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## NEWSLETTER

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## COUNTERFEIT AND ILLEGAL GOODS – NEW POWERS GRANTED TO THE STATE

The Trade Marks Amendment Act 2011 and the Copyright Amendment Act 2011 were passed on 15 September 2011, bringing changes that give powers to Enforcement Officers, Customs and Police to assist in cracking down on infringements.



The changes target illegal and counterfeit goods. Commerce Minister Hon. Simon Power advises the new powers will allow the Ministry of Economic Development National Enforcement Unit (‘the Ministry NEU’) and the Customs Service (‘Customs’) to investigate and prosecute people involved in the manufacture, importation, and sale of illegal goods. These powers came into force in October this year, and are as yet untested.

The impact of the granting of investigative, search and seizure powers to the Ministry NEU and Customs means that these Departments can work together with Police and private individuals, companies and other entities holding rights under copyright or trade marks (‘rights holders’) to prosecute the criminal offences of importing and selling counterfeit goods and pirated works.

Pursuant to clause 134C of the Copyright Act, Enforcement Officers in their newly created role must “...to the extent it is reasonably practicable, promote compliance with this Act by carrying out the following functions:

- gathering information relating to offences under the Act,
- investigating offences under the Act,
- reporting to the chief executive on any matters relating to the Enforcement Officer’s functions.”

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While the above provision requires Enforcement Officers to promote compliance with all areas of these Acts, the Government is advising that the Ministry NEU and Customs will be focused on counterfeit or other illegal goods, and that “responsibility for protecting and enforcing copyright and registered trade marks still lies with the rights holders”. Rights holders will not be able to rely on or expect the Enforcement Officers to enforce rights on their behalf.

The Acts will allow Customs greater powers at our country’s borders through their increased rights to seize property, question suspected offenders, and investigate goods entering the country that may be counterfeit. The aim of the legislation is to restrict the flow of illicit goods into New Zealand, and thereby increasing consumers’ confidence that they are buying genuine household products and luxury goods. The Government has said that “Illicit traders are moving beyond luxury items and into common everyday household products such as

medicines, car parts, electronic equipment, and food products”, and do not concern themselves with health and safety considerations.



Enforcement Officers will be able to deal with anyone selling goods in public, including markets, stalls and fairs, which are often rife with counterfeit goods.

Enforcement Officers have the right to enter any public area, including shops, stalls and markets to investigate without being required to obtain a search warrant. They may also apply for a search warrant to allow them to enter and search private property to investigate non-compliance with the Acts.

The Trade Marks Act now also provides for greater international protection of trade marks, permitting New Zealand to join international treaties such as the Madrid Protocol, which allows protection in up to 84 Countries with one trade mark application, and one fee.

## CHRISTCHURCH EARTHQUAKE TO TRIGGER CHANGES TO RESOURCE MANAGEMENT ACT 1991

The Christchurch earthquakes have given cause for the Government to re-examine the requirements of the Resource Management Act 1991 (‘RMA’) with the damage caused to thousands of homes by liquefaction being a significant factor.

The purpose of the RMA is to “promote the sustainable management of natural and physical resources”. The catastrophic effects of the earthquakes have highlighted the importance of the RMA as not only protecting the environment from the impact of people and land use, but also to consider the effect on people from nature.



To achieve its purpose, the RMA requires that decision makers consider matters of “national importance” in their determinations. However, natural hazards are not included as a matter of national importance. As a result it is becoming apparent that the zoning of areas for residential use in district plans, and the consideration of Resource Consent applications do not sufficiently consider natural hazard risks.

The recent Canterbury Fact Finding Project (‘the Project’) has investigated how much was known about liquefaction and lateral spreading risks in Christchurch, and the impact of such knowledge on zoning and development decisions. Since 1991 there have been reports available on the significant liquefaction risk in Christchurch, including “clear maps that are uncannily accurate” on the locations where liquefaction would occur.

Hon. Dr Nick Smith, Minister for the Environment noted in a speech given recently that a significant number of

resource consents, covering about 20% of the severely liquefied properties in Christchurch, were approved after the area specific reports funded by the Earthquake Commission (EQC) and GNS Science (GNS) were released in 1991 and 1992 respectively.

The Project has found that Resource Consents issued under the RMA for the development of land in some areas did not take into account identified liquefaction risks. Even post 2004, it is considered consents were being granted without any regard for this significant and by then well documented risk. Not only was the information regarding identified risks non-existent with the zoning and consent decision making with the development of these areas, but the risk of liquefaction was not clearly identified on Land Information Memorandum Reports (‘LIM Reports’) for the affected properties.

The identification of liquefaction risk has now been incorporated into LIM Reports in Christchurch, and these risks will likely be considered with future residential development and zoning. The problems in Christchurch have however identified a shortcoming in the current consenting process, which must be readily addressed.

The Government is to continue with their changes to the Resource Management Act, and have indicated that further substantial changes will be proposed to ensure the risks of natural hazards are considered in planning decisions.

Perhaps these amendments will ensure all Councils look to address the risk of natural hazards beyond flooding when approving applications under the Resource Management Act, and be vigilant in protecting residents from real identified risks.

The inclusion of detailed information in LIM Reports will also assist in giving notice to property owners of the natural hazard risks to which the property may be subject,

allowing them to account for such risks when building upon or otherwise developing their property.

## FRUSTRATED CONTRACTS

The common law 'doctrine of frustration' allows a contract to be discharged on the occurrence of certain events beyond the control of the parties which would make the performance of the contract impossible. As the doctrine is a departure from the traditional view that contractual promises are absolute, its application in law must satisfy strict legal tests in order to be successful. It requires an event to occur that is firstly unforeseen and one which significantly alters the relationship between the contracting parties.



### CATEGORIES OF FRUSTRATION

Although not exhaustive, the following are five situations where the doctrine of frustration has been successfully applied.

1. **Where the subject matter of the contract ceases to exist:** In *Taylor v Caldwell (1863) 3 B & S 826*, a hall which was hired to host a series of concerts burnt down before the concerts could commence. Both parties were relieved of their obligations as the contract was held to be frustrated.
2. **Non-occurrence of events - the purpose of the contract has become impossible to attain:** In *Krell v Henry [1903] 2 KB 740* a flat was rented for the purposes of viewing the King's coronation procession. The procession was cancelled due to the King's illness and the contract was discharged as the sole purpose for which it was rented ceased to exist.
3. **Death or incapacity of a party where the contract involves obligations of a personal nature:** In *Robinson v Davison (1871) LR 6 Ex 269*, a contract by a pianist to perform on a specific day was held to be frustrated when the pianist became too ill to perform.
4. **Delay and obstruction of performance:** Where caused by external events, delay and/or obstruction

may be held to be frustration if the delay is so long, or the obstruction so extreme that it would make the result of the contract fundamentally different from what had been contemplated.

5. **Performance is rendered illegal by legislation:** If a change in legislation that comes into effect after the creation of the contract renders its performance illegal, the contract is held to be discharged.

### FRUSTRATED CONTRACTS ACT 1944 ('FCA')

The doctrine of frustration is supported in New Zealand by the FCA, which addresses the effect of the discharge of obligations on the areas of the contract already fulfilled. It confers three major benefits on parties that are supplementary to the common law doctrine.

1. It provides the right to a party to recover money paid in consideration of the contract despite payment being made before the date of frustration, and
2. It allows a party to claim compensation for work done and/or expenses incurred for the purposes of a contract up until the date of frustration, and
3. It permits the benefits received up to the date of frustration to be taken into account when determining the recovery of monies paid or expenses incurred.

The FCA can be contracted out of by including within the contract provisions addressing the event of frustration. In such instances, the provision will apply instead of the FCA.

The doctrine of frustration and FCA are examples of options or resolutions that may be available to a party following the breakdown of a contract. Legal advice may assist in identifying resolutions of a dispute or breakdown through remedies available outside the contract.

## CHILD SUPPORT CHANGES

Hon. Peter Dunne, Revenue Minister has advised that legislation is being introduced to Parliament to change the way child support is calculated.

The Child Support Scheme ('the scheme') in New Zealand was established by the Child Support Act 1991. The purpose of the scheme is to provide a backstop for parents who are unable to reach a private agreement regarding financial contributions and care arrangements for their children. The scheme currently provides financial support to over 210,000 children across the country.

In recent years with evolving social norms, the scheme has been criticised as failing to recognise the needs of

today's families due to it being based on outdated assumptions. A review of the scheme undertaken by the IRD in 2010 demonstrated the strong belief held by many parents that the current system was unfair. Specific areas of concern were the way in which child support was calculated, the assessment of income, and motivation for payment.

Greater public and social expectations of parents sharing the responsibility for the financial and emotional well being of their children has also demanded the scheme be updated to reflect such expectations, whilst at the same time encouraging parents to satisfy their child support obligations.

**CHANGES TO THE SCHEME**

The two main objectives of the amendments to the Child Support Scheme are:

1. To promote the welfare of children, predominantly through recognising that children are disadvantaged when child support is not paid or not paid promptly, and
2. To improve fairness by way of reflecting social and legal changes that have developed since the scheme's introduction in 1992.

Key areas of proposed change include:

**Shared Care:** The qualifying threshold for shared care that deems both parents as having equal care responsibilities is likely to be reduced from 40% of nights per year to a tiered system beginning at 28%. This change addresses concerns about the failure of the current scheme to recognise contributions of some parents who, while substantially involved in the care of their children, do not satisfy the 40% night test.



**Parents' Income:** The assessment of income used to determine the level of child support payment due will be based on the combined income of both parents. This change is based on the assumption that the financial responsibility for raising a child should lie with both parents.

**Definition of Income:** Income will continue to be taxable income but tax losses will be excluded. Certain trust income will also be captured within the scope of income for the purposes of child support. The change seeks to improve the scheme's fairness and veracity by ensuring the definition more accurately reflects the real income of parents.

**Compulsory Deductions:** Payments will be deducted automatically from the parents' salary/wages to ensure payments are made, and made on time.

**Changes to Penalty and Write-Off Rules:** Rules related to penalties and write-offs are due to become less punitive so as to encourage parents to resume child support payments following a default. This change also recognises financial hardships that some paying parents may be experiencing.

The first changes are expected to come into effect from 1 April 2013.

**SNIPPETS****THE "GIFT OF LIFE"**

A total of 11 hearts, nine lungs, 35 livers, three pancreases, and 50 kidneys were included in transplants from deceased people in New Zealand last year. These donations were given by a total of 41 organ donors.



The donation of organs and tissue in New Zealand is governed by the Human Tissues Act 2008 ('the Act'). The Act prescribes who may give consent or raise objections to donation of organs and tissue from deceased persons.

Indicating on your drivers licence that you wish to be an organ donor does not constitute consent to the donation of organs; as the decision to donate ultimately rests with your family. It is therefore important to discuss your wishes with them. Where any "close available relative" reasonably objects to the donation of your organs, any consent given could be overridden and the donation will not proceed.

The Act provides that the decision to donate should take into account the family's cultural and spiritual needs together with their values and beliefs. For further information, please refer to [www.givelife.org.nz](http://www.givelife.org.nz) and [www.donor.co.nz](http://www.donor.co.nz).

**WHEN IS RELATIONSHIP PROPERTY VALUED FOLLOWING SEPARATION?**

The date upon which relationship property is valued for division of asset purposes varies depending on whether the parties or the court decide the division of assets. The Property (Relationships) Act 1976 ('the Act') applies to de-facto relationships, civil unions and marriages. The Act provides rules for the division of property for relationships of over three years in duration.

Where the parties agree, they can document their agreement in a Separation and Relationship Property Agreement, and include the values as at the date of separation.

Where agreement cannot be reached, application can be made to the Family Court, where the value of relationship property is determined at the date of hearing, unless the Court exercises the overriding discretion it has to depart from a hearing date valuation.

Be aware of the impact timing can have when disputing the split of relationship property assets following separation. For some people, a quick resolution at the earlier asset value may be a better result than getting a greater share when asset values have fallen.

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