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NEW REINZ AGREEMENT FOR BUYING AND SELLING PROPERTY – TAKE CARE

The most common situation involving a written legal contract with much at stake, is almost certainly the buying and selling of property. It is therefore very important to be aware that the Real Estate Institute of New Zealand has recently introduced a new standard form agreement for buying and selling property in New Zealand.

For over 20 years the buying or selling of property in New Zealand has been recorded using (as a base) a standard form agreement produced jointly by the Auckland District Law Society and the Real Estate Institute of New Zealand. This agreement is now in its 8th Edition having been improved over the intervening years to take account of changes in the way property is bought and sold and also changes in the law over that time.

The ADLS/REINZ 8th Edition Agreement is tried and tested. It has been the subject of many Court cases in which its provisions have been scrutinised and given clear judicial interpretation. It has been taught in our law schools and has been the subject of much academic commentary. Its provisions are easily understood and helpfully regulate the way in which lawyers deal with each other and third parties through the course of a sale and purchase of property. In summary it is a “no surprises” agreement with a proven track record.

By comparison the new REINZ Agreement introduces new concepts, rules of interpretation and time frames which may be unexpected, particularly if you have previously bought and sold property using the ADLS/REINZ 8th Edition Agreement. The new REINZ Agreement endeavors to adopt a plain English format in order to simplify the process of buying or selling property. The problem however is that “plain English wording” can end up being more problematic (from an exact interpretation viewpoint) than detailed legal wording, particularly where the agreement has not had the benefit of many years of use.

If you are planning to either buy or sell property in the near future, please contact us for legal advice prior to signing any legal agreement. We have always recommended this but it is now even more important than ever. In most situations we will advise the continued use of the ADLS/REINZ 8th Edition Agreement, until such time as the provisions of the REINZ Agreement become well known, judicially interpreted and well settled. Please be aware that all real estate agents will have access to both forms of agreement so this should not present any difficulty or delay



in the buying and selling process.

For more information call Katy Harrison or Celeste Crawford.

PROPOSED REFORM OF THE RESOURCE MANAGEMENT ACT 1991 (“RMA”)

The RMA is a complex statute designed to provide a regulatory framework for the wide range of issues, conflicting values, expectations and rights that arise in relation to the environment. Since the Act became law over 17 years ago there has been growing criticism of its ability to effectively manage complex environmental issues. Of particular volume have been complaints about slow and costly plan preparation and consent processes.

The “Resource Management (Simplify and Streamline) Amendment Bill 2009” (“Bill”) was introduced to Parliament in February 2009. It proposes a number of changes aimed at streamlining and simplifying the RMA through

the use of different tools including financial disincentives and reallocation of powers. The core principles of the Act remain unaffected and the sustainable management of natural and physical resources continues as the RMA’s guiding purpose.

The key elements of the proposed changes include:

Removing frivolous, vexatious and anti-competitive objections

Currently, the RMA provides the ability for almost any person to object or appeal a decision made under the RMA. This is often exploited by trade competitors.

The proposed changes will attempt to discourage persons who are only seeking to delay matters from bringing unmeritorious cases, and to limit the ability of trade competitors to use the RMA as a tool to delay projects.

Specific changes to target this issue include reinstating the Environment Court's power to award security for costs, increasing the filing fee at the Environment Court and introducing punitive damages.

Streamlining processes for projects of national significance – the new EPA

The objective of this reform measure is to provide an efficient and robust process for the consideration of, and decision making on, resource consent applications, plan changes and notices of requirement for large infrastructure or public work projects that are of national significance.

Proposed changes to promote this objective include the ability for applications for projects of "national significance" to be made directly to a new Environmental Protection Authority ("EPA"). The creation of the EPA is also intended to enable the centralizing of a number of existing regulatory roles which it is considered may be better and more efficiently exercised on a nationwide basis.

Improving plan development and plan change processes

This set of changes attempts to reduce the amount of administrative work required to be undertaken by local authorities - which the Government believes to be a significant contributing factor to current time delays and cost levels.

Changes include removing the ability for appellants to make general submissions or submissions seeking the withdrawal of an entire proposed policy statement or plan; modifying the current requirement for local authorities to summarise submissions; allowing local authorities to deal with submissions by issue rather than necessarily each submission individually; removing the non-complying activity category; enabling regional councils and all territorial authorities within a region to combine to produce a single RMA planning document; and removing the requirement for territorial authorities to review their plans every 10 years (as it is perceived to be more cost effective for plans to be changed as and when required).

Improving the resource consent process

Currently many consents are not processed within the time limits prescribed by the RMA. Changes proposed to incentivise the timely processing of resource consents include removing the existing presumption in favour of notification and amending the criteria for when public notification is required. Provisions with the aim of simplifying the reporting requirements for council decisions and requiring all councils to develop a "discount" policy for late consent processing, are also included.

Streamlining decision making

The Bill seeks to limit the degree of repetition often faced by applicants in presenting an application to both the Council and to the Environment Court.

To address this, the Bill allows applicants to nominate whether a local authority or an independent commissioner hears the application. Certain applications can request to be heard directly by the Environment Court.

Improving workability and compliance

The measures proposed to improve the effectiveness of compliance mechanisms include raising the maximum fine for committing an offence under the RMA from \$200,000 to \$600,000 for corporate offenders and to \$300,000 for private individuals. The Bill will also enable enforcement action to be taken against the Crown by local authorities.

Improving national instruments

National Policy Statements ("NPS") and National Environmental Standards ("NES") are tools under the RMA which can be used to provide direction on specific national, regional or local issues.

Councils potentially face significant costs in implementing new NPS and NES, mostly due to the plan change processes (including consultations, hearings, appeals etc) necessary to give effect to NPS and to refer to NES.

Measures proposed to manage this area more effectively include enabling the EPA to direct that a local authority must change its objectives and policies to be in line with an NPS or NES, without the need for further local planning processes.

Summary

As its name suggests, the Bill is intended to "simplify and streamline" current issues under the RMA, particularly as they relate to delays faced by applicants in the consenting process. However, viewed together, it may be seen that many of the measures aimed at reducing administration costs and delay have the countervailing effect of reducing public participation in matters which concern the environment.

The changes proposed above, reflect only Phase One of the Government's overall proposed reform package. The Phase Two reforms include ten proposed work streams which include alignment of consenting processes under the RMA and the Building Act 2004, Conservation Act 1987, Forests Act 1949, Forests Amendment Act 1993 and the Historic Places Act 1993; improving infrastructure provisions; exploring better approaches to urban planning; and establishing a fairer and more efficient water management system. Appropriate articles covering these additional matters will follow in due course.

For more information on resource management matters call Janice Revie or John Farrow.



REDUNDANCY

With the world in the grip of a recession, New Zealand is facing challenging economic times. Employers are experiencing the economic squeeze and one of the solutions they are likely to turn to is restructuring and/or redundancy. Unless employers deal with these situations carefully and comply with the legal requirements they may end up facing additional costs in the form of personal grievances raised. Legal advice at the outset may save time, stress and money.

Employers are entitled to run their business as they see fit. However, they must have genuine commercial reasons for making employees redundant and they must follow a fair process. It is in the process that employers often come unstuck.

As a guideline employers must be able to show:

- the redundancy was based on genuine commercial reasons
- the provisions of the employment agreement have been followed
- the employer has been fair and reasonable in the way they have carried out the redundancy, and
- the action the employer has taken is fair and reasonable in all the circumstances.

Genuine commercial reasons for redundancy

Genuine commercial reasons for redundancy may arise from restructuring and/or contracting out work, a decline in demand, or a sale or transfer of the employer's business. Employers must not use redundancy as a way of dismissing an employee who is not performing.

Where redundancy occurs as a result of restructuring, the employer must make sure that any new positions formed are not substantially similar to the position being made redundant. A position that has a different title, but the same duties, will most likely be substantially similar. The following are just some of the factors that will be relevant:

- substantial changes to duties
- change in level of seniority
- changes to salary or benefits
- change to the number of hours worked
- increased or reduced responsibility for other staff

Process

Having passed the 'genuine reason for redundancy' hurdle, employers must follow a fair process, as required by the duty to act in good faith. This will generally involve:

- consultation about any proposal that may impact on the employee's employment
- a consideration of any alternatives to dismissal e.g. redeployment, reduction in hours, job sharing
- providing affected staff with information about proposed redundancies and the selection criteria for appointment to any new positions

- following the terms of the employment agreement with respect to notice periods, payment and redundancy compensation
- advising the employee of their right to representation and offering support, and
- where possible, providing counselling, career, financial and retraining advice.

Whether the process has been fair will depend on all the circumstances of the case.

Employers should note that the National Government has introduced the "ReStart" package to assist redundant workers. "ReStart" provides short term relief for low to moderate income families with children and also those already receiving the maximum accommodation supplement, along with help with securing new employment. A redundancy tax credit is also available that makes taxing redundancy payments fairer when the redundancy payment has pushed the employee into a higher tax bracket as a result of receiving a lump sum redundancy payment.



For more information on this and all other employment matters call Larna Jensen or John Farrow.

MORTGAGEE SALES – PUT YOUR DUCKS IN A ROW BEFORE YOU PUT PEN TO PAPER



If you buy a property at a mortgagee sale, be aware that you are entering a contract that is quite different in its nature to an agreement entered into in other circumstances. The agreement is likely to be weighed heavily in the mortgagee's favour as mortgagee sales involve factors outside of the mortgagee's control, which it will want to protect itself from. This may include a very unwilling and impecunious owner occupier who is being forced to leave their home by the mortgagee which assisted them to get there in the first place.

In such circumstances the mortgagee is usually unwilling to negotiate terms with the purchaser and adopts a take-it-or-leave-it stance.

It is not uncommon for purchasers to face difficulties after settlement, such as having to evict a previous owner occupier or having to deal with damage caused to the house by the disgruntled owner. In one instance the occupier took all the chattels from the property and sold them to pay other sundry debts, leaving the purchaser out of pocket.

Other common issues for purchasers at mortgagee sales can include:

- There is less protection for purchasers as the agreement usually does not include standard provisions. For example, the mortgagee will have removed the section in the agreement relating to the vendor's warranties and will have removed the right for the purchaser to approve title. Often purchasers will not be able to view the property

beforehand as the owner does not allow an inspection, so it will not be clear whether work has been carried out that should have required a permit.

- Purchasers may not be able to claim against the mortgagee for late settlement/possession as there may be situations where the mortgagee is unable to evict the owner. The mortgagee does not guarantee that it will give vacant possession on the day of settlement.
- Once the contract is signed it is unconditional and so requires thorough due diligence prior to signing. Even though a contract is unconditional, the terms may allow the bank to cancel the agreement prior to settlement if the owner pays the debt. This means the purchaser is unable to know whether settlement will actually occur until the day of settlement.
- The mortgagee may require the purchaser to insure the property from the moment the agreement is signed, because the mortgagee ceases to accept responsibility for loss from the moment the hammer falls.

Buying a vacant property at a mortgagee sale reduces the chance of the house and chattels being interfered with prior to, or after, settlement.

Mortgagee sales offer an opportunity to buy a property at a reduced cost. To lessen the chances of problems occurring you must understand the agreement well and undertake a thorough due diligence investigation prior to entering into the agreement. You should seek legal advice before the auction, as well as checking the title, council records and the property in advance, if possible. However, there may still be some issues that arise that are out of your control as purchaser.



The above is by no means an extensive list of the issues that a purchaser could face, but it is a reminder to put your ducks in a row before putting pen to paper.

For more information call David Ehlers or Teresa Chan.

SNIPPETS

Early release of deposit

If you are a purchaser of a property, have paid the deposit on the unconditional date, and are subsequently asked to agree to an early release of the deposit to the vendor (quite a common request), then think again! When a deposit is paid, the stakeholder (usually a real estate agent) is required to hold it for 10 days. Vendors often ask the agent to release the deposit early to use it as a deposit on another house. The agent can do so, provided the purchaser agrees. Be wary of agreeing to the release, because the transaction might not settle. If the transaction does not settle and the vendor has already spent the deposit, you as the purchaser have no security and your deposit is gone.

Retention of the deposit until settlement by the stakeholder has merit, especially where there is a mortgage on the title. If there is a mortgage, be aware that the deposit might be needed

to settle the vendor's mortgage debt, and if released early and spent in other ways by the vendor, then the vendor might not be able to discharge the mortgage.

The key is to consider the issues carefully before agreeing to the early release of the deposit, particularly where the title is encumbered.

The Sale and Supply of Liquor & Liquor Enforcement Bill – Update

Introduced to Parliament in August 2008, the Sale and Supply of Liquor and Liquor Enforcement Bill is a response to public demand for Government action regarding youth drinking and alcohol related offending. The Bill proposes to amend the sale of Liquor Act 1989, Summary Offences Act 1981, and the Land Transport Act 1998.

The Bill takes a multifaceted approach towards encouraging a moderate drinking environment

and reducing the normalisation of youth drinking. In summary, it proposes to:

- Improve community input into liquor licensing decisions. Local councils will be able to restrict the number of liquor outlets in an area, as well as their location and proximity to other community buildings such as schools.
- Require grocery-selling stores seeking a liquor licence to be at least 150 square metres or more in size. Existing outlets of less than 150 square metres will be ineligible to renew their liquor licence.
- Make it an offence for anyone, other than a parent or guardian, to supply a minor with alcohol.
- Reduce the blood alcohol limit to zero for drivers under 20 who do not hold a full drivers licence.

WEBB FARRY NEWS

- Webb Farry is pleased to announce the appointment of Peter Newton as its Office Manager. Peter brings valuable administration and systems experience to his new role, having previously worked in other accounting and law firms. Peter is working primarily with James Lovelock and has a particular focus on the firm's day to day operations.
- The Partners of Webb Farry have recently signed off a revamp of the exterior of the firm's Dunedin office. Watch out for some exciting developments as the year progresses.

If you have any questions about the newsletter items, please contact us, we're here to help.

WHO'S WHO? ... AT WEBB FARRY

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