

# Petrie Mayman Clark

BARRISTERS, SOLICITORS AND NOTARY PUBLIC

## Newsletter - Winter 2011

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### Hi everyone,

Welcome to the second edition of our 2011 newsletter format via email. Please let us know if you do not wish to be on our list to receive these newsletters.

### Recently...

Petrie Mayman Clark was established in 1991 and we have recently celebrated our 20th Birthday.

Maria Green, Staff Solicitor, is leaving us to travel the world. We wish her all the best.

### Inside this edition we feature:

- Changes to Manage Legal Aid Spending
- Consumer Law Update
- Copyright (Infringing File Sharing) Amendment Bill
- Wills and Property Ownership - Things you need to know

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## Changes to Manage Legal Aid Spending

The Government has announced changes to ensure legal aid costs are financially sustainable. Legal aid costs have increased from \$111 million in 2006/07 to \$172 million in 2009/10, an increase of 55%.

The changes are designed to better manage legal aid expenditure, while maintaining access to the legal aid system for those who need it most. These changes are the latest in a package of reforms initiated last year

following Dame Margaret Bazley's review of the legal aid system. They complement other initiatives already underway and will be phased in from July 2011. They are expected to be fully effective from 2012.

### The three main changes are:

- Adjusting the eligibility criteria for legal aid.
- Implementing a new purchase approach for legal aid services.
- Improving the level of repayments received from legal aid clients.

Eligibility tests currently look at whether the proceedings are eligible, the merits of the case and the

## OUR PEOPLE

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means of the applicant. The tests differ across criminal, family, civil and Waitangi Tribunal legal aid.

Eligibility criteria will be tightened to address specific areas of recent growth. This will include the following:

- Tightening the family merits test to encourage parties to resolve minor matters themselves rather than through the court system.
- Restricting discretion to grant legal aid in special financial circumstances to only the most complex cases, for family and civil legal aid applicants who do not meet the standard test.
- Applying means thresholds for legal aid that are currently used for family and civil cases, to less serious criminal cases.
- Not automatically adjusting financial eligibility thresholds for inflation.
- Improving the verification of benefit and income status of applicants.

Changes to eligibility criteria will mean that income is no longer a principal determining factor in qualifying for legal aid. This could mean that people who would have previously qualified for legal aid may no longer be eligible. For those who are above the means threshold, an application for legal aid can still be made but it must be proved that their case is likely to be expensive or that they are genuinely unable to finance a lawyer.

All legal aid lawyers will see changes to how they are paid for their legal aid services.

In the 'criminal summary jurisdiction' (less serious criminal cases), and most family law areas, fixed fees will be introduced. Fixed fees are expected to reduce the administrative burden for legal aid providers. High cost cases, including serious criminal trials and some Treaty of Waitangi cases, will be funded using the high cost case management system - which is likely to involve upfront agreement of levels of funding.

Funding of cases not subject to fixed fees or high cost case management will also change to ensure consistency. This is expected to involve changes to amendment criteria, disbursements and the number of hours that can be funded for particular stages.

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## Consumer Law Update

A Consumer Law Reform Bill (the 'Bill') will be introduced to Parliament later this year to update and simplify consumer law. This is in recognition of the fact that the laws covering layby sales, door to door sales, unsolicited goods and services, and the regulations for auctioneers have not been reviewed for some time.

The Ministry of Consumer Affairs (the 'Ministry') released a detailed discussion paper on Consumer Law Reform in June 2010. Extensive consultation has taken place since that time and, together with submissions received, has resulted in five additional papers being produced by the Ministry.

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The Bill will reform the Consumer Guarantees Act, the Weights and Measures Act, the Layby Sales Act, the Fair Trading Act, the Door to Door Sales Act, the Auctioneers Act and the Unsolicited Goods and Services Act. Each Act has been reviewed taking into consideration:

- its history, original purpose and ongoing relevance, and
- any gaps in the law, and the effectiveness and overall enforceability of the Act.

It is beyond the scope of this article to describe all of the reforms proposed, however, listed below are some that may be of interest:

- The Fair Trading Act will be amended to update and simplify consumer law related to layby sales, unsolicited goods and services, door to door sales, and the regulation of auctioneers. It is proposed that infringement notices for minor breaches of the Fair Trading Act will be issued by the Commerce Commission.
- The Consumer Guarantees Act will be amended to require greater disclosure to consumers on express warranties and provide consumers who take up cover under express warranties a statutory cooling off period.

- Changes will be introduced to product safety protections. The Minister will be empowered to issue Government Product Safety Statements that will provide some guidance on acceptable product safety. Notification of product safety recalls will be mandatory and recalls will be published on the Ministry website. Goods that are recalled may be required by the Ministry to be destroyed and a supplier may be asked by the Ministry to stop selling a product if it has been implicated in a serious incident.
- The law related to auctions will be updated. The Consumer Guarantees Act "acceptable quality" provisions will apply to goods sold by auction, online, and to those sold by tender. The Auctioneers Act will be repealed and minimum standards will be set for the registration of auctioneers and the conduct of auctions.
- Unsubstantiated claims will be prohibited under the Fair Trading Act. The Ministry anticipates this measure will assist the Commerce Commission in enforcing the Fair Trading Act as well as assisting consumer confidence and good market conduct.
- The jurisdiction of the Disputes Tribunal will be extended to cover complaints about deceptive and misleading conduct and to provide for the full range of remedies available under the Fair Trading Act.

To keep up to date with the Bill and the proposed changes readers may wish to visit the Ministry website [www.consumeraffairs.govt.nz](http://www.consumeraffairs.govt.nz).

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## Copyright (Infringing File Sharing) Amendment Bill

The internet has totally revolutionised the entertainment industry. Downloading music and movies, also known as file sharing, has become common practice in this day and age. However, it is sometimes easy to forget that behind that one click on the "download" button, lies someone's art, their work and source of income that when downloaded without permission, is in breach of our copyright laws.

The Copyright (Infringing File Sharing) Amendment Bill (the 'Bill') was passed into law by Parliament on 14 April this year. The Bill repeals a section of the Copyright Act 1994 and replaces it with two new sections that specifically deal with illegal peer to peer file sharing.

A review of section 92A of the Copyright Act 1994 concluded that the enforcement measure was ineffective in its current state and its repeal and subsequent replacement is intended to offer greater deterrence for illegal file sharing through the implementation of a three-step notice regime. Previous concerns over an ad-hoc approach to the suspension of internet accounts and a lack of judicial oversight have been addressed with the new Bill requiring either the Copyright Tribunal (the 'Tribunal') and/or District Court to assess matters and oversee the formulation of proportionate remedies.



### The Three-Step Regime

The Bill provides an overview of the 'Infringing File Sharing' regime and states that the purpose of the amendment is to "provide copyright owners with a special regime for taking enforcement action against people who infringe copyright through file sharing."

The regime itself is based on a notice system where three kinds of infringement notices will be sent to offending account holders before enforcement ensues. The first notice is a detection notice, it is followed by a warning notice, and finally an enforcement notice. The notices are to be issued to the account holder by the Internet Protocol Address Provider (IPAP); which was formerly known as an Internet Service Provider (ISP).

### Penalties

If an account holder continues to infringe after receiving all three notices, the copyright owner is able, under the new Bill, to apply to the Tribunal or District Court for relief and enforcement options.

The Bill also permits the Tribunal to award damages against the account holder, the sum of which is to be determined by the Tribunal. The amount ordered can be up to \$15,000, and is to be based on the level of damage or loss sustained by the copyright holder.

Alternatively, the copyright holder will be able to apply to the District Court for a suspension of the account holder's internet account. The District Court may, after considering both parties arguments, make a suspension order requiring an IPAP to suspend the internet account of an offender for up to six months. The suspension order is supposed to be reserved for more serious offenders.

Account holders are able to challenge the infringement notices and can request a hearing if they feel they should not be penalised.

### **ISP Definition Amended**

The new amendment has also redefined an internet service provider and the former acronym of an 'ISP' has been replaced with 'IPAP', which stands for Internet Protocol Address Provider. The new definition is a broader one which encapsulates some organisations that are not traditional ISPs such as businesses and universities. The amendment bestows upon such organisations similar responsibilities as a traditional ISP and requires such organisations to send notices to infringers in the same manner as a traditional ISP.



### **Wills and Property Ownership - Things you need to know**

The recent High Court case of *Rauch & Ors v Maguire & Anor [2010] 2 nzlr 845* highlights two interesting distinctions. Firstly, the distinction between ownership of property as 'joint tenants' and ownership as 'tenants in common'. Secondly, the distinction between the duties of disclosure owed to beneficiaries by 'Executors' and by 'Trustees' of a deceased person's estate.

### **The Facts**

The deceased and his son owned two properties that were originally purchased in 1997; mistakenly as tenants in common. The mistake was corrected one year later when the properties were transferred to them both as joint tenants. The effect of owning the properties as joint tenants was that on the death of the father in 2009, the properties were transmitted by survivorship to the son and did not form part of the estate.

The son gained from this correction because two properties, which together were worth \$5 million, were accordingly his and did not form part of his father's estate. This in turn meant that the father's estate reduced in value from \$2.5 million (a half share of the two properties) to \$39,000 - hence the claim by the disgruntled beneficiaries (who did not include the son).

The High Court held that the residuary beneficiaries were not entitled to information from the executors and trustees of the estate. The properties were personal assets that were transmitted by survivorship prior to death and as such the circumstances were confidential.

### **Joint Tenancy or Tenancy in Common?**

If property is owned as joint tenants then it does not become part of the estate and transfers by survivorship to the surviving joint tenant regardless of the contents of the will. If property is owned as tenants in common, then it forms part of the estate and is dealt with according to the terms of the will.

### **Beneficiaries' Rights to Disclosure of Information**

It is common for the executor and trustee named in a will to be the same person, however beneficiaries' rights of disclosure of information differ depending on whether they seek disclosure from the Executor or the Trustee.

In the above case, the residuary beneficiaries could not compel the Executors to disclose any information because they had no legal or equitable property interest in the unadministered estate. They had no greater right to disclosure after death than during the deceased's lifetime.

The residuary beneficiaries also could not force the Trustees to disclose information regarding the transfers because the information sought was information relating to non-trust assets. The assets were not part of the residuary estate. The Court held that disclosure is at the Trustee's discretion and if asked the Court would intervene in a supervisory role, if appropriate, given the particular circumstances. In this case, the residuary beneficiaries could not show good reason for the Court to intervene and order disclosure.

A beneficiary has a right to disclosure of information by the Trustee, provided the information sought relates to the assets of the estate.

## Conclusion

Understanding the manner in which property can be owned, including an appreciation of the distinction between joint tenants and tenants in common is crucial to estate planning.

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**If you have any questions about the newsletter items please do not hesitate to contact us - we are here to help.**

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