

Fineprint



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Legal Health Check for Businesses

It's essential for your business to be compliant

Another trading year is almost at an end. You concentrated on increasing business income, you've built (or improved) your business systems, you believed in yourself and your product/service and profits have improved.

However, whilst you have been busy minding your own business you may have only briefly considered how changes in legislation or regulations might affect your business, and how you may need to adjust your management systems to include those changes.

Below we note some recent legislative changes that you should already have adopted into your business processes. We also alert you to upcoming changes so you can make preparations to ensure that your business complies as soon as they come into force.

Employment Relations Act 2000

Changes to flexible working arrangements came into force on 6 March 2015.

Your employees may now request a variation of their working arrangements (without requiring a reason to be given). An unlimited number of requests for flexible working arrangements can now be made.

To ask for flexible working arrangements, your employee's request must be in writing, stating their name, the date the request is made and that the request is made under Part 6AA of the Act. They must also specify whether the request is permanent or temporary, the dates that the arrangements are to begin (and end, if a temporary arrangement), and provide an explanation in their view of what arrangements within the business you as their employer will need to make to accommodate the new arrangements, if the request is granted.

As an employer, you have a maximum of one month to grant or refuse the request. The decision must be notified to your employee in writing.

A request may only be refused on the grounds contained in the Act and reasons must be provided for relying upon the particular grounds of refusal.

The grounds for refusing a request are an inability to reorganise work amongst existing staff or to recruit additional staff, detrimental impact on quality, the performance or inability to meet customer demand, insufficiency of



work during any proposed period of work, planned structural changes and the burden of additional costs.

The request must be refused if a collective agreement applies to the employment.

If you don't comply with this legislation, the Employment Relations Authority could impose a fine of up to \$2,000 per breach. The fine would be payable to your employee.

Key take away: Know the entitlements of your employees. Failing to provide those entitlements can have real and significant consequences for a business.

Changes to consumer legislation

There have been incremental changes to the Fair Trading Act 1986 and Consumer Guarantees Act 1993 with critical dates being 18 December 2013 and 18 June 2014 (see *Fineprint* issue 63, Autumn 2014 for a full description of the changes).

On 17 March 2016, unfair terms in consumer contracts will be prohibited under the Fair Trading Act. This amendment has been deliberately delayed to allow businesses time to review their standard form consumer agreements, whether they be terms of trade or credit, or some other standard form agreement.

Creating the right balance between consumer protection and protecting your legitimate business interests can be a minefield.

If you're at all unsure on how to proceed on reviewing your trading terms and consumer agreements, please get in touch with us.

Key take away: Building customer confidence in your product or your service is vital. Inappropriate market behaviour can harm your business.

Companies Act 1993

If you are looking to incorporate a company, since 1 May 2015 at least one director must live in New Zealand or Australia.

If the director lives in Australia then he or she must also be a director of a registered Australian company and must supply his or her name, the company name, address and Australian Company Number (referred to as an ACN).

You must also provide the date and place of birth of each director of the proposed company and details of any 'ultimate holding company'.

There do not appear to be any exceptions to this. If you have a company, then this should have been completed by 28 October 2015. If not, don't delay making those changes as there is a risk your company could be removed from the Companies Register.

Key take away: You must know your trading entity. If you are trading as a company then you must understand the associated compliance aspects to maintain the benefits of trading under that structure.

Workplace law changes

The Health and Safety at Work Act 2015 will come into force on 4 April 2016. This replaces the Health and Safety in Employment Act 1992 and its many amendments.

This legislation brings significant changes to workplace health and safety, and means that health and safety matters must be high on your business agenda. We outline below a snapshot of significant responsibilities and obligations.

The legislation places the primary duty of care on the person, or persons, carrying on a business or undertaking (PCBU).

A PCBU must ensure, so far as is reasonably practicable, the health and safety of its employees, while they are at work in the business or undertaking.

If you have a 'zero-employee' business, there is also a duty on you to ensure your own health and safety whilst undertaking your business.

Further, a PCBU must ensure, so far as is reasonably practicable, that the health and safety of other people is not put at risk from work carried out as part of the conduct of the business or undertaking.

As you can see, your primary duty of care is not owed to just your employees, but you also have an obligation to other people such as clients, customers and/or visitors who enter your workplace such as product reps, tradespeople and investors.

'Reasonably practicable' is defined in the Act. Briefly, a PCBU must do what is reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters.

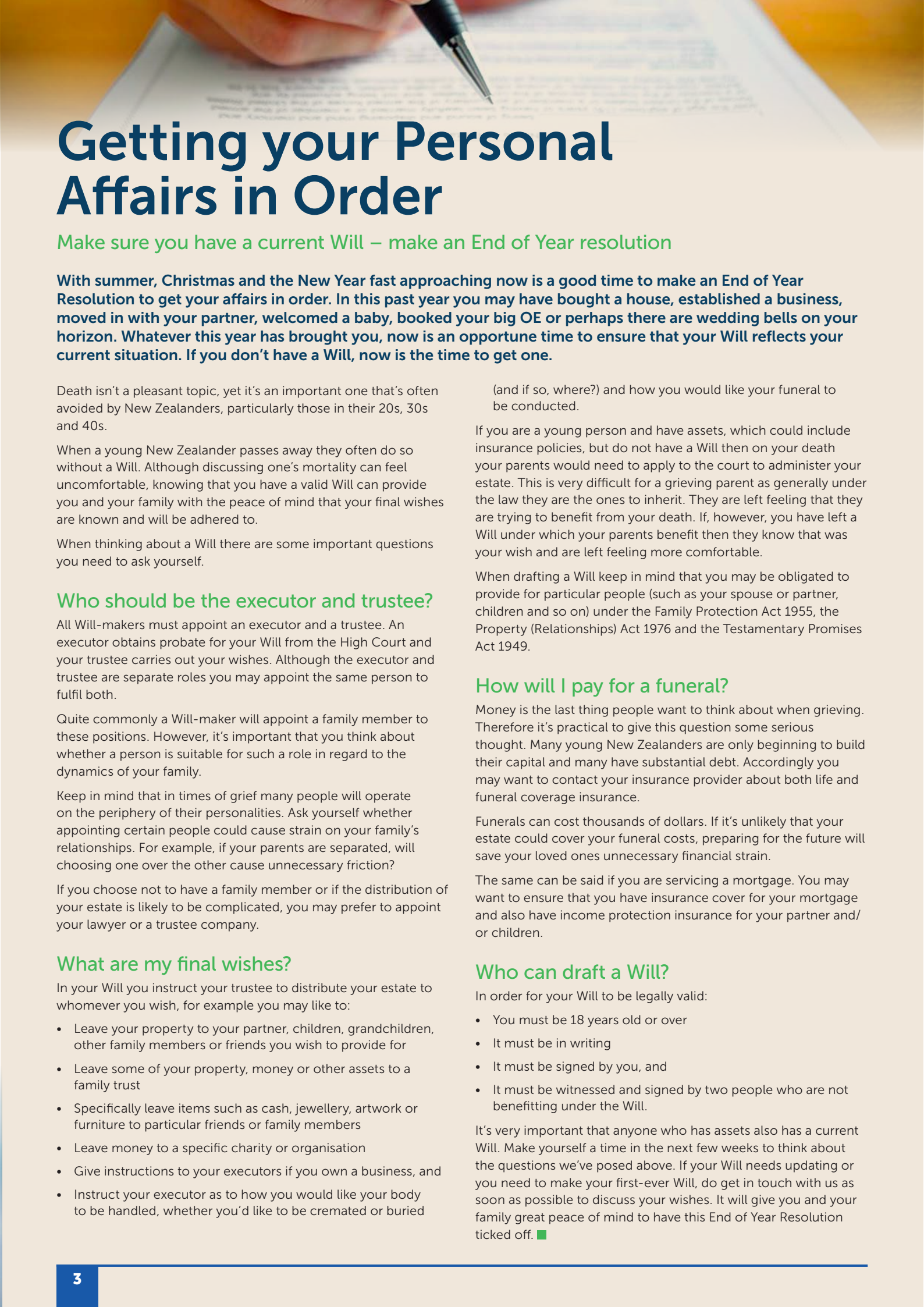
This includes weighing up the likelihood of the hazard or risk occurring, the degree of harm that might result from the hazard or risk, the availability and suitability of ways to eliminate the risk and the costs associated with the above, and whether or not those costs are disproportionate to the risk.

This is a principle set out in the purpose of the Act; workers and other people must be given the highest level of protection against harm to their health, safety and welfare from hazards and risks arising from work.

To avoid any harm, no matter how minor, it must be diligently and proactively managed.

Key take away: Proactively manage your risk and don't be at all tempted to develop a 'culture of cost cutting' in your business.

As you can see there is a raft of recent (and upcoming) legislative changes that have significant implications for your business; in this article it's impossible to cover every point. If you're unsure on how to tackle any of them or want more detailed information, do talk with us early on so you can be sure your business is legally compliant. ■



Getting your Personal Affairs in Order

Make sure you have a current Will – make an End of Year resolution

With summer, Christmas and the New Year fast approaching now is a good time to make an End of Year Resolution to get your affairs in order. In this past year you may have bought a house, established a business, moved in with your partner, welcomed a baby, booked your big OE or perhaps there are wedding bells on your horizon. Whatever this year has brought you, now is an opportune time to ensure that your Will reflects your current situation. If you don't have a Will, now is the time to get one.

Death isn't a pleasant topic, yet it's an important one that's often avoided by New Zealanders, particularly those in their 20s, 30s and 40s.

When a young New Zealander passes away they often do so without a Will. Although discussing one's mortality can feel uncomfortable, knowing that you have a valid Will can provide you and your family with the peace of mind that your final wishes are known and will be adhered to.

When thinking about a Will there are some important questions you need to ask yourself.

Who should be the executor and trustee?

All Will-makers must appoint an executor and a trustee. An executor obtains probate for your Will from the High Court and your trustee carries out your wishes. Although the executor and trustee are separate roles you may appoint the same person to fulfil both.

Quite commonly a Will-maker will appoint a family member to these positions. However, it's important that you think about whether a person is suitable for such a role in regard to the dynamics of your family.

Keep in mind that in times of grief many people will operate on the periphery of their personalities. Ask yourself whether appointing certain people could cause strain on your family's relationships. For example, if your parents are separated, will choosing one over the other cause unnecessary friction?

If you choose not to have a family member or if the distribution of your estate is likely to be complicated, you may prefer to appoint your lawyer or a trustee company.

What are my final wishes?

In your Will you instruct your trustee to distribute your estate to whomever you wish, for example you may like to:

- Leave your property to your partner, children, grandchildren, other family members or friends you wish to provide for
- Leave some of your property, money or other assets to a family trust
- Specifically leave items such as cash, jewellery, artwork or furniture to particular friends or family members
- Leave money to a specific charity or organisation
- Give instructions to your executors if you own a business, and
- Instruct your executor as to how you would like your body to be handled, whether you'd like to be cremated or buried

(and if so, where?) and how you would like your funeral to be conducted.

If you are a young person and have assets, which could include insurance policies, but do not have a Will then on your death your parents would need to apply to the court to administer your estate. This is very difficult for a grieving parent as generally under the law they are the ones to inherit. They are left feeling that they are trying to benefit from your death. If, however, you have left a Will under which your parents benefit then they know that was your wish and are left feeling more comfortable.

When drafting a Will keep in mind that you may be obligated to provide for particular people (such as your spouse or partner, children and so on) under the Family Protection Act 1955, the Property (Relationships) Act 1976 and the Testamentary Promises Act 1949.

How will I pay for a funeral?

Money is the last thing people want to think about when grieving. Therefore it's practical to give this question some serious thought. Many young New Zealanders are only beginning to build their capital and many have substantial debt. Accordingly you may want to contact your insurance provider about both life and funeral coverage insurance.

Funerals can cost thousands of dollars. If it's unlikely that your estate could cover your funeral costs, preparing for the future will save your loved ones unnecessary financial strain.

The same can be said if you are servicing a mortgage. You may want to ensure that you have insurance cover for your mortgage and also have income protection insurance for your partner and/or children.

Who can draft a Will?

In order for your Will to be legally valid:

- You must be 18 years old or over
- It must be in writing
- It must be signed by you, and
- It must be witnessed and signed by two people who are not benefitting under the Will.

It's very important that anyone who has assets also has a current Will. Make yourself a time in the next few weeks to think about the questions we've posed above. If your Will needs updating or you need to make your first-ever Will, do get in touch with us as soon as possible to discuss your wishes. It will give you and your family great peace of mind to have this End of Year Resolution ticked off. ■

Teenagers and Alcohol

Some harsh remedies when retailers sell to minors



For generations, teenagers have tried every trick in the book to get their hands on alcohol before they are legally old enough to buy it. However, it's getting more and more difficult to do so. This article looks at the legislation and what happens when a retailer sells alcohol to a minor.

It's almost three years since the Sale and Supply of Alcohol Act 2012 came into force with various provisions introduced on a transitional basis. It's interesting to see how the case law has developed in this time. There's no doubt that Parliament intended to give a mandate for a more vigorous approach when imposing penalties such as suspensions and cancellations.

Recent cases indicate that the Alcohol and Regulatory Licensing Authority is taking a hard-line approach on sales to minors.

It's a serious offence

The sale of alcohol to minors is considered one of the most serious offences under the Act. Several supermarkets and bottle stores have had their licences suspended in the last few months. Most were the result of police 'Controlled Purchase Operations', more commonly known as 'stings'.

In July 2015 the Authority suspended the off-licence held by Super Liquor Anderson's Bay¹ for 21 days following an incident in October 2014 when two 16-year-olds purchased a four-pack of RTDs. They weren't asked for identification.

The company has paid a heavy price for a staff member's mistake. While a supermarket subject to a ban on alcohol sales can still trade, there's little point in a bottle store opening its doors to only sell products such as chippies and cigarettes.

The Authority held that while there had been no previous sales to minors at Super Liquor Anderson's Bay, the company held other licences and had failed five previous stings in the Dunedin area between 2007 and 2014.

Meanwhile in August 2015 the Kilbirnie Pak'nSave² in Wellington was banned from selling alcohol for five days. Two 16-year-olds had purchased alcohol despite showing the staff legitimate passports that showed they were under age. The checkout operator concerned has since been dismissed from employment.

In September 2015 three Auckland Countdown supermarkets, in Sylvia Park, St Johns and Mt Roskill were banned from selling alcohol for between three and five days³.

1 McCarthy Enterprises Limited [2015] NZARLA 466–467

2 Galt's Supermarket Limited [2015] NZARLA 365–366

3 General Distributors Limited [2015] NZARLA 503–508

Important to check ID

In two of the Countdown stings the underage teenagers had handed over identification. The staff checked the identification but the sale was completed anyway allowing a 17-year-old to buy a \$10 bottle of wine and a 16-year-old to buy a four-pack of cider. The Authority has been critical of the Countdown chain for what it considered to be systemic issues in Countdown's operations.

These businesses face a heavy penalty for what are simple mistakes. Staff members get tired or distracted and simply forget the most basic of tasks. It is equally simple to avoid this mistake. Thorough checking of identification and robust staff training is essential. Some employers have been known to include provisions in their employment contracts that provide disciplinary action should the liquor legislation be breached.

The 2012 Act also introduced new provisions in respect of what is known in the industry as a 'holding'. If a licensee has three holdings (breaches) within three years, the police must apply for cancellation of the licence. There's no discretion.

The last year has also seen an increase in penalties for managers' certificates. For those whose livelihood is as a bar or bottle store manager, this is at risk if a certificate is suspended. This may be the case when it's not even the manager who carries out the sale. Managers are responsible for the actions of their staff and will be penalised. Staff members can also be prosecuted.

When the 2012 legislation had its first reading in Parliament, the Minister of Justice said:

"This is a large Bill, but its objects are simple. It zeros in on alcohol-related harm, crime, disorder and public health problems, especially where our young people are concerned"

The Authority is clearly doing all it can to achieve these objects. There's no doubt that the Authority wants to hammer the message home – sales to minors are unacceptable. ■

Supplying drinks to young people

Over the summer, young people will be keen to celebrate the end of the school year and enjoy the long holidays.

It's timely to remind you that it's a criminal offence to supply alcohol to anyone under 18 years old without the 'express consent' of their parent or their legal guardian. Express consent can come from a conversation, an email or text. (Express consent isn't required if the young person is married, in a civil union or living with a de facto partner.)

Earlier this year a Christchurch woman appeared in the District Court and was fined \$2,400 for supplying alcohol to six teenagers at her daughter's 14th birthday party.

The courts have sent a clear message to those supplying alcohol to minors; such offending is unacceptable. If you're hosting a party for your teenager, you should speak to other parents first. Even a casual barbecue with a couple of beers could result in a conviction if another parent was to report anything to police. ■

Ensuring Sufficient Feed for Stock When Buying a Farm

When you are selling, buying or leasing a rural property one of the things that you should take time to consider is what grass or supplements will be available for the incoming farmer's stock. This is a matter for both the landowner, when selling and leasing, and the prospective purchaser or lessee to establish – regardless of what time of year settlement is to occur.

Often in rural land agreements there's provision for a determination of the average grass cover that's to be left at settlement, and the mechanisms to be applied if there's a shortfall. Frequently it's agreed that an independent farm consultant measures the available pasture and, in the event of a feed shortfall, requires that supplementary feed be purchased and transported to the property, or for a cash payment to be made as compensation. Each of these options needs careful consideration depending on when settlement will occur and what the availability of feed will be.

Good husbandry provision

Alternatively, the agreement may not even address the matter, or provide that the vendor or lessor shall farm 'in a good and husband-like manner in accordance with normal agricultural practice in the district'. This general and broad rule of thumb approach provides that the farmer will use his/her best endeavours to farm in a prudent manner. However, while enforceable, this provision for good husbandry raises the debate of what is good husbandry in a particular situation and location. Each farmer farms differently – whether it's stocking levels, stock types, or stock and pasture welfare.

In entering into a sales agreement, or a lease, the incoming farmer needs to have certainty as to what feed will be available at a given time. Make sure you contact us (before you sign the agreement) to discuss how to best protect your position to ensure you know where you stand.

Early access?

Also to be considered when negotiating the sale or lease is whether the incoming farmer should seek early access in order to prepare the planting ground with winter crops, or to arrange for the destocking of some or all of the pasture to ensure suitable feed is available on settlement.

Lessors need also to consider what feed, including supplements, is being left for the incoming lessee at the start of the lease, and to establish what feed the outgoing lessee will leave at the end of their lease. One provision could be that the tenant is required to leave sufficient pasture as was present when the lease began. If the pasture wasn't measured, this is difficult to enforce. Or if the landowner or outgoing lessee destocks early, this may result in the incoming lessee having to destock early themselves in order to match the grass cover at commencement date.

Some pre-thought and negotiation by the parties when entering into a farm sale or a lease agreement will reduce the likelihood of dispute and allow a smooth transition for all, as well as sufficient pasture and/or feed for your stock. ■

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Postscript



Significant changes ahead in construction industry

The construction industry will see some significant changes in the long-awaited Construction Contracts Amendment Act which was passed in October. The impact will be felt by every building owner, homeowner, contractor and subcontractor.

This new legislation will require retentions money – that could previously be put at risk by the main contractor and used as working capital – to be held in trust and given priority in the event of a business failure. The legislation also covers residential building work, as well as commercial building contracts. Also included in the legislation is better access to dispute resolution for all parties.

The scope of the Act has also been widened. From 1 September 2016 the legislation will cover construction-related services, such as work carried out by architects, engineers and quantity surveyors.

The new legislation comes into effect for new construction contracts on 1 December 2015.

To find out more, see www.building.govt.nz/construction-contracts-act ■

Exchanging gifts

With Christmas and gift giving (and receiving!) on the horizon, this is a good time for a reminder about the law around the exchange of goods. The Ministry of Consumer Affairs advises that when buying a present and you're unsure if the recipient will like it, ask for an exchange card when you buy. Make sure you include the exchange card with the gift. If the recipient would like to exchange it, it's then easy for the recipient to return to the shop to exchange it for something they prefer.

Exchange cards usually have an expiry date, so make sure there will be enough time for the recipient to make an exchange if they want to. No point having 23 December as the expiry date when you're giving them a present for Christmas! ■

Be safe this summer when you're in the water

In September a new bill was introduced to Parliament that will change the rules around how swimming pools are to be fenced. The government says the proposed legislation will give a more consistent and practical approach to protect people (and children in particular) from drowning.

We're not sure if this new legislation will come into force before the summer holidays, but it's a reminder that you must always watch children when you are near the water – whether you're at a public swimming pool, you have a pool of your own or you're at the beach. As well, if you're an adult and either can't swim or you're not confident, please be careful when you swim in a pool, or you're at the beach or the river.

Drownings in this country have increased in 2015. DrownBase (Water Safety New Zealand's database) shows that as at 11 September 2015 there have been 68 drownings so far this year, compared with 54 at the same time in 2014. There were two under-5 drownings; one drowning in the 5-13 year-old age bracket; 56 of these drownings were male; 45 were in rivers, beaches and tidal waters; and 15 were Māori. ■

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