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For further information visit:  
[www.webbfarry.co.nz](http://www.webbfarry.co.nz)



## Latest Webb Farry News

### Our Sponsorships

Webb Farry is proud to support a number of local individuals and organisations. Some of these are as follows:

**Deb Lynch** - Deb is a local triathlete who has been selected to represent New Zealand at the Elite U23 World Championships in Canada this September. We congratulate Deb on this achievement and wish her all the best for both this and future events!

**Dunedin Performing Arts Competitions Society Inc** – the “Webb Farry Junior Scholarship” forms part of the Senior Vocal Festival each year. This scholarship gives young singers the opportunity to perform a varied three song recital which tests their vocal stamina, musical story-telling ability, linguistic skills and overall performance skills.

The prize money is often used by the singer to purchase music and pay for tuition.

**Southern Rugby Club** – Webb Farry is a proud sponsor of the Southern Rugby Club where Webb Farry Associate and Southern “A” prop Warren Moffat promotes us strongly!

### Mosgiel Office

Please see below timetable details for our Mosgiel team:

Chris Hawker – Monday to Friday  
John Summers – Mondays, Tuesdays, Wednesdays (and Fridays by appointment)  
John Farrow – Wednesdays  
Maree Adams and Melanie Hayes – Thursdays

As some of you may have realised, our Mosgiel Manager is now listed as Chris Hawker. Please rest assured this is not a change of personnel... our longstanding Mosgiel Manager Chris Frew was married earlier this year and accordingly this is simply a change of surname!

## ... Executors and Trustees – roles and responsibilities ...

All of us should have a Will. Having a Will ensures that our wishes regarding our property and how that property is treated after our death is clearly set out for our loved ones. A key part of making a Will is to consider who to appoint as our personal representative in our Will. Under the Wills Act 2007 ‘personal representative’ means administrator, executor or trustee. In this article the roles of executor and trustee will be outlined.



### The Executor

The executor's role can be understood as the initial manager of the affairs of the deceased. The executor has a duty to ensure the wishes of the will-maker are carried out. These duties also include an obligation to attend to funeral arrangements and payment, identify the estate property, ensure debts are paid, apply for probate of the estate, and ensure specific gifts are made. The duties of the executor are owed to the estate and to the beneficiaries, and are fiduciary in nature. The executor owes duties of utmost good faith and loyalty, and to act in a timely way in administering the estate.

Consequences of breaching the executor's duties could be that the beneficiaries of the Will take action in the High Court for breaches of fiduciary duty, or apply to remove the person as executor.

### The Trustee

The role of trustee is to administer any Trusts arising from the Will. Not all Wills will create Trusts,

but where a bequest creates a Trust, the trustee is obliged to discharge their duties in acting as trustee under a Will. These duties are imposed by various pieces of legislation, including the Trustee Act 1956. The duties are owed to the beneficiaries of the Trust, in other words those that stand to benefit from the Trusts created under the Will. The duties are onerous and far reaching and include the duty to comply with the terms of the Trust, to invest prudently and in the best interests of the beneficiaries, to

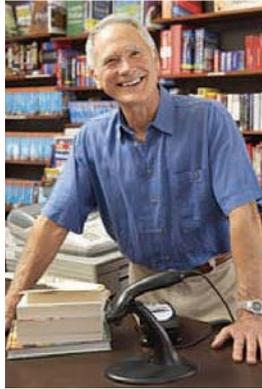
keep complete and careful records and to report and provide information to the beneficiaries and to treat all beneficiaries of the Trust fairly.

The beneficiaries of the Trust are entitled to rely on the trustees and that the trustees are discharging their duties. The consequences of a trustee breaching their duties could result in the beneficiaries applying to the court for various remedies, including that the trustee be removed from the Trust. If the trustee's breach of duty results in a financial loss then the court may make punitive awards against the trustee.

It is imperative that an executor and trustee understand their roles and the difference between them, the duties that arise from the roles, and the consequences that could arise from breaching those duties. It is always wise to seek advice to ensure that one's obligations are met and Webb Farry would be pleased to assist with any queries in this regard.

## Consumer Law Reform – what does it mean for you?

Consumer law is changing in New Zealand and some of the changes have already taken effect. In early December 2013, the long awaited Consumer Law Reform Bill went through its final reading in Parliament and on 17 December 2013 was passed into law by way of six separate amendment Acts.



The law reform has been designed to update consumer law in New Zealand and harmonise it with Australian law to further the Government's agenda of a single economic market. The widespread changes are intended to provide stronger consumer protections in order to enable consumers to transact with greater confidence and promote competition, innovation and growth.

### What is changing?

The most significant changes are the amendments to the Fair Trading Act 1986 and Consumer Guarantees Act 1993. There are also changes to other enactments, such as the Carriage of Goods Act, Weights and Measures Act, Secondhand Dealers and Pawnbrokers Act as well as a new Auctioneers Act.

Consumer Guarantees Act 1993 (CGA) - the CGA protects consumers by providing certain guarantees from suppliers and manufacturers when goods are acquired. The amendments to the CGA introduce new guarantees for the delivery of goods, as well as for the supply of electricity and gas. The CGA will also be extended to cover goods ordered over the internet or by telephone, and goods sold at auction or tender.

Fair Trading Act 1986 (FTA) - the FTA protects consumers by prohibiting unfair conduct and trade practices. It provides for the disclosure of information relating to goods and services, and promotes product safety. The changes to the FTA introduce new restrictions relating to unfair contract terms, unsubstantiated representations, extended warranties, unsolicited goods, product safety and recalls, and internet sales and auctions. The Commerce Commission has also been granted extended powers.

### When do these changes take effect?

Some of the changes took effect from 18 December 2013. These include changes to new product safety requirements and the increased powers of the Commerce Commission. Most of the

key changes however, only came into effect on 17 June 2014. The six month delay is intended to give businesses the time to change their practices. Changes that came into effect at that time included those relating to unsubstantiated representations, extended warranties, unsolicited goods, internet sales, and delivery guarantees. Further changes relating to unfair contract terms will not come into force until March 2015.

### Can you contract out of the FTA and CGA?

No, not if you are in the business of providing goods or services to consumers. The amendments to the FTA and the CGA now make that clear. The only exception to this rule, which the amendments to both Acts seek to align, is where one business is contracting with another. To successfully exclude the requirements both parties must be in trade, they must agree in writing, and the exclusion must be fair and reasonable. What is fair and reasonable in the circumstances will depend on a number of different factors.

### What should you do now?

If you are a consumer you can learn more about the new protections the changes will bring by speaking with the team at Webb Farry. The Commerce Commission and Consumer Affairs websites can also be a useful source of information.

## Selling and buying goods internationally

The United Nations Convention on Contracts for the International Sale of Goods 1980 ('CISG') was the end result of a lengthy process towards unifying international trade law. The CISG became New Zealand law when the Sale of Goods (United Nations Convention) Act 1994 came into force on 1 October 1995, and as such New Zealand businesses dealing with international contracts should be aware of its operation.

### What is the CISG?

The CISG provides a universal framework to govern international contracts for the sale of goods. Amongst other things, it sets out which contracts the CISG applies to, rules around formation of such contracts, the obligations of the buyer and seller, and remedies for breach of such contracts.

### When does the CISG apply?

When two parties have their place of business in two different countries, and both countries have ratified the CISG ("Contracting States"), the CISG will govern operation of a contract for sale of goods between those parties. For example, where a business based in New Zealand enters into a contract to sell or buy goods with a business based in the USA the CISG would apply, as both these countries are Contracting States.



The CISG may also apply where only one party is a Contracting State. In this instance, the rules of private international law apply, which may lead to the law of the Contracting State being applicable to the contract. For example, because the CISG is domestic law in New Zealand, it would apply if New Zealand law was found to be applicable under a contract between a business based in New Zealand and a business based in a non-Contracting State.

### When does the CISG not apply?

Some contracts for sale of goods are specifically excluded from the scope of the CISG – for example, goods bought for personal, family or household use, or at auction. Parties to a contract that would

usually be subject to the CISG can explicitly choose to exclude its application, or choose to deviate from some of its terms.

When an issue arises that is not covered by the terms of the CISG, this situation is to be dealt with either by the general principles of the CISG, or where this is not possible, by the rules of private international law.

### Why is the CISG relevant for New Zealand businesses?

Where a business based in New Zealand enters into a contract for the sale or purchase of goods with an overseas based business, the CISG will often apply. With this in mind, it is also important for businesses to note that while the CISG is New Zealand domestic law, when it applies to a contract it changes the 'usual' New Zealand domestic law. For example, the CISG departs significantly from usual New Zealand domestic law in respect of irrevocable offers.

In order to have peace of mind when entering into international contracts for the sale of goods, it is important to consider firstly the law that applies to your contract, and if the CISG applies. If it does, you will then need to understand the effect it will have and how it can be tailored to meet your needs.

## Changes to the Fencing of Swimming Pools Act 1987

Proposed changes to the Fencing of Swimming Pools Act 1987 ('the Act'), if passed, will give owners more choice about how they restrict access to their pools, but rules will be tightened generally and the inspection process unified.

### Problems with existing rules

The existing rules have been criticised as inconsistent and cumbersome. The Act is implemented by local councils, and there are no strict guidelines for how those councils should act. Some councils consider garden ponds and other water hazards as a 'pool' to be fenced, while others do not. Only some councils will provide a (costly) fencing exemption to spas that are otherwise child-resistant, and some councils carry out regular compliance inspections while others not at all.

The Act allows part of your house to form part of the pool fence; however, it can be difficult for your council to consent to a door opening directly into the pool area. Existing rules only allow this where your council is satisfied that to do otherwise is impossible or unreasonable – leaving inconsistent results with different councils and leaving owners with fewer choices on how they can best restrict access to their pools.

The Ministry of Building and Construction has released consultation documents and taken submissions on proposed changes to the Act,



and has indicated that existing laws will soon be updated. No clear timeframe has been provided for the implementation of the proposed changes.

### Proposed changes

- All pools must be inspected by your council every five years. This ensures all areas of the country are regularly inspecting pool fencing, and that each council is working with the same standards and timeframes.
- Access to portable pools must be restricted if they contain more than 30 centimetres of water (reduced from the current 40 centimetres).
- Spas do not need to be fenced off if they are child-resistant (e.g. have locked lids), and will not need regular inspection from your council. This will mean spa owners will no longer need to apply for a costly exemption if their spa has a full lockable child-resistant lid and they do not want a fence.

- Rules around house doors opening directly into the pool area to be relaxed. Doors must still be self-closing and be fitted with an adequate locking device, but the proposed changes should allow more flexibility where the house is intended to form part of the fence.
- Requirements to be placed on retailers to inform customers who purchase swimming pools and spa pools of their obligations.
- Your council can inspect properties where it believes pools (including spa pools) may be non-compliant and issue warning and infringement notices.

### What do the proposed changes mean for you?

For most pool owners - not a lot. Existing fences that meet the current rules will still meet the new proposed rules. Regular council inspections will however become compulsory to ensure continued compliance with the Act.

For new pool owners, there will be more flexibility around how access to pools can be restricted.

Finally, more portable pools than ever will need to be adequately fenced. Portable pool owners will need to ensure that they comply with the proposed changes, as councils will be able to issue infringement notices if they do not.

## Snippets



### The Harmful Digital Communications Bill

Charlotte Dawson's untimely death has seen calls across the Tasman for regulation against online bullying, pushing this issue into the limelight both in Australia and New Zealand.

New Zealand is already working towards putting laws against online bullying in place through the Harmful Digital Communications Bill ('the Bill'). The Bill was introduced to Parliament on 5 November 2013, with its first reading on 3 December 2013.

The Bill is the result of a 2012 Law Commission briefing for the Minister of Justice in respect of harmful digital communications. The briefing included a recommendation for a new criminal

offence for anyone who posts or distributes material that causes serious emotional distress or humiliation to another person. It also included a recommendation that a Tribunal be established to provide citizens harmed by digital communications with efficient and cheap access to remedies.

### Trust Busting – case update

New Zealand Courts have been reluctant (although not unwilling) to dismiss a Trust as a sham. Recent case law has affirmed this position with the High Court refusing to find that a Trust was a sham (and therefore invalid), even when the Settlor of that Trust insisted it was a sham and that it was only established to delay triggering payment of GST in a commercial transaction.

The High Court observed that a sham exists where there is an intention to conceal the true nature of a transaction. Here, the Court took the view that although the Trust was prepared partly to deceive (to avoid GST), this does not in itself prove that it is invalid. Not surprisingly, the Court went on to say that because the GST payment was successfully avoided, the Trust must be valid, because a Trust cannot be valid for one purpose but invalid for another.

### 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.

If you have any employment related query, please don't hesitate to contact John Farrow for advice.

# Your top legal team, committed to providing the highest quality of service.



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