NEWSLETTER

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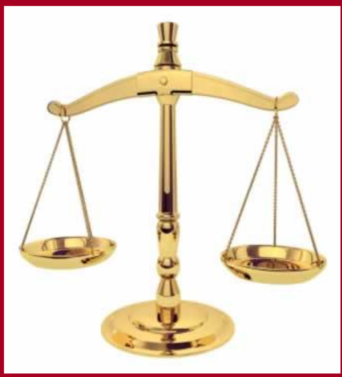

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vosper LAW

Your duty of disclosure to your insurer

Have you ever had that nagging feeling that your insurer might, just *might*, find a reason not to pay out on a claim?

We all deal with different kinds of insurance; house, contents, life, health, travel, mortgage, income protection, professional liability, public liability, earthquake, builders risk, and, if you want to believe, some foreign providers even offer a policy protecting against alien abductions.

No doubt you read your insurance policies in detail and are aware of the circumstances in which your claim can be refused (for example if you snow-ski overseas, injuries that occur while off-piste are typically excluded from travel insurance).

Duty of disclosure

In New Zealand the insurer has a right to refuse a claim if you, the insured party, failed to disclose something that may have influenced their decision as a prudent insurer to offer you insurance in the first place. This is known as your duty of disclosure. You are obliged to update your insurer with relevant information every time your policy is renewed or varied.

Breach of the duty may have disproportionately harsh results

Your failure to disclose a material circumstance allows your insurer not only to refuse a claim, but to treat the contract of insurance as never having existed. A flow on effect is that successful claims you have made in the past could also be reversed.

The problem we face is that the consumer would typically only become aware that their policy is void when they make a claim, as this is usually the only time the insurer makes a thorough investigation of your particular affairs. Some examples where policies were cancelled for non-disclosure include:

- Home insurance claim for fire damage denied because insured party did not disclose a previous (although unrelated) criminal conviction.
- Income protection insurance claim denied after historical medical records showed insured party had previous (yet reportedly minor) undisclosed stomach pain that his General Practitioner concluded resulted from stress.

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What the insured must disclose is inherently uncertain
An insurer will usually ask you many questions to determine your premiums and level of cover, however the questions they ask are non-exhaustive and do not excuse you of your duty of disclosure.

Difficulties arise because the ordinary consumer does not have a sophisticated knowledge of insurance law. An ordinary consumer might diligently and honestly complete a detailed insurance application, overlook some piece of information they have no idea would be relevant to the insurer (and was not asked for by the insurer), pay years of premiums only to find when making an eventual claim that their policy is void.

The New Zealand Law Commission has been unsuccessfully advocating to ease the obligations on the consumer since the late 1990s to bring us more in line with the legal position in the UK and Australia. The simple advice under the current regime is to review your new or existing policy document carefully and disclose everything you possibly can to your insurer and let them decide what is relevant. If this results in a higher premium – you can take comfort knowing you are now less likely to have a claim rejected due to non-disclosure.

Makeover for trust law proposed

The Law Commission feels a new framework is needed to provide a clear and robust approach for trusts in the 21st Century. They are undertaking a three part review of trust law in New Zealand and presented the first report to Parliament on 11 September 2013.

The Law Commission report focuses on the essential nature of trusts and recommends the introduction of a new Trusts Act ('new Act') to replace the Trustee Act 1956, which the Commission believes has become outdated. A selection of the recommendations in the report are summarised below:

Core trust concepts

- That the new Act provides a statutory definition of "trust", setting out the specific requirements necessary for a trust. It is hoped a clearer definition will assist the courts in addressing possible "sham" trusts.
- That the new Act clearly sets out the duties of trustees. While not creating new duties per se, the purpose is to make the law clear and accessible. The new Act would introduce six mandatory duties and 11 default duties, which will apply unless the trust deed indicates otherwise.
- That trustees be barred from limiting their liability or receiving an indemnity for gross negligence, which aligns with the current position in cases of dishonesty or wilful misconduct.

Trustees

- That provisions be enacted that broadly empower trustees. The Commission believes the current Act unduly restricts trustees' powers, and that the duties on trustees will be sufficient to control any inappropriate use of trustees' powers.
- That trustees be able to invest funds, with discretion to determine whether the return is "income" or "capital". The focus is on the overall return, meaning investment managers can also be appointed.
- That the rules relating to changing trustees be amended, as the current legal framework is difficult and often necessitates the court's involvement.

Court powers and jurisdiction

- That the court be given wider powers in its role of overseeing trusts and reviewing trustees' decisions.
- That the District Courts have the same jurisdiction as the High Court to deal with trusts, provided the amount involved is within the court's monetary limits. The report also recommends the Family Court have jurisdiction in certain cases.
- Promotion of Alternative Dispute Resolution in the new Act, as well as an increased role for the Public Trust to alleviate dependence on the courts.

General trust issues

- That the rule against perpetuities for new trusts be extended from 80 to 150 years.
- That the Property (Relationships) Act 1976 be amended to enable the Family Court to make orders compensating a partner by way of trust assets, where their claim would otherwise have been defeated.

While many of the recommendations simply clarify the existing law, the Commission recognises the new regime will widely impact the estimated

300,000 – 500,000 trusts currently in New Zealand.

Whether the Government approves the report remains to be seen. In the meantime, the Commission will continue with the final two stages of review, which relate to charitable trusts and corporate trustees. For a full list of the proposed changes refer to the Commission's website: www.lawcom.govt.nz/publications.

Review of burial and cremation laws

In the immortal words of Benjamin Franklin, "the only certain things in this life are death and taxes". Whilst taxes are an oft considered subject, death is less so. It is often only with the passing of a loved one that the legal framework surrounding death is considered, including the requirements around how the remains of our loved ones are dealt with.

The law governing burial and cremation in New Zealand is the Burial and Cremation Act 1964 ('the Act'). The Act has remained untouched since it was passed almost 50 years ago. The Law Commission is currently undertaking a wide ranging review of the Act, and has published an Issues Paper entitled "The Legal Framework for Burial and Cremation in New Zealand: A First Principles Review" ('the Review'). The Review considers the Act and whether the law meets the diverse needs of New Zealanders around burial and cremation, and also more significantly, considers issues not addressed by the Act, such as how family disputes around burial and cremation should be resolved.

The issue of family disputes around burial was thrust into stark relief in the case of *Takamore v Clarke* [2012] NZSC 116. When James Takamore died suddenly in 2007 a dispute arose between Mr Takamore's long term partner Denise Clarke and Mr Takamore's Tuhoe whanau about where he should be buried. As Mr Takamore's executor and partner, Ms Clarke wanted to bury him in Christchurch where he had lived with her and their two children for 20 years. Mr Takamore's whanau wanted him buried in the Bay of Plenty with other members of his family. Mr Takamore's whanau took Mr Takamore's body and buried him in the Tuhoe urupa. A bitter court battle ensued all the way to the Supreme Court. The Supreme Court found in Ms Clarke's favour, ordering that she could have Mr Takamore buried in a place of her choosing. The *Takamore* case highlighted the gaps in the Act where situations like this arise.

Such situations could be avoided with specific provisions enacted to address disputes of this nature. The Review contemplates enacting a new regime to clarify which individual or group should have the authority to make decisions when a serious burial dispute arises within a family, and factors that must be taken into account when making a decision. The Review also contemplates giving the Family Court jurisdiction if a decision is challenged, to make burial orders, require mediation to attempt to resolve the dispute, and to refer cases involving tikanga to the Maori Land Court for resolution.

The Review examines another significant area of the law relating to the establishment and management of cemeteries, including making provision for burial on private land - for example, generational farms. The proposal is that burial on private land be brought under the umbrella of the Resource Management Act 1991, and be subject to resource consent application. The Review sets out various requirements where a resource consent is granted for burial on private land, including the burial to be noted on the Land Information Memorandum and certificate of title, and a covenant required to ensure the land remains undisturbed.

A new Incorporated Societies Act – what could it mean for our organisations?

The Incorporated Societies Act 1908 ('the Act') has played a critical role in New Zealand's development for over a century. The Act enables groups and organisations to incorporate and establish themselves as separate legal entities.

Commonly referred to as the not-for-profit sector, incorporated societies operate alongside the private and public (state) sectors. New Zealand has over 23,000 incorporated societies, covering a diverse range of purposes, including: sports, social and recreational clubs, religious organisations and social service providers. It is vital that these societies are supported with legislation to provide guidance and support for their members to attain the purpose of the society.

Although pioneering at its time, the Act lacks adequate guidance on: the obligations of the members who run the society, how disputes are to be resolved, and ensuring that members do not profit or make a monetary gain through involvement in the society.

The Law Commission has recommended that the Act be repealed and replaced with a modernised version that provides greater accountability, transparency and prescribed governance structures; while also enabling each society to operate independently from the state.

Some of the key recommendations are as follows:

- Removing the ability for incorporated societies to be established under the Charitable Trusts Act 1957 and requiring all societies to be incorporated under a new incorporated societies Act,
- Prescribing minimum membership rules, where an incorporated society must have 10 members at all times, not just at the time of application,
- Requiring the establishment of a committee of officers and an appointed statutory officer for each society, and imposing duties on them similar to those duties imposed on company directors under the Companies Act 2004. Some of these duties include an obligation to disclose financial conflicts of interests and to be excluded from discussion or voting on a matter where the officer has a conflict of interest,
- Providing a minimum standard of rules for all constitutions dealing with matters such as meetings, quorums, procedures for committee member appointment, and how the society will enter into legal obligations,
- Mandatory dispute resolution procedures for members' misconduct and grievances between members, the committee and the society itself,
- Requiring societies to provide detailed annual reporting to the Registrar of Incorporated Societies ('the Registrar'), which includes: membership numbers and details, annual accounts and contact information for the statutory officer of the society,
- The introduction of sanctions against societies and their members. These include infringement offences for non-compliance with filing requirements or other obligations imposed under the Act, resulting in a $1,000 fine. A range of criminal offences are also included, such as using a position of responsibility within the society to obtain an advantage, punishable with a fine of up to $200,000 or five years imprisonment,
- Clarifying the prohibition on distributing surplus assets to members upon the eventual dissolution or liquidation of the Society, and
- Providing the Registrar powers to investigate and intervene in a society if it is in the public interest to do so.

It is clear that the recommendations set a minimum standard of good practice and governance while maintaining the private membership nature of a society. If the recommendations become law, many incorporated societies will need to update their constitutions while other societies will need to consider whether they should actually continue to exist.

SNIPPETS

Redundancy pitfalls for employers

An employer may make an employee redundant on the basis that there is a genuine work-related reason or business decision for that redundancy. It must be about the employee's position, not the employee personally.

In *Totara Hills Farm v Davidson* ('*Totara*') the courts demonstrated that they may examine the reasons behind such a business decision, to ensure it was fair and reasonable in the circumstances, and not a cover for some other reason for the dismissal.

In *Totara*, the Employment Court determined that although the redundancy did relate to a genuine business decision (to save costs), the savings would not actually be achieved by the dismissal. Because of this, the dismissal was held to be unjustified.

Totara highlights the burden on employers to ensure that when they make an employee redundant that not only should it be the result of a genuine business decision, but also that the redundancy will actually achieve the intended results of that decision.

Update – the NZ Emissions Trading Scheme

In 2008 the Forestry sector became the first to enter into the New Zealand Emissions Trading Scheme (ETS). The Energy and Mining sector followed in 2010 and the Waste sector in 2013. Biological emissions from the Agriculture sector were due to become part of the scheme in 2015, but this has recently been postponed indefinitely.

New Zealand is somewhat unique in the developed world because more than half our greenhouse emissions come from biological emissions from the Agriculture sector, which cannot be reduced using current technology without reducing productivity.

Including Agriculture in the ETS would result in most emitters having to purchase carbon credits to offset their emissions, as they cannot actually reduce their output (the aim of the ETS), thus increasing costs to the industry. This would put both the industry and New Zealand at a disadvantage because our economy relies on Agriculture more than most other developed countries do.

This postponement is expected to continue until there are suitable technologies available to reduce emissions and our international competitors are taking similar steps.