

NEWSLETTER

Issue 2
Winter 2008

Welcome to our Winter issue of the PMC newsletter.

Staff changes:

Belatedly, we welcome Renee Bloxham as our new Administration Assistant, and Maureen Fitzgerald joins us as Legal Secretary/PA to our litigation team.

On a leaving note, Zylpha Kovacs, Staff Solicitor, has made a career change. We wish her all the best.

While we are happy to continue mailing our quarterly newsletters to you, we do offer the following options:

- 1 Email: Please contact us if you would like to receive them by email, or
- 2 You can download each quarterly newsletter from our website www.pmc-law.co.nz

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Our aim is to provide access to excellent and affordable legal services focused on client satisfaction.

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New Disclosure Obligations for Investment Advisers & Brokers

Over the past 6 months, eighteen finance companies have either failed completely or run into trouble. So it should be comforting to know that the Government has indicated a willingness to legislate to protect the public by passing into law the Securities Markets (Investment Advisers and Brokers) Regulations 2007 (the "Regulations").

The Regulations supplement and update the Securities Markets Amendment Act 2006. Commencement Order SR 2007/367 provided for the Amendment Act to come into force on 29 February 2008, the same day as the Regulations. They are now either contained in or read together with the Securities Markets Act 1988 ("the Act").

Intention of the changes

The intention of the amendments and regulations is to oblige Investment Advisers and Brokers to make certain disclosures to clients in a prescribed manner before giving investment advice or providing services as an Investment Adviser or Broker.

What must be disclosed?

An Investment Adviser must disclose in writing, in the manner prescribed, the following:

- experience and qualifications
- criminal convictions and adverse findings in any Court on their professional role
- the nature and level of any fees charged
- details of remuneration or awards they received or will receive from anyone else
- other interests and relationships that could affect the advice
- types of securities they advise on

It is important to note that clients do not have to ask for this information; it must be provided up-front.

Who is an Investment Adviser or Broker?

An Investment Adviser gives recommendations, opinions or guidance relating to investment in securities to members of the public in the course of the adviser's business or employment. Certain information will not constitute advice, such as opinions published in the media, assistance with acquiring and disposing of securities, and offer documents including a registered prospectus and authorised advertisements.

An Investment Broker receives investment money or property from members of the public in the ordinary course of their business. Therefore, the definition of an Investment Adviser or Broker can include sharebrokers, financial planners, accountants, lawyers and others that give investment advice to the public.

One point that will be of real interest is the requirement for Investment Advisers and Brokers to disclose their commission structure and the amounts before advice is given. That includes all remuneration whether direct or indirect, that the Adviser or Broker may receive following the giving of advice.

Criticisms

The regulations have been criticised for not going far enough as Advisers and Brokers are not required to give advice about the nature and quality of the investment and the client is not required to sign any

agreement or receive any warning about associated risks. Furthermore, the regulations do not provide for a declaration of any conflict of interest and a consequent prohibition if a conflict does arise.

It has been suggested that a client agreement should be introduced that clearly sets out the risk associated with the investment being considered. It has also been argued that because a person's life savings may be at stake, the Government should consider passing more comprehensive laws requiring Advisers to fully apprise unsuspecting investors of the risks being taken and make it part of the Investment Adviser's job to assess the client's situation and make a recommendation based on that. Legislation aimed at ensuring that the risk is understood could be the next step.

Remedies

An Investment Adviser or Broker who fails to disclose in accordance with the Act commits an offence, and may be liable for a maximum fine of \$100,000 for an individual and \$300,000 for a body corporate. However, the Investment Adviser or Broker has a potential defence if he or she believed on reasonable grounds that the disclosure given was not deceptive, misleading, or confusing.

It is hoped that these changes go some way towards increasing transparency and reducing the types of losses we have seen recently.

Are You in a De Facto Relationship?

The inclusion of de facto relationships, (which encompasses same sex relationships) within the Property (Relationships) Act 1976 ("the Act") effectively means de facto couples will receive similar treatment, concerning disputes about property, to those who are married.

De facto relationships and the Act

De facto relationships will ordinarily be covered by the Act only if the partners have lived together as a couple for three or more years. After three years, the principle of equal sharing applies.

There are exceptions to the three year rule. These include situations where there is a child of the de facto relationship or where one party has made a "substantial contribution" to the de facto relationship. Before it makes an order, when considering exceptions to the rule, the Court must be satisfied that failure to make an order would result in a serious injustice.

Definition of a de facto relationship

Section 2D (1) of the Act defines a de facto relationship as a relationship between two persons

whether they be a man and a woman or same sex partners; provided both are aged 18 or older, live together as a couple and are not married to or in a civil union with each other.

What constitutes living together as a couple?

Section 2D (2) of the Act states that when determining whether two persons live together as a couple, all the circumstances of the relationship are to be taken into account, including any of the following matters that are relevant in a particular case:

- the duration of the relationship
- the nature and extent of common residence
- whether or not a sexual relationship exists
- the degree of financial dependence or interdependence, and any arrangements for financial support between the parties
- the ownership, use and acquisition of property
- the degree of mutual commitment to a shared life
- the care and support of children
- the performance of household duties
- the reputation and public aspects of the relationship

The overall question for the Court is whether the two people concerned live together as a couple. The above list is not intended to be exhaustive, and any other relevant factors may be taken into account. Similarly, none of the factors is either independently, or in combination, a necessary ingredient of a de facto relationship. The factors set out above simply assist the Court in determining whether a de facto relationship exists.

It appears the Court is looking for a mutual commitment to a single lifestyle, with or without a common residence or sexual relationship. The Court will also be giving active consideration to the intention of the parties at 'relevant times', ('relevant times' will vary from case to case, but essentially encompass the series of events being considered by the judge) to enter into and to remain in a committed de facto relationship.

Farm Succession – Planning Ahead

The most important decisions pertaining to the family farm are made when the boots are off and the kettle is on. There are many difficult questions that must be discussed and resolved by the farming family, including how to achieve the most tax effective outcome while reflecting an ownership structure that meets the needs of the farming family now and in the future.

Farm succession differs from non-farm based estate planning in that the farm is the major asset. As such it needs to provide retirement income for the retiring generation, as well as employment and income for the younger generation.

Elements of a good succession plan

The starting point of any succession plan is to consider what the goals and aspirations are for each member of the family. These will include business, personal and financial goals.

In planning for these goals you will need to consider the following issues:

- the possibility of keeping the farm in the family
- at what age the older generation wish to retire – are they going to wind down slowly on the farm or retire to another property
- the desired level of retirement income
- is the younger generation ready to succeed and do they have the skills and commitment to run a farming business
- will the younger generation take on an acceptable debt burden and how will they pay out the other siblings
- fairness to non-successor siblings
- business structures – whether it will be a trading/family trust, sole trader, partnership, a limited liability company or a combination of two or more of these

- tax implications for all of the above
- the distinction between the farm operating as a business and the ownership of farm assets

Implementing the plan

Once the family goals have been developed and outcomes agreed, the next step is to seek professional advice regarding business structures and tax implications. Your lawyer and accountant should work closely together to discuss options with you in order to implement the best structure to enable your family to achieve their goals. The long term benefits achieved by restructuring correctly outweigh the short-term associated costs.

It is prudent to start early as it may take some time to put the structure in place and to transfer assets. The final structure must be able to adapt to changing needs.

Maintenance of the plan

Ensure the plan is revisited regularly, especially when there are new additions to the family, marriages or de facto relationships, or deaths. Make sure all family members have an up-to-date will. Enduring Powers of Attorney are also important to have in place. These include a Property Attorney and a Personal Care and Welfare Attorney. In both cases these Attorneys should be people you trust to make decisions and act for you when you are unable to make decisions for yourself.

Throughout the whole process remember the key to success is careful, well informed consideration of all the issues, and effective and early communication with each other and your advisers.

Hearsay

With the amount of legal dramas on the television, you will have likely to have heard the term hearsay bandied about and cries in the Court room (from the likes of Denny Crane!) of “objection, hearsay”.

While the general rule is that a hearsay statement is not admissible in Court proceedings, there are exceptions to this general rule and the rules relating to hearsay are controlled by the Evidence Act 2006.

Section 4 of the Evidence Act states that a hearsay statement in relation to Court proceedings is:

- a statement that is made by a person other than that witness and
- is offered in evidence by that witness to prove the truth of its contents.

This means that the mere fact that a witness gives evidence as to words spoken to them by another person will not be hearsay unless the truth of what was said is in issue. For example, it would not be considered hearsay if Bob gave evidence in Court that Paul had told him that he drove a red Mazda vehicle at 8pm that evening if none of those facts were an issue. However, it would be hearsay if the colour of the vehicle or the time of the driving of the vehicle were an

issue before the Court and Paul's evidence was being heard to try and establish the truth of the issue.

Section 18 of the Evidence Act provides that a hearsay statement may be admissible if:

- it is reliable, and
- either the maker of the statement is unavailable as a witness, or, the Judge considers that undue expense or delay would be caused if the maker of the statement was required to be a witness.

The party who plans to introduce hearsay evidence must give notice to the other party of their intention to call hearsay evidence.

Examples of what may be hearsay under the Evidence Act 2006 would include spoken or written communications or a telephone call in which a person identifies himself or herself. Communications unlikely to be hearsay under the Evidence Act 2006 would be what a person observed about another person, for example they saw bruising or injuries on another person.

The general idea of the Evidence Act 2006 is to exclude hearsay unless there are sound reasons for admitting it.

Snippets

Charities Act Update

Charities are reminded that in order to retain or obtain charitable-purpose tax exemptions, they must register with the Charities Commission by 1 July 2008. The Charities Commission is currently processing applications from November/December 2007. Therefore, later applications for charitable status may not be processed by 1 July 2008. However, the Commission does have the power to backdate an organisation's charitable entity status to the date it received the properly completed application. Tax benefits can be claimed provided an application is received prior to 1 July 2008.

An application to the Commission involves completing the prescribed application forms and providing a certified copy of the rules of the charity. Registering a charity is often not straightforward. Therefore, legal advice is recommended.

Taser Update

The New Zealand Police are strongly in favour of Tasers being introduced, following the end of their trial last year. But controversy surrounding the Taser continues. An article entitled “Think Twice About Tasers”, released by the Auckland District Law

Society, cautions against a hasty implementation of the Taser and considers that strict guidelines need to be in place to prevent the Police from developing a casual attitude towards its use.

The introduction of the Taser will also have wider implications for New Zealand in terms of compliance with the Bill of Rights Act and International Law obligations. The Law Society has suggested that the final decision should be made by an independent body with provision for the public to make submissions.

Our newsletter is designed to keep you up to date with changes in law. We are happy to address any inquiries you may have – feedback welcome.

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