiona was part of the team that advised the Vanuatu Government on the drafting of the International Companies Act 1992, which modernised Vanuatu company law, and has presented papers at various seminars in London, Indonesia, Malaysia, the Philippines and Vanuatu.

### BRUCE FRASER Commercial Law & Fisheries & Maritime Law Nelson Office



Bruce joins us with over 20 years experience in law. Prior to moving to Nelson Bruce had his own practice as Fraser Evans Law in Christchurch and earlier began his career with Bell Gully in Wellington before moving to Auckland and becoming a partner in the firm of Ellis Gould.

Bruce has wide ranging experience from Litigation in his early years to more latterly Commercial, Company, Conveyancing and Fisheries/Maritime law. This has seen Bruce acting for numerous corporate and commercial clients and has involved him in a diverse range of activities, from national inquiries to business sale and acquisitions.

Bruce has been on the Board of the National Heart Foundation for several years and has been the chair of the national board since late 2001.