

Newsletter

April 2005

The Foreshore Debate

The issue of ownership of the Foreshore and Seabed entered the public arena in June 2003 when the Court of Appeal ruled that the Maori Land Court had jurisdiction to investigate customary title to the foreshore and seabed.

Proposed legislation to govern ownership of New Zealand's foreshore and seabed was controversial, and a source of much debate. However, on 24 November 2004, the Foreshore and Seabed Act 2004 ("FSA") was passed, together with amendments to the Resource Management Act 1991 ("RMA") to reflect the new legislation.

Purpose

The FSA vests the full legal and beneficial ownership of all public foreshore and seabed in the Crown, and aims to maintain public rights of access while ensuring protection of the association of Whanau, hapu and Iwi with areas of public foreshore and seabed.

Key objectives of the FSA are:

- Recognising and protecting ongoing customary rights to undertake and engage in activities, uses or practices in areas of the public foreshore and seabed;
- Recognising territorial customary rights (where there has been exclusive use and occupation of an area of foreshore (to the exclusion of persons not belonging to the group) by group members without substantial interruption from 1840 onwards, and where the group has had continuous title to the land above the foreshore).
- Enabling applications to be made to the High Court to investigate common law rights;
- Enabling successful applicant groups to participate in the administration of a foreshore and seabed reserve, or enter into formal discussions on redress; and
- Providing for general rights of public access, recreation and navigation in, on, over and across the public foreshore and seabed.

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What is the Foreshore?

Under the FSA, the foreshore and seabed is deemed to be the area between the line of the mean high water springs, and the outer limits of the territorial sea. It includes the air space and water space above that area, and the sub-soil and bedrock below.

What about My Place?

Some New Zealanders have been concerned that their coastal properties will be affected. The FSA only applies to public foreshore and seabed. Any land (including reclaimed land) that is subject to a specified freehold interest (and owned by a person other than the Crown or a local authority) and where a certificate of title for that land has been issued is excluded. However, the RMA now provides that where a section of land that includes foreshore and seabed is subdivided, the foreshore and seabed portion of that land will vest in the Crown.

Land that is reclaimed after commencement of the FSA, or which was not subject to a specified freehold interest, vests in the Crown. And (other than for limited exceptions) the Minister of Conservation will not transfer freehold title over reclaimed land, but may provide an applicant with a lesser right or interest in the land.

Access

The Act protects and secures the rights of access for members of the public in or on the public foreshore and seabed, and the right to remain in that area and engage in recreational activities in or on the public foreshore and seabed, but subject to any territorial customary rights or prohibitions or restrictions on access imposed under the FSA.



Smokefree Law

The recent amendments to the Smokefree Environments Act 1990 have generated a lot of interest in the media over the past few weeks. Although the impression sometimes conveyed by the media is that a new law has come into effect, the amendments to the 1990 Act were actually passed at the end of 2003 and provided for progressive changes over a two-year period.

The most significant are as follows:

- Imposition of a ban on access to smoking products for those aged less than 18 years of age effective from 10 December 2003.
- Buildings and grounds of schools and early childhood centres became smokefree with effect from 1 January 2004.
- Licensed premises (including bars, restaurants, cafes, sports clubs and casinos) became smokefree indoors from 10 December 2004.
- All other work places became smokefree indoors from 10 December 2004.
- Restrictions on the display of tobacco products in retail outlets apply from 10 December 2004.

Retailers

There are a number of restrictions on retailers who sell tobacco products. These include:

- A prohibition on the promotion of the sale of tobacco products with other products.
- A prohibition on promotional schemes for the sale of tobacco products.
- Restrictions as to the manner in which tobacco products can be displayed.
- Appropriate signage warning of the dangers of tobacco use which must be displayed where tobacco products are sold within 200 metres of the point of sale.
- Strict marketing directives aimed at enforcing the prohibition on the sale of tobacco or herbal products to persons under the age of 18 years.

Sports Clubs

All clubs or sporting organisations which are licensed for the sale of alcohol must comply with the new smokefree law. In particular, such organisations should be aware of the following:

- The fact that the premises are not open to the general public does not mean that compliance with the Act is not required.

- A club must take "reasonably practical steps" to ensure that it complies with the Act. Failure to do so could result in a fine.

Although the Act does not define what "reasonably practical steps" are, the Ministry of Health has issued guidelines which include the formulation of smokefree policies, displaying appropriate signage and prohibiting the sale of tobacco products on the club's premises. Further information can be obtained from the Ministry of Health.

The underlying objective in making these changes is to protect the public from the harmful effects of smoking and to further promote a smokefree lifestyle as the norm.

The changes to the law have not been welcomed by everybody, particularly some hotels and bars where employers and customers have voiced resentment at what they perceive as undue Government interference.

There are significant penalties whereby failure to comply can result in fines of up to \$4,000 in respect of each offence for companies and up to \$400 for each offence in respect of individuals. As some licensees of licensed premises (particularly hotels) have stated their intention to flout the law by continuing to allow smoking on their premises, presumably it will not be long until we have an indication as to the penalties likely to be imposed by the Courts in practice.

Ouch – That Hurt!

What do you do when you think your lawyer has charged you too much? What if the amount of the bill is significantly more than you expected or were led to believe it would be? What if an estimate was given and the bill is well over the estimate? Were you warned that the estimate was going to be exceeded?

First Steps

The first thing you should do is talk to your lawyer. Lawyers are bound by their rules of professional conduct to charge a fair and reasonable fee. Your lawyer should provide you with an explanation for the bill and should clarify the basis on which the fee has been calculated, especially if that has not been discussed in the past. As most lawyers rely on time recording as the basis for setting a fee, you might ask to see the lawyer's time records to see if there has been any time written off, or if any premium has been added to the time recorded.

If you are not satisfied with the explanation, or cannot negotiate a reduction to what you believe is a fair and reasonable fee, then the next step is to make an application to the District Law Society for a cost revision.

Cost Revision

The Law Practitioners Act 1982 provides a framework for each District Law Society to assist in a dispute by reviewing and, if appropriate, revising the bill.

Any request for a cost revision must be made within 6 months of you receiving the bill, or any longer time that may be agreed, with some exceptions. A bill can also be revised on the order of the Court if, for example, your lawyer has taken steps to obtain judgment against you for non-payment.

To apply, you simply need to write to the District Law Society and advise them of your desire to have the bill revised. They will then appoint a senior lawyer to conduct a cost revision. That reviser may obtain the time records and possibly the lawyer's file, and will then conduct a meeting between you and your lawyer to discuss the complaint.

The reviser will then give a decision as to whether the fee is justifiable or should be reduced. The time taken to arrange and conduct the hearing and deliver a decision will vary depending on the availability of the parties involved and the complexity of the matter.

Billing is a Complex Matter

There are a number of factors, other than the amount of time it took to undertake the work, that can be taken into account by your lawyer when setting a fee and rendering a bill. Those factors include:

1. Whether any specialised knowledge is required
2. The results achieved and the importance to you of those results
3. The urgency and the circumstances of the matter
4. The value of the property or money involved
5. The complexity of the matter
6. The reasonable costs of running a practice.

Also be aware that an estimate is not binding, nor will the bill be revised simply because an estimate has been exceeded, even by what seems to be a large amount. To avoid any surprises or disputes you should discuss the method of billing and the basis for the fee with your lawyer before any work is undertaken.

If you have a serious question about the amount of a bill and you are still dissatisfied after having an explanation from your lawyer, then your lawyer has a duty to advise you of the revision process. In any

event you might like to contact your District Law Society to find out more.

Key Amendments to the Employment Relations Act

On 1 December 2004 amendments to the Employment Relations Act came into force. The amendments aim to better support the key objectives of collective bargaining and good faith and provide effective processes for resolving relationship problems. It also protects employees, by including a requirement for an employee protection provision, if their job is affected by the sale or transfer of their employer's business or if their work is contracted out. The four main areas are summarised below:

1. Collective bargaining is actively promoted rather than simply permitted. Parties negotiating for a collective agreement must now conclude one, unless there is a genuine reason, based on reasonable grounds, not to. The Employment Authority can now facilitate collective bargaining in specified circumstances. Bargaining fee clauses are deemed to apply unless the employee notifies the employer in writing that the employee does not agree to pay it. Bargaining fees are to be deducted from wages and paid to the union concerned.
2. The duty of good faith – the meaning has been widened and there is now a legislative requirement for good faith behaviour. There are now penalties for failure to comply. Employers and employees need to be active and constructive in establishing and maintaining a productive employment relationship. This includes being responsive and communicative. There is a statutory requirement on an employer to consider any issues that employees (and prospective employees) raise in relation to bargaining for an individual agreement or any variation of one, and to respond to them.
3. The processes for resolving employment relationship problems now include:
 - 3.1 Providing dispute resolution services through the Department of Labour to independent contract situations

- 3.2 Procedures that allow mediators to address any party to a matter without any representative of that party being present and to express their views to one or other party with or without their representative being present, on the substance and process of the matter.
- 3.3 Allowing employers to pay by way of instalment, if financial circumstances require it
- 3.4 Ensuring that any payment goes straight to the other party and not to their representative, unless their representative is a solicitor

4. Providing protection to employees in situations where business undertakings are sold, transferred or contracted out. From 1 December 2004 all new employment agreements must contain an 'employee protection provision' which meets the requirements of the Act. For existing agreements these new provisions need to be included at the earliest of:

- 4.1 12 months after 1 December 2004;
- 4.2 When the agreement is next amended;
- 4.3 If the employer's business is restructured, before that restructuring occurs.

This clause is not required if the employees fall within the definition of 'vulnerable employees', namely those providing cleaning, food catering, caretaking or laundry services in specified sectors (i.e. school, hospitals or residential care sectors, airports, public service). These types of employees have special protections set out in the Act in the event of a restructuring.

Your solicitor will be able to provide you with further information on the amendments to the Employment Relations Act and how they may affect you.

Govett Quilliam News

New Associates

We are delighted to announce that as from 1 April 2005, Laurie Campbell, Alex Smit, Turitea Bolstad and Kirsty Rowe have been made associates of the firm.

Laurie Campbell grew up in Stratford and her parents own and operate Campbell's World Travel. Laurie attended St Mary's College before completing her secondary education at New Plymouth Girls High School. She attended Otago University where she did a double degree (law and science) and accepted a position in Govett Quilliam's Family Law Team upon completion of her professionals in May 2001. She is experienced in all areas of family law and also employment law with a special interest in mediation and restructuring.

Alex Smit joined us in August 2001 and has since practiced in the commercial and property arena and also in Employment Law. He has had wide ranging experience in the areas of property acquisition and development, commercial leasing and statutory compliance in respect of corporate and businesses. Alex grew up in Christchurch and attended Canterbury University, sat the bar exams and worked for a time in Wellington before moving to Taranaki. He takes a keen interest in the GQ sporting teams and events.

Turitea Bolstad is a descendant of Taranaki Iwi and Ngati Maniapoto. Turitea was a probation officer with the Community Probation Service prior to practicing law. Turitea attended the Waikato University Law School and graduated in 1999 and has since been in Taranaki practicing law. Turitea joined us in October 2001 and has since practiced in the litigation arena and has also covered some family law.



From left to right: Kirsty Rowe, Laurie Campbell, Turitea Bolstad, and Alex Smit

Kirsty Rowe is Taranaki born and bred and attended New Plymouth Girls High School before going to Waikato University where she studied a Bachelor of Law (hons) and a Bachelor of Management Studies (hons). Kirsty joined Govett Quilliam in July 2004 and has since practiced in the commercial arena with a special interest in trademarks, construction law, and the acquisition and restructuring of businesses.

New Consultant (Rural)



We are also delighted to announce that as from 1 April 2005 Margaret Joyce has been made a Consultant to the firm with a special expertise in farming. Margaret joined the firm in 1985 and was appointed as a Legal Executive in 1996. She is a Fellow of the New Zealand Legal Executive Institute. Margaret was born in Tikorangi and raised on a dairy farm. She and her husband now own a dairy farm at Omata where she lives with her husband and four children.



Continuing Education

The following seminars have recently been attended by members of our firm. It is a requirement that all solicitors attend seminars to keep up with legal developments in their fields of expertise. If you would like information on any of the following topics please contact us.

- ❖ *Immigration Law* - Kate Gordon
- ❖ *The PRA and Property* – , Paul Shearer, Laurie Campbell, Margaret Harrop, Keryn Broughton
- ❖ *Advising Not-for profit organisations* – John Eagles, Susan Hughes
- ❖ *Structuring and Financing Commercial Property Developments* – Paul Franklin

*Please note that all the Govett Quilliam Guides to many interesting
Legal topics and opportunities are available on line on www.thelawyers.co.nz.
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