NEWSLETTER

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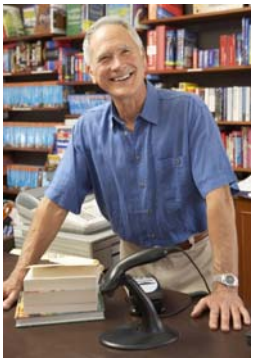
Consumer Law Reform – what does it mean for you?

Consumer law is changing in New Zealand and some of the changes have already taken effect. In early December 2013, the long awaited Consumer Law Reform Bill went through its final reading in Parliament and on 17 December 2013 was passed into law by way of six separate amendment Acts.



The law reform has been designed to update consumer law in New Zealand and harmonise it with Australian law to further the Government's agenda of a single economic market. The widespread changes are intended to provide stronger consumer protections in order to enable consumers to transact with greater confidence and promote competition, innovation and growth.

What is changing?
The most significant changes are the amendments to the Fair Trading Act 1986 and Consumer Guarantees Act 1993. There are also changes to other enactments, such as the Carriage of Goods Act, Weights and Measures Act, Secondhand Dealers and Pawnbrokers Act as well as a new Auctioneers Act.

Consumer Guarantees Act 1993 (CGA) - the CGA protects consumers by providing certain guarantees from suppliers and manufacturers when goods are acquired. The amendments to the CGA introduce new guarantees for the delivery of goods, as well as for the supply of electricity and gas. The CGA will also be extended to cover goods ordered over the internet or by telephone, and goods sold at auction or tender.

Fair Trading Act 1986 (FTA) - the FTA protects consumers by prohibiting unfair conduct and trade practices. It provides for the disclosure of information relating to goods and services, and promotes product safety. The changes to the FTA introduce new

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restrictions relating to unfair contract terms, unsubstantiated representations, extended warranties, unsolicited goods, product safety and recalls, and internet sales and auctions. The Commerce Commission has also been granted extended powers.

When do these changes take effect?
Some of the changes took effect from 18 December 2013. These include changes to new product safety requirements and the increased powers of the Commerce Commission. Changes to collateral credit contracts are also now in effect. Most of the key changes however, only come into effect on 17 June 2014. The six month delay is intended to give businesses the time to change their practices. Changes that will come into effect at that time will include those relating to unsubstantiated representations, extended warranties, unsolicited goods, internet sales, and delivery guarantees. Further changes relating to unfair contract terms will not come into force until March 2015.

Can you contract out of the FTA and CGA?
No, not if you are in the business of providing goods or services to consumers. The amendments to the FTA and the CGA now make that clear. The only exception to this rule, which the amendments to both Acts seek to align, is where one business is contracting with another. To successfully exclude the requirements both parties must be in trade, they must agree in writing, and the exclusion must be fair and reasonable. What is fair and reasonable in the circumstances will depend on a number of different factors.

What should you do now?
If you are a consumer you can learn more about the new protections the changes will bring by speaking with your solicitor. The Commerce Commission and Consumer Affairs websites can also be a useful source of information.

Individuals and businesses in trade are particularly advised to consult with their solicitors before 17 June 2014 in order to assess the impact the changes to the law may have on their current business practices. The changes are widespread and significant, which is why the six month lead-in time has been put in place.

Selling and buying goods internationally

The United Nations Convention on Contracts for the International Sale of Goods 1980 ('CISG') was the end result of a lengthy process towards unifying international trade law. The CISG became New Zealand law when the Sale of Goods (United Nations Convention) Act 1994 came into force on 1 October 1995, and as such New Zealand businesses dealing with international contracts should be aware of its operation.

What is the CISG?
The CISG provides a universal framework to govern international contracts for the sale of goods. Amongst other things, it sets out which contracts the CISG applies to, rules around formation of such contracts, the obligations of the buyer and seller, and remedies for breach of such contracts.

When does the CISG apply?
When two parties have their place of business in two different countries, and both countries have ratified the CISG ("Contracting States"), the CISG will govern operation of a contract for sale of goods between those parties. For example, where a business based in New Zealand enters into a contract to sell or buy goods with a business based in the USA the CISG would apply, as both these countries are Contracting States.

The CISG may also apply where only one party is a Contracting State. In this instance, the rules of private international law apply, which may lead to the law of the Contracting State being applicable to the contract. For example, because the CISG is domestic law in New Zealand, it would apply if New Zealand law was found to be applicable under a contract between a business based in New Zealand and a business based in a non-Contracting State.

When does the CISG not apply?
Some contracts for sale of goods are specifically excluded from the scope of the CISG – for example, goods bought for personal, family or household use, or at auction. Parties to a contract that would usually be subject to the CISG can explicitly choose to exclude its application, or choose to deviate from some of its terms.

When an issue arises that is not covered by the terms of the CISG, this situation is to be dealt with either by the general principles of the CISG, or where this is not possible, by the rules of private international law.

Why is the CISG relevant for New Zealand businesses?
Where a business based in New Zealand enters into a contract for the sale or purchase of goods with an overseas based business, the CISG will often apply. With this in mind, it is also important for businesses to note that while the CISG is New Zealand domestic law, when it applies to a contract it changes the 'usual' New Zealand domestic law. For example, the CISG departs significantly from usual New Zealand domestic law in respect of irrevocable offers.

In order to have peace of mind when entering into international contracts for the sale of goods, it is important to consider firstly the law that applies to your contract, and if the CISG applies. If it does, you will then need to understand the effect it will have and how it can be tailored to meet your needs.

Ensuring it's a first house and not a P house

As the use of illicit drugs, in particularly methamphetamine ("meth") grows in popularity, so does the chance that you could purchase a property that was used as a clandestine meth laboratory.

When meth is manufactured or used, a wide range of poisonous, explosive, and extremely flammable chemicals are used. These chemicals, fumes and by-products can be spilt on surfaces, carpets, curtains and ventilation systems, and poured down drains contaminating the structure and fabric of the building.

Exposure to the chemicals found in meth labs can have various short-term and long-term effects on the health of the occupants. As a result this impacts on the value or marketability of a property to potential purchasers or tenants.

When a meth lab is discovered by police, a notification is usually provided to the local council who in turn raise a requisition on the council's Land Information Memorandum (LIM) database. Under the Health Act 1956, a Cleansing Order is issued by the council to the owner of the property and a validation report plus other relevant information must be provided to the council before the Cleansing Order can be discharged.

It is estimated that the proportion of meth labs found by the police is 5 to 10% of the total amount in operation at one time and that in 2009, 75% of meth labs reported were located in rental properties. Therefore there is a strong chance that many home owners have given into temptation and replaced the carpet and repainted the walls in an attempt to hide the signs of meth use in order to preserve the property's value. This is a short-term fix and does not resolve the issue as the highly toxic residues remain.

Caution must be raised, particularly if the purchaser has a view to tenanting the property in the future, as it is a breach of a landlord's obligations to tenant a contaminated premises. Therefore if undetected the costs of remediating the property may fall on the purchaser.

As a prospective purchaser, there are a number of practical things that can be done to reduce the risk that the property you are about to purchase was a meth lab, which include:

- Find out whether the property has been used as a rental,
- Contact the local council and review the LIM report as part of pre-purchase due diligence (however there may be a chance that the local council records may not be up to date),
- Ask the vendor and real estate agent about the property's history; specifically asking whether they are aware of any meth related activity. Legal remedies may be available where misrepresentation is proven,
- Ask the vendor if the property has been monitored for meth manufacture by a third party agency (similar to an alarm system),
- Inspect the property for tell-tale marks. However, it is very hard to detect when the property has new carpet and a fresh coat of paint,
- Contact the neighbours to inquire about the property's history, and
- Get the property tested (prior to making an offer of purchase or as a condition).

If you are a prospective purchaser and have concerns about a potential property, it is our advice that you contact a property lawyer to discuss your concerns in detail.

Changes to the Fencing of Swimming Pools Act 1987

Proposed changes to the Fencing of Swimming Pools Act 1987 ('the Act'), if passed, will give owners more choice about how they restrict access to their pools, but rules will be tightened generally and the inspection process unified.

Problems with existing rules

The existing rules have been criticised as inconsistent and cumbersome. The Act is implemented by local councils, and there are no strict guidelines for how those councils should act. Some councils consider garden ponds and other water hazards as a 'pool' to be fenced, while others do not. Only some councils will provide a (costly) fencing exemption to spas that are otherwise child-resistant, and some councils carry out regular compliance inspections while others not at all.

The Act allows part of your house to form part of the pool fence; however, it can be difficult for your council to consent to a door opening directly into the pool area. Existing rules only allow this where your council is satisfied that to do otherwise is impossible or unreasonable – leaving inconsistent results with

different councils and leaving owners with fewer choices on how they can best restrict access to their pools.

The Ministry of Building and Construction has released consultation documents and taken submissions on proposed changes to the Act, and has indicated that existing laws will soon be updated. No clear timeframe has been provided for the implementation of the proposed changes.

Proposed changes

- All pools must be inspected by your council every five years. This ensures all areas of the country are regularly inspecting pool fencing, and that each council is working with the same standards and timeframes.
- Access to portable pools must be restricted if they contain more than 30 centimetres of water (reduced from the current 40 centimetres).
- Spas do not need to be fenced off if they are child-resistant (e.g. have locked lids), and will not need regular inspection from your council. This will mean spa owners will no longer need to apply for a costly exemption if their spa has a full lockable child-resistant lid and they do not want a fence.
- Rules around house doors opening directly into the pool area to be relaxed. Doors must still be self-closing and be fitted with an adequate locking device, but the proposed changes should allow more flexibility where the house is intended to form part of the fence.
- Obligations to be placed on retailers to inform customers who purchase swimming pools and spa pools of their obligations.
- Your council can inspect properties where it believes pools (including spa pools) may be non-compliant and issue warning and infringement notices.

What do the proposed changes mean for you?

For most pool owners - not a lot. Existing fences that meet the current rules will still meet the new proposed rules. Regular council inspections will however become compulsory to ensure continued compliance with the Act.

For new pool owners, there will be more flexibility around how access to pools can be restricted.

Finally, more portable pools than ever will need to be adequately fenced. Portable pool owners will need to ensure that they comply with the proposed changes, as councils will be able to issue infringement notices if they do not.

Snippets

The Harmful Digital Communications Bill

Charlotte Dawson's untimely death has seen calls across the Tasman for regulation against online bullying, pushing this issue into the limelight both in Australia and New Zealand.

New Zealand is already working towards putting laws against online bullying in place through the Harmful Digital Communications Bill ('the Bill'). The Bill was introduced to Parliament on 5 November 2013, with its first reading on 3 December 2013.

The Bill is the result of a 2012 Law Commission briefing for the Minister of Justice in respect of harmful digital communications. The briefing included a recommendation for a new criminal offence for anyone who posts or distributes material that causes serious emotional distress or humiliation to another person. It also included a recommendation that a Tribunal be established to provide citizens harmed by digital communications with efficient and cheap access to remedies.

The Bill is still in its early days, with a Parliamentary Report in respect of submissions due on 3 June 2014.

Trust Busting – case update

New Zealand Courts have been reluctant (although not unwilling) to dismiss a Trust as a sham. Recent case law has affirmed this position with the High Court refusing to find that a Trust was a sham (and therefore invalid), even when the Settlor of that Trust insisted it was a sham and that it was only established to delay triggering payment of GST in a commercial transaction.

The High Court observed that a sham exists where there is an intention to conceal the true nature of a transaction. Here, the Court took the view that although the Trust was prepared partly to deceive (to avoid GST), this does not in itself prove that it is invalid. Not surprisingly, the Court went on to say that because the GST payment was successfully avoided, the Trust must be valid, because a Trust cannot be valid for one purpose but invalid for another.

If you have any questions about the newsletter items, please contact us, we are here to help.