

## NEWSLETTER – JUNE 2011



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## In a Seashell: The Marine and Coastal Area (Takutai Moana) Act 2011

On 24 March 2011, the Marine and Coastal Area (Takutai Moana) Act 2011 (“the Act”) was enacted to repeal and replace the Foreshore and Seabed Act 2004.

The call for change has been motivated by an independent Ministerial Review of the Foreshore and Seabed Act 2004, which deemed the 2004 Act unfair, as it failed to recognise the rights of all New Zealanders and was discriminatory against Maori. The new Act is the product of approximately two years of consultation between the Attorney General, on behalf of the Government, and iwi groups. According to the Attorney General Hon. Christopher Finlayson, the new Act is a “just and durable resolution to the issue, and recognises the rights of all New Zealanders in the common marine and coastal area.”

“Marine and coastal area” is defined in section nine of the Act and broadly encapsulates the area that is bounded by the line of mean high-water springs and the outer limits of the territorial sea. It also includes the beds of rivers, airspace, subsoil, bedrock and other matter that are part of the coastal marine area.

The new Act repeals the 2004 Act as it grants courts the jurisdiction to recognise customary rights where such rights can be proven under the Act. However, the granting of a customary title under the Act is distinguished from a private (fee simple) title, as the land comprised under a customary title is subject to public access and cannot be sold.

In summary, the Act:

- applies to the area formerly known as the foreshore and seabed, which will be known in the future as the marine and coastal area,
- creates a common space in the marine and coastal area which allows the interests and rights

of all New Zealanders in the marine and coastal area to be recognised in law,

- does not affect existing private titles in the marine and coastal area,
- guarantees and, in some cases, extends existing rights for navigation, ports, fishing and aquaculture,
- provides tests for applicant groups to meet, to demonstrate customary marine title in areas where they have had exclusive use and occupation since 1840 without substantial interruption.
  - This recognition will include the right to go to the High Court (or negotiate an out-of-court settlement with the Crown) to seek customary marine title for areas with which groups such as iwi and hapu have a longstanding and exclusive history of use and occupation.
  - Similar to private (fee simple) title, customary marine title gives rights to: permit activities requiring a resource consent, some conservation activities, protection of wahi tapu (sacred areas), ownership of taonga tuturu (Maori objects) found in that space, and ownership of non-Crown minerals. It also gives the customary title holder the right to create a planning document setting out objectives and policies for the area.
  - Groups such as iwi, hapu and whanau will also be able to gain recognition and protection for longstanding customary rights that continue to be exercised. Their association with the common marine and coastal area in their rohe (home territory of a specific iwi) will also be recognised through a right to participate in conservation processes, which formalises existing best practice in coastal management.

## Sleeping on the Job

In *Idea Services (an IHC subsidiary) v Phillip Dickson CA 405/2010*, the Court of Appeal affirmed the decision of the Employment Court that Mr Dickson was working throughout his sleepover and was therefore entitled to the minimum wage for the period of his sleepover.

Mr Dickson worked for Idea Services Limited as a community service worker providing care and support to people with disabilities who live in community homes. A requirement of his position was that Mr Dickson sleep overnight in the home so that he could deal with any issues that arose during the night and for security purposes. He was paid \$34.00 per sleepover, and \$17.66 per hour for any time during which he was required to be actively working and tending to the needs of the residents. If there were no incidents during the night Mr Dickson would receive \$34.00, which amounted to between \$3.40 and \$4.30 per hour depending on the length of the sleepover.

Mr Dickson claimed that he was entitled to the minimum wage prescribed under the Minimum Wage Act 1983 ("the Act") for every hour of his sleepover. This claim was upheld at both the Employment Relations Authority and the Employment Court.

The Court of Appeal was required to consider whether sleepovers constitute "work" for the purposes of section six of the Act which states:

"every worker who belongs to a class of workers in respect of whom a minimum rate of wages has been prescribed under this Act, shall be entitled to receive from his employer payment for his work at not less than that minimum rate."

The Court of Appeal agreed with the Employment Court that three factors must be considered in order to determine whether the sleepover constituted "work":

- the constraints placed on the employee's freedom to do as he or she pleases,
- the nature and extent of responsibilities placed on the employee, and
- that benefit the employer receives from having the employee perform the role.

Mr Dickson had significant restraints placed on him when sleeping over, important responsibilities that he had to attend to with respect to both the home and the residents, and the employer derived a correspondingly significant benefit. The Court of Appeal therefore agreed that in this instance all of these factors applied to a significant degree and therefore Mr Dickson's sleepovers constituted work for the purposes of the Act.

The Court of Appeal rejected Idea Services Limited's alternative argument that the Act was breached only if the employee's average rate of pay over a pay period was less than the prescribed minimum.

This decision will have a great impact on the disability services sector. Ralph Jones, chief executive of Idea Services Limited is quoted as saying this decision would cost the organisation about \$176 million in back payments. Idea Services Limited have lodged an application for an appeal against the Court of Appeal decision, and the outcome is likely to be newsworthy.

## 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.

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 on-going 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.

## Changes to Manage Legal Aid Spending

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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 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.

## Copyright (Infringing File Sharing) Amendment Bill

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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 it’s 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.

## Snippets

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### Employment Law Update

In the case of *Costley v Waimea Nurseries Limited* [2011] NZERA Christchurch, the Employment Relations Authority ("ERA") found that Mr Costley was unjustifiably dismissed for using drugs at work because Waimea did not disclose to Mr Costley information that was relevant in reaching their decision to dismiss him.

It was reported to Waimea's nursery manager, Mr Jameson, that Mr Costley and another employee (Api) may be consuming drugs during their lunch breaks. Mr Jameson met with each employee separately and told them of his suspicions. Api confessed that he and Mr Costley were smoking marijuana at lunch time. Mr Costley was not told about Api's admission or the identity of the person who raised concerns about their suspected drug use.

The ERA found that by not disclosing Api's admission to Mr Costley, Waimea had withheld the piece of information that was most relevant to the decision to dismiss, and that this was a breach of s4(1A)(c) of the Employment Relations Act 2000.

This decision serves as a timely reminder that employers must follow a fair procedure when disciplining or dismissing employees including providing the employee with any relevant information that may be relied on by the employer in reaching their decision.

### A King or a Queen – The Law of Succession

Following the recent marriage of Prince William and Kate Middleton, the expectation of children in the future raises the question of succession for the future King or Queen of New Zealand.

Succession to the British Throne is passed on by "male-preference primogeniture". The rule has been in place for over 300 years and means male children are preferred over female children and an older child is preferred over a younger child of the same gender.

The British Government is currently consulting with Commonwealth countries about changing the laws on Royal Succession to enable an older sister to succeed over a younger brother.

Recently our own Prime Minister, Hon. John Key, has said he agrees that the current rules, which could block the succession of a first born daughter of Prince William and Kate Middleton, are "old fashioned". However, because the British Monarch is also head of state of Canada, Australia, nine countries in the Caribbean, three in the South Pacific as well as New Zealand, it would have to be approved by all these countries.

## Govett Quilliam Profile

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Brad is a registered legal executive. He joined Govett Quilliam in 1984 and is a member of one of our commercial teams. Prior to Brad's enrolment as a member of the New Zealand Institute of Legal Executives in 1988, he worked in the banking industry.

Brad acts on a wide range of conveyancing and property transactions, subdivisions as well as trusts and asset protection. Brad has developed an expertise in easements and eDealings.

Outside of the office, Brad enjoys golf, cycling and keeping fit

## Continuing Education

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

- Legal, Tax & Practical Issues with business structuring – Catherine Pfister
- GST Changes for Land Transactions – Stu Barraclough, Sandy Ellice, Karen Wood, Ross Fanthorpe, Alice Davies, Margaret Joyce, Brad Miles.
- Update on Contract Law – Troy Wano and Lauren Wallace
- Taxation - Forestry Emission Trading Scheme – Stu Barraclough
- Introduction to Family Law Advocacy and Practice – Annabel Dennett
- Trusts – John Eagles

## Govett Quilliam News

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### New Associates – Nina Elliott and Alice Davies



The partners of Govett Quilliam are delighted to announce the appointment of two new associates as from 1 April 2011.

Nina Elliott works in our New Plymouth office in the family law team and specialises in family, matrimonial and relationship property matters. Alice Davies works in our Inglewood office and specialises in commercial law, rural law, wills and trust formation.

### Welcome to Troy Wano



Troy Wano joined our civil litigation and employment team in March 2011 after returning to Taranaki with his wife and four children from the UK. Troy specialises in general civil and commercial litigation and employment law. Troy has an extensive background in general civil and commercial litigation, including breach of contract, employment, insolvency, construction and property law, debt recovery, banking and finance, partnership and company law disputes.

Troy is a keen sportsperson and is attempting to relearn how to surf. He coaches his eldest son's soccer team. Troy is of Taranaki, Te Atiawa and Ngati Awa decent.

### Congratulations



Congratulations to Charlotte Williams who graduated on Monday 9 May 2011 receiving a Bachelor of Business with a marketing major through Massey University. Charlotte has completed her degree extramurally and has been part of our team at Govett Quilliam for over four years.

Charlotte is Govett Quilliam's marketing coordinator and is responsible for the organising and coordinating the firm's promotion, advertising and marketing activities and designing advertisements and promotional material for the firm.

### Govett Quilliam Squash Team



The GQ Tigers welcomed a new member in this round of the Business House squash league. Troy Wano stepped into the number two spot and blew us all away with his dedication and superior squash skills. This new talent, combined with the old stalwarts of Murray Keast, Paul Franklin, Alex Laurenson and Heather Froude proved very successful and the team placed third overall. Our best result yet.

## Baby News



There is something in the water at Govett Quilliam! Congratulations to Annalyse and Andrew Maycock on the birth of their daughter Alice on Saturday 19 March, weighing 7lb 15oz. Congratulations also to Anna Haase and Daryl Wood on the birth of their daughter Maia on 19 April weighing 6lb 13oz.

## Gift Duty Changes

Family Trusts have long been used for asset protection. One of the issues with Trusts has been the need to gift the value of the asset from the settlors to the trustees to avoid paying gift duty. Either \$27,000 or \$54,000 (in the case of two donors) was gifted per annum to reduce the debt and to avoid gift duty.

With the abolition of gift duty on 1 October 2011, that paperwork can be avoided and it appears one gift for the value of the asset transferred can be filed at once. Clients with an existing Trust can gift the balance of the loans to their trustees in one gift.

We recommend clients who are keen to find out more about Trusts to contact us.

## Govett Brewster Art Gallery

### New Exhibitions

- **Fiona Pardington: The pressure of sunlight falling – 11 June – 28 August 2011**

Fiona Pardington's *The pressure of sunlight falling* is a powerful series of large-scale photographs depicting life casts made from indigenous peoples of the South Pacific during one of French explorer Dumont d'Urville's voyages in the early 1800s.

- **Presence: New Acquisitions and Works from the Collection – 18 June – 28 August**

Since the mid-1960s the Govett-Brewster Art Gallery has been building a strong permanent collection of work from Aotearoa New Zealand and the Pacific. *Presence: New Acquisitions and Collection Focus* features important new acquisitions by photographers Mark Adams and Peter Peryer alongside Lisa Reihana's haunting stop-frame animation, *A Maori Dragon Story*, earlier photography by Fiona Pardington and a sculptural wall work by Jacqueline Fraser that addresses a colonial legacy of cultural repression.

### Monica Brewster Evenings

The Monica Brewster Evening in association with Govett Quilliam –The Lawyers brings an impressive array of national and international artists and cultural thinkers to New Plymouth. The evenings offer exceptional speakers, art, food, wine and conviviality. The events are also supported by Michael Radich Wine Merchant. Entry \$12, Friends of the Govett-Brewster \$8, students with ID free.

- **Roger Blackley – Tuesday 28 June 6pm–8pm**

Roger Blackley is an expert in colonial New Zealand art, presently teaching art history at Victoria University of Wellington. Previously Curator of Historical New Zealand Art at the Auckland Art Gallery, Toi o Tamaki, Blackley organised exhibitions including *Two Centuries of New Zealand Landscape Art* (1990), *Golden Evenings: The Art of Alfred Sharpe*, 1993 and *Goldie*, 1997.

- **Shigeyuki Kihara - Tuesday 26 July 6.00pm–8.00pm**

Shigeyuki Kihara is a leading inter-disciplinary contemporary artist and freelance curator/cultural producer who explores the intersection between visual arts, performance and theatre of Japanese and Samoan heritage, Kihara has represented New Zealand at the 4<sup>th</sup> Asia Pacific Triennial and the 4<sup>th</sup> Auckland Triennial. Kihara's first solo museum exhibition in North America entitled *Shigeyuki Kihara: Living Photographs* (2008-09) was held at the Metropolitan Museum of Art, New York; these works are now held in the museum's permanent collection.

- **Fiona Pardington - Tuesday 23 August 6.00pm–8.00pm**

Photographer Fiona Pardington investigates psychoanalysis, medicine, voyeurism, memory and the body, creating evocative photographs and exploring ambiguities of simultaneous solicitation and resistance. Pardington's more recent work explores the formality of the photographic still life, particularly in relationship to taonga (treasured artefacts found in museums, offering limitless ways of seeing traditional objects through contemporary eyes.

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