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NEWSLETTER

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INSIDE THIS EDITION

Anti-money laundering overview

The government has recently made changes to the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (the "Act") to prevent money laundering and terrorism financing within various businesses and professions (including lawyers, accountants and real estate agents).

The Act aims to enhance the reputation of New Zealand businesses and maintain the view that New Zealand is a safe place to run a business.

Money laundering is the process of disguising the origins of illegally obtained money. Financing of terrorism is where financial support is provided to individual terrorists or terrorist organisations.

The Department of Internal Affairs ("DIA") regulates and monitors compliance with the Act and is responsible for reporting any breaches.

The Act imposes preventative measures to ensure services provided by businesses are not used by criminals to hold and move funds anonymously.

Compliance with the Act for lawyers came into place on 1 July 2018. This involves lawyers completing customer due diligence ("CDD") on clients before acting for them even where they are long-standing clients or the lawyer knows them personally.

The level of information required to complete the CDD will vary depending on the matter type, but as a minimum, lawyers are required to obtain and hold for each client involved evidence of full legal name, date of birth; and address.

Examples of evidence for the above information can be Driver's Licence or Passport, and a utility bill, other government issued letter or bank statement recording the client's address.

Depending on why you have instructed a lawyer to act for you, further information may be required. For

example, if a lawyer is paying funds to you from their trust account, the lawyer must also confirm with you the bank account number that the funds are being paid to. This usually involves obtaining a bank deposit slip, bank statement or online screenshot showing the account number and your name. Alternatively, where lawyers receive funds into their trust account, particularly from overseas accounts, they may require verification of the funds. This is particularly important in property transactions as the DIA have identified overseas money being laundered in this manner.

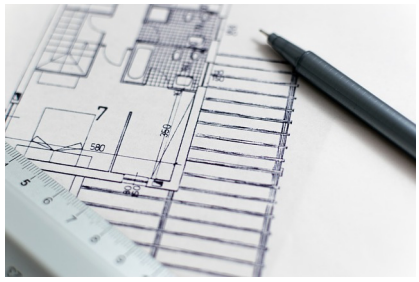
This information is not only required for individuals, but also for trusts, companies and partnerships. So, if you have a lawyer acting for your family trust for example, they will require proof of address and ID for each trustee. In the case of a company, your lawyer will require the same information for all directors and shareholders.

You will find that if you require a real estate agent, lawyer, and your bank for a single transaction, all three entities will ask for the same information (where they do not have the information already). Accordingly, it is best practice if you can provide the required information to the parties that require it from the outset of your matter. This will ensure your matter progresses smoothly and may result in reduced CDD compliance fees.

While the Act has imposed further compliance requirements and administrative work on lawyers and other professionals, its aim is to reduce money laundering and prompt people to question 'red flags' to ensure that New Zealand is a desirable and safe place for business.

What to know when building a house with a building company

Building a house can be a stressful, expensive and intimidating prospect for both new and experienced customers. As such, ensuring you are aware of not only your rights and obligations, but also those of the builder, is crucial.



Prior to even hiring a builder, you should complete your own due diligence on:

- the builder,
- your financial position,
- the requirements of your lender during the build (if any),
- what consents are required and when they should be applied for,
- whether the building quote encompasses all aspects of the build (consents, labour, materials, mark-up, subcontractors, architects input and final designs etc.), and
- the time intended to complete the build.

If you can be thorough with your due diligence before entering into a building contract and starting the build, it can help to reduce costs, aide the builders and ensure that no unnecessary delays/costs are incurred.

If you are using a builder, and the cost of the build is expected to be over $30,000 then the builder is required to provide you with a building contract. There are four groups of documents your builder needs to provide you with:

1. a written building contract to be signed and dated before the work is carried out;
2. a Ministry of Business Innovation and Enterprise ("MBIE") consumer protection checklist;
3. an MBIE disclosure document; and
4. copies of the various documents to be given to you at the end of the job (insurance policies, guarantees, warranties, maintenance requirements).

Your builder should be advising you to review the documents before signing and also that you should be taking the documents to a legal professional to review. Given the size of the documents and language that can be used, some of the terms and conditions can be hard to grasp if it is your first time. As such, the documents should be reviewed by an expert who can explain the contract to you and advise whether the contract terms are beneficial/detrimental to your intentions.

A building contract can vary depending on the builder, hence why it is important for it to be reviewed on a case by case basis, as rules and regulations are ever changing for builders. The www.building.govt.nz website has a standard checklist for you to review, which lists all the clauses you should expect to see in your own contract, this is subject to the type of role played by the builder.

Issues that arise in a build dispute are commonly to do with the cost, miscommunication and cost of variations, quality of the finish and what responsibilities each party had during the build. These issues are often a result of poorly drafted contracts that lack key details and the necessary clauses. Taking your time to understand and amend (if needed) any documents required for the build will go a long way to avoid such issues.

Contracts by their nature are always more difficult to change after they have been signed, hence we suggest you are at peace with the agreement prior to signing if at all possible.

In conclusion, given the investment made in a build, it is highly recommended that you review this with your lawyer, so they can raise any 'red flags' in the contract before it is signed. "Plan for the worst, hope for the best".

Overview of the new gun law changes

Following the Christchurch Terror Attack of March 15th 2019 changes to the gun laws in New Zealand have been made. The Arms (Prohibited Firearms, Magazines, and Parts) Amendment Bill came into force on 12th April 2019; which was rather swiftly by legislative standards. The aim of the Bill is to tighten gun control in New Zealand by amending the Arms Act 1983.

The most significant change the Bill makes is prohibiting semi-automatic firearms, magazines, and parts that can be used to assemble prohibited firearms. Semi-automatic firearms, other than those that are capable of only firing up to 0.22 calibre cartridges and hold no more than 10 cartridges and semi-automatic shotguns that are capable of holding no more than 5 cartridges, are now prohibited. The bill also classes pump-action shotguns that can hold more than 5 cartridges and those that can be used with detachable magazines as prohibited firearms.

The new penalties that come from the changes include a maximum of 10 years imprisonment for the use of a prohibited item to resist arrest. Also, a maximum of 7 years imprisonment for carrying a prohibited firearm in a public place, carrying a prohibited firearm with criminal intent, presenting a prohibited firearm at another person, and possessing a prohibited firearm while committing an offence, which itself has a maximum penalty of 3 years or more. A maximum imprisonment of 2 to 5 years is now the penalty for the unlawful possession of prohibited parts, magazines, or firearms.

Until December 20th 2019, an amnesty from prosecution is in place for the possession of prohibited parts, magazines, and firearms. This allows any persons who are in possession of these now prohibited items to hand them in to police. This can be done anonymously, although anonymous handovers will not be eligible for the buy-back offer in place throughout the amnesty period. The amnesty also allows for handover of these prohibited firearms, and non-prohibited firearms if desired, even if a valid firearms licence is not currently held.

Applications can be made to the Police for permits to possess prohibited items. The limited exemption categories include employees of the Department of Conservation involved in operations for the control of wild animals or wild pests, and persons that hold concession granted by the Minister of Conservation to undertake wild animal recovery operations. You may also apply for a permit to possess a prohibited firearm if the item has special significance as an heirloom or memento.

With the Bill being introduced to Government on April 1st 2019, just over 2 weeks on from the terror attacks, and Royal Assent being granted on April 11th 2019, concerns were raised at the speed at which the Bill was progressed. In fact, the reason behind the sole opposing vote to the changes was because of the speed at which the law was being rushed through. Politicians in reply to this concern have promised that there will be further laws and changes to come.

Sole Trader and Limited Liability Company – liability compared

A sole trader is a common ownership structure that can be used to operate a small business. The main operator of the business may be one person, supported by a family member such as a spouse. Operating a business may be risky if the right asset protection and insurance is not in place to support the sole operator. The extent of their liability is that they are personally liable for any business debt or loss, including taxes.

For debt owing to a creditor, a claim can be made against the personal assets of the sole trader, including funds in bank accounts, and the personal family home. Liability on behalf of the sole trader, will end when the sole trader has passed away unless a Will provides for the business to carry on.

Should the sole trader cease to operate their business, then there is a statute of limitation of between 6 to 15 years for creditors to make a personal claim, and therefore liability after this time may not apply.

When borrowing funds there may be a linked personal guarantee from the sole trader. When the debt is repaid to the bank, it will remain in place unless the lending organisation agrees in writing for its release. Liability can continue onto the sole trader's executors and assignors under their Will.

The difference between a sole trader and the structure of a limited liability company, is the latter is seen to be a separate legal entity from the shareholders of the company, who are its owners.

Liability on behalf of the shareholders of the company is limited to the amount of the debt belonging to it in ratio to the shares held. If the shares haven't yet been paid for in full there is an element of exposure of liability on the unpaid

amount. If the company goes into liquidation, assets sold, creditors paid back first, then shareholders have a right to a share in the funds raised.

As liability can be dependent upon many things, directors can still be held personally liable for the company debt if trading while it is insolvent and if they have given personal guarantees.

It is important for directors and shareholders to remember to have personal guarantees released in writing when changing lending institutions or retiring from the company.

Personal liability on behalf of directors may also apply where the director(s) have not acted in the best interest of the company, and may have failed to act in accordance with the Companies Act.

If the company is acting in the capacity as an independent trustee of a family trust, liability can be disclosed not to be personal and unlimited. It can be limited to an amount equal to the value of the assets of the trust, that are in the hands of that trustee company available to meet the trustee company's liability from time to time. The relevant time for the purposes of assessing the value of the assets of the trust will be the time of enforcement of any judgment or order against the trust.

It is important when entering into business to receive proper advice regarding the ownership structure, and consider how much risk and liability you are willing to accept when deciding to become a sole trader, director and or shareholder of a limited liability company.

Caveats explained

The word caveat is Latin and translates to "let him or her beware". A caveat can be lodged against someone's property title to protect the lodging party's right or interest in the property and it prevents the registered owner of the property from selling, mortgaging, and dealing with the property until the caveat is removed from the title.

To lodge a caveat you must have a "caveatable interest". Under section 138(1) of the Land Transfer Act 2017, to meet the threshold of a caveatable interest, the person:

(a) claims an estate or interest in the land, whether capable of registration or not; or
(b) has a beneficial estate or interest in the land under an express, implied, resulting, or constructive trust; or
(c) is transferring the estate or interest in the land to another person to be held on trust; or
(d) is the registered owner of the estate or interest in the land and—
  (i) has an interest that is distinct from that of a registered owner; or
  (ii) establishes to the satisfaction of the Registrar that at the time the caveat is lodged there is a risk that the estate or interest may be lost through fraud.

Common examples of when a caveat could be registered are:

- A party has purchased a property and there is a substantial amount of time between signing the contract and the settlement date.
- A purchaser of a property registering a caveat when the vendor is seeking to cancel the contract.
- A party is a beneficiary who has an interest in land under a trust or estate.
- A party has a lease over the land.

Please note that if a caveat is registered without reasonable cause, you could be liable to pay compensation to anyone who suffers a loss as a result of the caveat being registered.

There are three ways to remove a caveat from a title which are:

1. The person who lodged it (also known as a caveator), withdraws it.
2. When the caveat lapses. The registered proprietor applies to the Land Registrar for the caveat to lapse. The caveator will then receive a notice that an application has been made for the caveat to lapse and will have 14 days to notify the Land Registrar that an application has been made to the High Court to sustain the caveat.
3. Apply to the High Court to have it removed. The High Court is required to be satisfied that there is not a valid reason for the caveat to be registered. The onus is on the caveator to prove there is/are reasonable ground(s) for the caveat to be sustained.

In conclusion, whether you would like to protect an interest you have in land, or would like to apply for the removal of a caveat from your property, we advise you seek legal assistance to explore the best way to move forward to resolve your matter.

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