

### Latest Webb Farry News

We are pleased to welcome a couple of new additions to the Webb Farry team.



Leanne Pryde has joined our Commercial / Property team as a solicitor and works primarily from our Mosgiel office.

With over 25 years' of legal experience, Leanne has a wealth of knowledge and a passion for Elder Law, Wills, Estates, Trusts, Enduring Powers of Attorney and Residential Conveyancing. She is excited by the opportunity to assist our

Mosgiel based clients and be involved in the greater Taieri community.

Simon Eton has also joined our Commercial /

Property team. Graduating from the University of Otago in May 2019 with a Bachelor of Laws and a Bachelor of Arts (History) Simon is looking forward to getting his legal career underway. He will work primarily under the supervision of Warren Moffat gaining experience across a range of property and commercial transactions. Simon will be admitted to the bar as a Barrister and Solicitor in 2020.



#### Christmas Donation

This year we have teamed up with Kaans Catering Supplies and together we are making

a substantial donation of quality produce to the Dunedin Family Works Foodbank for distribution to families in need across the region.

#### Christmas Close Down Period

We take this opportunity to confirm our hours over the Christmas period.

Webb Farry will close at 5.00pm on Monday, 23 December 2019. The Dunedin office will re-open at 8.30am on Monday, 6 January 2020 and the Mosgiel office at 8.30am on Monday, 13 January 2020.

For urgent enquires during our close down period, please refer to our website: [www.webbfarry.co.nz](http://www.webbfarry.co.nz) for mobile phone contact details.

We thank you for your support during 2019 and wish you a safe and relaxing holiday season.

## A stitch in time saves ninety-seven thousand

***Receiving or distributing funds from an associated company? Be careful, a little paperwork goes a long way in determining whether or not those distributions will be deemed taxable.***

The Taxation Review Authority has recently emphasised the importance of recording the nature of transactions between associated entities (like companies and their shareholders) by imposing a shortfall penalty on a taxpayer ("S") who had no records to support several nil tax returns.

During the 2010 to 2014 tax years, S was a shareholder of or was associated with a shareholder of three companies. S received various payments (some of which she had annotated as "wages") and had personal expenditure paid from those companies over the 2010 to 2014 tax years. Previously S had raised funds in her personal capacity and advanced those funds to two of those companies which she treated as loans.

S had been (correctly) told by her accountant that capital distributions from companies by way of loan repayments were not taxable (as income to the recipient). On that basis, during the 2010 to 2014 tax years, S treated all payments she received from those companies as repayments of her loans to those companies. The effect of doing so was that those payments were treated by S as non-taxable capital distributions and without seeking any further advice, S filed nil tax returns across the 2010 to 2014 tax years.

The Commissioner of Inland Revenue ("CIR") did not agree with S. The CIR deemed that the amounts received by S were taxable income to S, either as wages, dividends, and/

or as income under ordinary concepts. It was then up to S to prove the CIR was incorrect.

Although we generally subscribe to the mantra that a person is "innocent until proven guilty", tax law is better summed up as "incorrect until proven correct." Because the taxpayer has greater knowledge and information about their circumstances, the onus of proof in tax disputes is on the taxpayer rather than on the State.

To effectively challenge the CIR's assessment, S needed to produce evidence that established that the various payments she had received from those companies over the 2010 to 2014 tax years were repayments of the loans she had previously made to those companies. Acceptable evidence would have been loan agreements, minutes or resolutions, journal entries or ledgers kept by either the Companies or S.

Unfortunately for S, the only evidence she was able to produce was that she had borrowed funds from a lender secured by her own residential property, and advanced those funds to two of the companies. As a result, the CIR ruled that the payments received from the companies were to be treated as dividends and applied income tax and a shortfall penalty on the distributions in the sum of \$97,735.00.

This case serves as a reminder of the importance of accurate record keeping. Bank

narrations will not be sufficient evidence of the nature of a transaction, and loan agreements, minutes, resolutions and journal entries are essential. The documentary evidence also needs to be contemporaneous, as the IRD consider after the fact documentation as a "re-characterisation in hindsight" which the CIR will not accept.

A capital distribution and a wage or dividend may be indistinguishable once they appear in your account. Characterising transactions at the time with the appropriate legal documentation is the best way to avoid lengthy disputes with the IRD. At the very least, by having the proper paperwork in place, you can avoid shortfall penalties and costly disputes with the CIR in future.

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## WebbFarry Lawyers

### Are you buying your first home?

**Are you ready to put in an offer on a property but would like to chat to a lawyer first?**

#### We can help.

Most lawyers will advise you that you need to make sure your offer includes conditions that provide you with adequate protection such as approval of finance and due diligence. Whilst that is good advice, currently there are far more buyers of property than there are sellers, meaning sellers ("Vendors" in our language) will generally receive multiple offers on their property, which in turn means that offers tagged with conditions are generally being turned down. We know that the pressure is on you as a buyer and we know the process is daunting. So how do you beat the odds? Why not drop in and chat to us - we can help.

#### What we'll do...

We'll walk you through the process and help tailor your offer, and we'll also try and answer any questions you might have. If you're ready we can even help you sign the offer and scan it to the agent for you.

#### Sound good?

Come along to our free First Home Buyers clinic, available at both our Dunedin and Mosgiel offices

every Monday morning, for a chat with one of our lawyers. To book a time, give us a call on 474 5727.

#### But before you come see us, to get the most out of our time together...

##### Before the open home:

- Know how much you can borrow (including any KiwiSaver and Home Start Grants).
- Check if the property has a property pack available (i.e. Land Information Memorandum ("LIM"), Building Report etc - some real estate firms will have data rooms set up with relevant due diligence documentation) and if so, print off and take to the open home:
  - o the list of building consents and plans from the LIM; and
  - o the building report (if there is one).

##### At the open home:

- Make sure the layout of the property matches what is shown in the LIM plans. If there are discrepancies (i.e. walls missing, toilets and showers in different places) then check the list of building consents from the list you printed off to make sure any changes to the property have been consented and signed off by the council.
- Consider whether there are any issues

with the property that might hinder your ability to obtain insurance, common factors insurers consider when approving insurance are:

- o How old is the house (currently most insurers won't approve cover over the phone if the house was built pre-1920 and if the house is more than 50 years old the insurer will often require a satisfactory electrical certificate before granting insurance)?
- o Are there any walls lined with scrim?
- o Is the property in an identified Hazard Zone?

##### Things to bring along with you:

- ID such as your passport or drivers licence;
- A proof of address document such as a utilities bill or bank statement; and
- If possible a copy of the Agreement for Sale and Purchase.

#### So... how much will all this cost?

We know that certainty around cost is important when buying your first home. We're up front about our costs and as soon as we know the parameters of your purchase we will provide you with an estimated cost and you are not committed to using us until you have approved that estimate.

### Bringing the Adoption Act into modern times

The New Zealand Adoption Act 1955 ("the Act") has been widely viewed as being in need of an overhaul to bring it up to date with the modern times. In 2016 the Human Rights Review Tribunal ruled that sections of the Act were discriminatory and outdated. This article will take a closer look at the specifics of the Act that are not in keeping with today's New Zealand.

**Surrogacy** - The Act sees the natural mother (the woman who births the child) as the legal guardian of the child. The natural mother is named on the birth certificate and her partner, if she has one, as the father. This occurs even in the case of surrogacy where the natural mother and/or her partner have no biological connection to the child. This means that the biological parents have to go through the adoption process to become the legal guardian of their biological child.

The Act does not allow for surrogacy agreements to be enforced. This leaves the biological parents with little or no security that

when their baby is born it will legally become their child if the natural mother decides to keep it. On the other hand, except for direct costs such as the hospital invoices, surrogates cannot be compensated for their time or loss of wages.

**Not the nuclear family** - Currently under the Act single men cannot adopt a female child unless the court is satisfied that the man is the child's father, or that there are special circumstances that justify the adoption. There is nothing in the Act that states a single woman is not allowed to adopt a male child.

Until the Marriage Amendment Bill was passed in 2013, same sex couples could not legally adopt children. In New Zealand the number of children available for adoption has declined substantially over the years, meaning many New Zealanders now have to adopt from overseas. The problem for same sex couples in this regard is that New Zealand has overseas adoption agreements with five countries (India, Lithuania, Philippines, Russia, Thailand) but none of these countries will accept applications

from same sex couples, whether they are married or de facto.

**Magic numbers** - The mandatory age requirements for adopters are found in section 4 of the Act. This section explains that you must have reached the age of 25 years and be at least 20 years older than the child that you wish to adopt; or you have reached the age of 20 years old and the child that you wish to adopt is a relative.

You are considered a child in the Act until you have reached the age of 20. This means that adoptees are not able to obtain their birth certifications or know any medical background regarding their biological parents until they reach the age of 20.

The Act is a reflection of New Zealand society in 1955, and perceptions have changed over the 64 years since the Act was brought in, with different views now on adoption. With that said, the Act requires an overhaul to bring it in line with the modern views of today's world.





## WebbFarry Lawyers

### Purchasing a property at auction – what you need to know

When purchasing a property, there are generally two ways in which you can achieve this.

The first, the traditional offer method, is by offer and acceptance of a signed Agreement for Sale and Purchase between the vendor (seller) and purchaser (buyer) of a property. The terms of the Agreement for Sale and Purchase can be negotiated between the parties, whether through a real estate agent or a private sale. These types of agreements can contain terms known as special conditions to enable the purchaser sufficient time to ensure they have completed their due diligence on the property including (and not limited to) confirmation of finance being approved, obtaining Land Information Memorandum (LIM) reports to check for building consents, code of compliance certificates, location of services such as stormwater and wastewater running through the property, and any intended works by the council or government agencies, such as road construction. Additional reports may be required such as building and methamphetamine contamination reports and anything else the purchaser may need to satisfy themselves that the property is suitable for their needs. This traditional method gives the purchaser the ability to terminate the agreement should they genuinely not be in a position to confirm their special conditions of sale.

The second method is purchasing by way of

auction. For any purchaser using this method, which can be riskier than the traditional method, it is highly recommended that they complete their due diligence of the property being purchased first. The consequences of not completing your due diligence could result in the property being purchased with hidden issues, such as weather-tightness or not having had code of compliance certificates issued for works completed from 1993 onwards, which may invalidate your insurance or prevent your bank from lending you mortgage funds.

The check-list mentioned above under the traditional offer option must also be carried out when an auction is the method of sale. The only difference is timing. Under the first traditional method, the purchaser has the luxury of having a signed agreement to work with. However, with the auction method the purchaser will have needed to complete their due diligence for the property, including approved finance as he or she must be ready before the auction. This is because when the hammer falls in your favour you are bound to purchase the property from that time.

The important steps to be aware of when purchasing by auction include the following.

- Register your interest with the real estate company before the auction.
- Have your conveyancer or solicitor review the auction terms and conditions to the

Agreement for Sale and Purchase before the auction.

- Ensure the vendor warranties, which give the purchaser protection in some circumstances, have not been deleted from the auction terms.
- Be prepared to have your deposit amount available, as at the fall of the hammer, if you are the winning purchaser your deposit is immediately payable.
- The reserve price the vendor has disclosed to the agent will not be known to the general public. Researching the value of the property before you attend the auction will ensure you are not over paying for it, or entering into a bidding war and going over your pre-approved finance limit.
- Once you have purchased at auction you are committed to completing it. There is no going back without a great legal battle, and you may forfeit the deposit you have paid.
- If the property fails to sell at auction, you may then be invited to enter into negotiations with the vendor to discuss price, the settlement date and any special conditions of sale.

It is recommended that you consult a legal professional before signing any Agreement for Sale and Purchase, whether it is by the traditional method or by way of auction, to ensure your rights as a purchaser are protected.

### Further change to gun laws

Following the amendments to the Arms Act 1983 ("the Act") that came into force on 11 April 2019, a second tranche of proposed changes, the Arms Legislation Bill ("the Bill"), is currently under review by the Select Committee. This next step in the reform of the Act looks to establish a firearms registry and amend licensing requirements with the intention of reinforcing positive behaviour that is required of firearms owners.

Not much is currently known about the firearms in New Zealand in respect of how many there are (legally), who has them, who is buying and selling, and how secure the firearms are. The Bill proposes to create a firearms registry that would store this information about firearms and link them to licence holders. Information about licence holders, their weapons, and ammunition would be stored on the registry. This would allow every legally held firearm in New Zealand to be monitored.

The licensing regime would be strengthened with the Bill aiming to tighten the current rules for both individuals and dealers. The licence period

would be shortened to five years from the current ten year period, with potential increases to the fees as well. Licence requirements would also be extended to cover parts, magazines and ammunition.

A new system for warning flags is proposed in the Bill to give the police more tools to vet people and allow them to intervene if concerns are raised about a licence holder. This system would capture behaviour such as encouraging or promoting violence, hatred or extremism, serious mental health or substance abuse issues, having close associations with gangs or organised crime, and being convicted of certain offences. The aim here is to filter out high risk people that are deemed an unfit and improper person to hold a firearms licence.

Shooting clubs and ranges would also have a licensing regime introduced by the Bill. There are



currently no licensing requirements for clubs and ranges in New Zealand. Clubs will also be required to have rules in place in regards to the safe operation of firearms. Ranges will be required to meet safety standards.

The recent amendment to the Act saw increases in penalties relating to firearms offences. This Bill will see further increases in penalties and also introduce new offences. An example of the degree of change that is proposed under the Bill is the penalty for being found guilty of selling or supplying firearms to an unlicensed person. Currently, a person found guilty of this is liable for up to three months imprisonment or a \$1,000 fine. This would be increased to up to two years imprisonment or a \$20,000 fine.

The Bill looks to re-state the purpose of the Act to put an emphasis on owning a gun being a privilege not a right, and people with that privilege have a responsibility to act in the best interests of public and personal safety.

# WebbFarry Lawyers

## Snippets

### The new Trust Act 2019

Trusts are widely used in New Zealand, with the main focus in recent years being on family trusts. These have been utilized in relation to relationship property, succession planning, risk control, and as a vehicle for enabling blended family outcomes; to name but a few.

The previous legislation around trusts has not been overhauled or reviewed for a long time. Aligned to that are a myriad of court cases setting up common law positions, both old and new. Often the current issues fit like square pegs in round holes. Many common-sense outcomes in today's world have been frustrated by the legislation lagging behind. Trust law is no exception.

So, the new Trust Act 2019 is very welcome. While passing into law on 30 July 2019, it does not come into effect until 30 January 2021. The interim time frame allows a true knowledge of what is proposed to be digested; with variations to be made both to documentation and best practice systems. These are being prepared and introduced so immediate compliance with the new parameters are completed and expected.

A heads up then about compliance requirements. You will be reminded about the duties required of those running the trusts, namely the trustees and settlors; that the term of a trust may be longer than the current 80 years; that those who benefit from them may be able to obtain more information in certain circumstances; that written documents must be held and easily accessible; and that reviews of trusts decisions will be more prevalent.

### The role of the executor

Often when you are asked to be the executor of a will, you accept the role without truly knowing its parameters. While not wishing to deter anyone from accepting the responsibility to carry out this very important role, you must understand what it entails. When a member of the family or a close friend asks you to be the executor of his or her will, you should seek some legal advice before you say yes.

Often the words 'executor and trustee' of the will are included together. The roles are often combined these days, with the trustee aspect relating to any testamentary trust set up under the will. For example, if a child under 20 receives a distribution under a will, he or

she must wait until the specified age before receipt of such distribution. In the meantime, the executor oversees both the investment of those funds and how access may be affected based on the terms of the will.

The executor works closely with the lawyer for the estate of the deceased to co-ordinate all aspects of the wishes as set out in the will. These jobs include: organising and accepting responsibility for the funeral; the obtaining of Probate (which is a court document confirming to the world at large that the executor stands in the shoes of the deceased); the distribution of chattels and cars; the itemising of all assets and liabilities of the estate; the investigation of any issue that arises as a result of that itemising; the transfer and distribution of all property and cash and other investments once known; together with the closing off of all matters ending with a final tax return for the estate.

While your lawyer helps with every step of the way, it is your role as executor that ensures a life well lived is recorded and signed off appropriately.

Webb Farry's solutions are always pragmatic, reflecting our awareness that strategies must be cost efficient if they are to successfully meet your objectives.



"Clarifying property ownership – when entering into a relationship or after separation – can be fraught. It's our role to protect your rights and help you realise your expectations."

**Larna Jensen-McCloy LL.B**  
Partner

## Who's Who at Webb Farry...

**Partners:** David Ehlers, LL.B, B.Com  
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