Terrace End Law

Director – Alison Green
Registered Legal Executive – Necia Parker
Family Lawyer – Mary Spillane

P O Box 5560, Palmerston North 4440 I Ph: 06 355 5303 I Fax: 06 355 5302 I Email: reception@telaw.co.nz

NEWSLETTER

Issue 3
Aug – Oct 2021

INSIDE THIS EDITION

All information in this newsletter is to the best of the authors' knowledge true and accurate. No liability is assumed by the authors, or publishers, for any losses suffered by any person relying directly or indirectly upon this newsletter. It is recommended that clients should consult a senior representative of the firm before acting upon this information.

New purchase price allocation rules

The purchase price allocation ("PPA") income tax rules came into effect on 1 July 2021.

These rules are particularly significant to those selling and purchasing commercial property and businesses. PPA is where parties allocate the total purchase price among the various types of assets in a transaction, such as buildings, stock and plant etc.

For transactions entered prior to 1 July 2021, parties could allocate the purchase price to assets outside of sale and purchase agreements to achieve more favourable tax outcomes. For example, a vendor would allocate less of the purchase price to a depreciable asset to reduce their income upon sale and accordingly their tax liability, whereas a purchaser would allocate more of the purchase price when buying the same depreciable asset to increase their expenses and thus reduce their tax liability.

The new rules provide for prescribed PPA, which ideally should be included in agreements and based on market value to uphold NZ's tax base.

The rules apply to mixed asset transactions i.e., business asset sales, farm and forestry sales, commercial property sales and high value residential sales which generally involve two or more categories of assets.

The rules do not apply to mixed asset transactions below $1 million and residential sales below $7.5 million; however, it is still best practise to agree on the PPA where applicable.

It is suggested that the agreed PPA is included within sale and purchase agreements before they are entered, and where it is not agreed or for urgent or unconditional transactions, provision is made within the agreement for the parties to agree on the PPA within a certain timeframe following settlement.

Once the PPA is agreed, each party must use it when completing their next respective tax returns.

The PPA must be based on market value, and where IRD considers the agreed allocations do not reflect this, it can prescribe a different PPA.

Where parties to a transaction cannot agree on a PPA prior to filing the next relevant tax return, the vendor can determine the PPA within 3 months from settlement by notifying IRD and the purchaser. If the vendor fails to do this, the purchaser may determine the PPA within 6 months from settlement by notifying IRD and the vendor. If the purchaser does not notify both parties, the IRD determines the PPA, and the purchaser may be denied any entitled tax deductions until the next tax year.

To avoid the situation above where the vendor may in the first instance unilaterally determine the PPA where it is not agreed from the outset, it is important to raise this issue when discussing the terms of a transaction, together with obtaining the relevant tax and legal advice prior to entering a binding agreement.

It is also suggested that independent market values are obtained for the assets involved to reduce the risk of IRD overturning a PPA agreed between the parties.

For tailored advice on the new PPA rules, you can contact your legal and tax advisors.

Enduring Power of Attorneys – A brief guide

Life can be uncertain and we never know what is just around the corner. No matter what age you are, anyone could have an accident or become seriously ill. In these circumstances, someone needs to step in and make sure the bills are paid, the kids are looked after and you are being cared for properly by the people around you making decisions.

An Enduring Power of Attorney ("EPA") is a document which appoints someone to make decisions on your behalf or sign documents for you, in the event that you become incapacitated. In this document, you are known as the "donor" and the person that you appoint to act on your behalf is known as the "attorney". An attorney can be any person of your choosing who you trust to carry out your wishes; however, they must be over the age of 20 and mentally capable. You also have the ability to appoint more than one attorney to manage your affairs; however, you must specify whether all of the attorneys have to agree on decisions or if any of the attorneys can act individually. In addition, you can name successor attorneys, in the event that your first choice passes away or becomes mentally incapacitated themselves.

There are two different types of EPAs, one which relates to property and one which relates to personal care and welfare. The property EPA relates to everything you own, including property, bank accounts, investments and chattels, whereas the personal care and welfare EPA relates to the way you are cared for and medical related decisions. With a property EPA, you have the choice whether the EPA can be invoked only if you are mentally incapable or whether it can be effective as soon as you sign the EPA. This option is beneficial if you are overseas or temporarily unable to deal with your own finances but still have mental capacity to make decisions.

A personal care and welfare EPA can be invoked when a medical practitioner undertakes an examination of you and determines and certifies that you are mentally incapable. Once this EPA kicks in, your attorney has the power to make decisions on your behalf that relate to anything regarding your care and welfare.

In the event you become incapacitated and you are unable to make decisions for yourself but you have not signed an EPA, then it may be necessary to apply to the Family Court for an order. The only people who can apply to the court for an order include a family relative, a social worker, a medical doctor or the manager of the facility where you are being cared for. The court then appoints an independent lawyer to look into matters and report to the court. Once this report is completed, the court makes a decision on who to appoint as your "manager" to look after your property and who to appoint as your "welfare guardian" to look after your personal care and welfare. This process can become costly and timely in addition to being stressful for your loved ones, so it's better to be prepared and have an EPA ready to go, just in case the worst happens.

Modifying or extinguishing restrictive covenants

A restrictive covenant is a contract between two parties that is restrictive in nature; a promise not to do something. The unique feature of restrictive covenants is that once they are noted on your title, they run with the land and bind subsequent owners. Some of the issues that can arise are around their interpretation, modification or removal and remedies (if available).

There are two primary ways to modify or extinguish a restrictive covenant (or easement); either by agreement or by statute. As we all know, sometimes the 'by agreement' route can be as troublesome as trying to herd cats.

If you are unable to obtain a collective agreement to the modification or extinguishment, then sections 316 and 317 of Property Law Act 2007 may be your next port of call.

An application to the court can be made under section 317. There are six grounds under which an application can be made for an order to modify or extinguish the easement or covenant.

The first ground relates to whether there has been a change which means that the covenant should be modified or extinguished. This could come in the form of a change of use in the land, the character of the neighbourhood or any other circumstance the court considers relevant.

The second ground relates to the change in nature or extent of the impediment that the ground creates i.e., a covenant that restricts building to a type of building that the land was zoned for at the time the covenant was created. Should the zoning subsequently change, the courts may be agreeable to making an order that a change in nature has occurred and the covenant may be modified or extinguished.

The third ground is by agreement or waiver from all the parties that have the benefit of the covenant.

The fourth ground relates to the fact that the change to the covenant will not substantially injure the person entitled to it. The recent case of Synlait Milk Limited v New Zealand Industrial Park Limited 2020 set down a two-stage approach for this ground, which noted that on top of the 'no substantial injury' requirement to the owner of the benefitted land, a further stage was included which looked at the justification to changes in the neighbourhood. In this instance, the land had been rezoned and there were other industrial plants in the area.

Section 317(2) allows for compensation to be paid, as determined by the courts. This refers to what reasonable compensation person A would need to pay to person B to have/agree to have the covenant extinguished/modified.

Section 115 of the Land Transfer Act 2017 refers to redundant easements. This is another route that can be utilised to extinguish an easement, in the circumstance where all or part of the land that has the benefit of the easement no longer adjoins the land that has the burden, either by a result of a subdivision or any other reason. The result of which provides that the easement no longer has any practical benefit.

Careful consideration should be given to any challenge, because not only is the result of the court process uncertain, it can be long and costly.

Smart watches for our kids – How safe are they?

The internet of toys and internet of things are interchangeable; they both refer to smart devices that, at their most basic, are physical objects that connect to the internet, which in turn allows them to send, receive and exchange data with the user. Smart watches come under this terminology.

Like any other device that connects to the internet, these items are open to the risk of having security and privacy breaches. How this data is then used is one of the main concerns.

There are many well documented risks associated with these devices; smart watches can be hacked for their GPS location, conversations can be listened to and the camera used to spy.

The Norwegian Consumer Council (Forbrukerrådet) have previously reported on the hacking of these devices that have camera and speaker capability and that also track the location of your child via GPS.

The responsibility of checking privacy and security of a product are placed with the purchaser; the parent.

The Norwegian Consumer Council have looked into the terms and conditions of various smart devices and toys and noted there were issues in relation to privacy, security and rights, with a distinct lack of regard for any of these, even on a basic level. Further issues were found in terms of data retention, termination and transfer of information to third parties.

The companion apps to these devices can be equally as disappointing in terms of security. The regulation of these devices is, to put it mildly, confusing. Devices are made in one location and then sold all around the world. Once a product enters another jurisdiction, that product should adhere to their specific laws and policies.

The privacy principles of the New Zealand Privacy Act 2020 govern how personal information should be collected and handled. In particular, privacy principle 4 has a particular focus on children,

providing that personal information may be collected by an agency only by lawful means and on the particular circumstance of each case. When having regard to children, it is to be fair and that it will not intrude upon the personal affairs of the individual.

If a person feels their privacy has been interfered with, they can follow the complaints procedure under section 70 of the Privacy Act 2020 by making a complaint to the Privacy Commissioner or the Ombudsman.

The complaints procedure appears to be relatively straight forward; however, how complex the process may become when a complaint is made about an overseas organisation is unclear.

The underlying message here is for parents to do their research and read the terms and conditions before purchasing a smart watch for their children.

Particular consideration should be given to whether you will be provided notifications as to a change in terms, limiting the use of personal data, the deletion of data from the app, the ability to set automatic deletion of location data after a set period of time, to be able to delete your account and a clear note of where possible data is stored (and transmitted to).

Snippets

When rural farm debt requires solutions

All businesses have their financial ups and downs and farming businesses are no exception. A new act, the Farm Debt Mediation Act 2019, is designed to assist, while also avoiding the spotlight which often publicly shines when debt needs addressing.

The mediation services under this Act are under the control of the Ministry for Primary Industries who are able to provide independent mediators. Those mediators are an integral part of a process that is structured to confidentially assist secured creditors (primarily banks) and their farming borrowers to attack debt related problems when those issues initially arise.

While mediation decisions are not necessarily binding and do not always produce an agreed result, they are today a compulsory first step in a process looking to point farmers and their lenders in the right direction when loan repayment becomes a problem

There are often many strands around farm debt, with an end result of preventing the parties from separating out the wood from the trees.

Legal advisors are often introduced to these types of debt problems early and therefore have a role to play in advocating at a mediation while helping their farming clients prepare for one.

There are always cash flow issues in rural businesses. Down times between seasons and the like. Stress levels rise with loan concerns at certain times, freezing borrowers into inaction. This mediation gets the parties talking.

Primary production businesses involved in agriculture (including sharemilkers), apiculture and horticulture should all be up to speed with this possible solution.

Three Waters debate

Water is a precious and essential resource for us all. Its use and sustainability are constantly under review to ensure it is treasured and used in the most efficient and effective way.

The future of water use is a hot topic again. There is a wide-ranging debate gathering momentum. Costs around everything to do with water use are high and are always destined to be higher as the population of New Zealand grows. In the current discussion the areas of storm water, waste water and drinking water are all in the spotlight, hence the reference to three waters.

Management of the waters has a direct link to the price we all have to pay to use all branches of this commodity. Reform proposals contemplate gathering the three strands into four new water related entities.

Economies of scale is mentioned as a solution to keeping, increasing and maintaining all pipes, pumping stations and other plant, together with all the related infrastructure.

All sectors of New Zealand life are affected, so everyone has an opinion as to how a re-structure will best serve them. Accordingly, it is important to join this debate, make submissions and be proactive.

Your legal advisers are able to assist in many ways as clients look to formulate their individual and collective responses to a far-reaching issue; one requiring an innovative and workable future plan delivering the benefits we all deserve.

If you have any questions about the newsletter items, please contact me, I am here to help.