

# NEWSLETTER

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## Building Compliance and The Building Act

You may recall an earlier article about the Building Act 2004 ("Act"). One of the areas in which its impact is being felt is by vendors selling properties on which building work has been undertaken. Purchasers often require evidence of compliance with the Act.

### Building Code

One of the fundamental principles of the Act is that all building works must comply with the building code. Compliance with the building code is mandatory regardless of whether or not a building consent is required for the work. Even for minor building projects, householders need to check whether or not the building code is relevant and if it is, must ensure that the building work complies with the requirements of the code.

### Evidence of Compliance

The most common way a building owner may provide evidence that work complies with the building code is by obtaining and being able to provide the purchaser with a Code Compliance Certificate ("CCC"). A CCC is issued where a building consent is applied for before building work is commenced. The CCC effectively provides that the consent authority is satisfied on reasonable grounds that the building work complies with the building consent. It is the building consent that is crucial in ensuring that the performance standards set out in the building code are met by the finished building product.

A building consent will lapse if work does not commence within 12 months of the date of issue. However, it appears that commencement of work within the first 12 months after the building consent is issued preserves the consent indefinitely.

### Certificate of Acceptance

Sometimes a purchaser will ascertain that building work for which a building consent and CCC should have been issued, has not been completed in accordance with those requirements. The Act provides that in that situation a building consent authority can issue a certificate of acceptance.

A certificate of acceptance certifies, to the best of the building consent authority's knowledge and on reasonable grounds, that, as far as it could ascertain, the building work complies with the building code.

Obviously this certificate conveys a far lower degree of quality assurance than a building consent or CCC. It replaces what was previously referred to as a "safe and sanitary" letter which followed an inspection by the Council certifying to the effect that the building was deemed to be neither unsafe nor unsanitary.

### **Building Warrant of Fitness**

Another matter which may require consideration when purchasing a commercial building is whether or not a building warrant of fitness is required and is up to date. If a building contains systems or services that require ongoing maintenance in order to function at the level demanded by the building code, a compliance schedule must be established in regard to those systems to ensure that maintenance is routinely carried out. The compliance schedule sets out

the inspection, maintenance and reporting procedures required to ensure that those systems meet performance standards. The building warrant of fitness confirms that the inspection, maintenance and reporting procedures set out in the schedule have been complied with for the foregoing 12 months. There are significant fines for a building owner who fails to obtain a compliance schedule or to display an up to date building warrant of fitness.

The Auckland District Law Society form of Agreement for Sale and Purchase of Real Estate (7<sup>th</sup> edition(2)) has been updated to incorporate the terms of the Act. If you require further information in regard to a specific building or a particular point mentioned in this article then please consult us.

## **Recognising the Rights and Views of Children**

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On 1 July this year the Care of Children Act ("Act") replaced the Guardianship Act. The Act extends the principle that children's needs should be of primary importance in proceedings before the Family Court and increases children's rights of participation in those proceedings.

### **Child's Welfare Paramount**

When making a decision under the Act, the court must ensure that the welfare and best interests of the child are the first and paramount consideration. The Act provides guidelines as to what constitutes the welfare and best interests of a child. Those guidelines are consistent with the principles of the United Nations Convention on the Rights of the Child (UNCROC).

The Act emphasises agreement rather than litigation, with parents encouraged to share responsibilities and to reach agreement as to their child's care, development and upbringing. Emphasis is also placed on the child's right to know and be cared for by both parents.

One of the key aims of the Act is to involve children in decisions that affect them. The child must be given a reasonable opportunity to express his or her views, and those views must be taken into account. Ways in which the court will achieve this include using the lawyer appointed to represent the child, obtaining a specialist report from a child psychologist or by the Judge talking to the child.

### **Parenting Orders**

The Act also increases the ability of the Family Court to enforce parenting orders. The court will have the power to admonish the person breaching

the order, vary an existing order, require the parties to attend counselling, or order the person in breach to enter into a financial bond to deter further breaches. The court can also issue a warrant that gives police the power to take possession of a child for the purpose of enforcing an order, but this is considered a last resort.

Parents deliberately breaching parenting orders could face up to three months in prison or a maximum fine of \$2500.

### **Open Court**

The previously closed environment of the Family Court will be opened up, although this will still be subject to certain restrictions. The reporting of proceedings, with identifying details removed, will also be allowed. The key principle here is that justice must not only be done, but be seen to be done.

### **New Terminology**

The Act also removes all reference to the terms "custody" and "access". These are replaced with "day-to-day care" and "contact". Contact includes contact by writing, email, telephone as well as direct face-to-face contact. One of the aims of the new terminology is to remove the implications of control and power associated with the term "custody".

### **Summary**

In conclusion, the new Act aims to move the focus away from parental rights, to parental responsibilities, recognising the child's right to participate in decisions affecting him or her and to ensure that those views are taken into account. The child's welfare and best interests must be the paramount consideration.

## Mediators Helping Families - Questions And Answers

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A court room is not always the best forum for resolving a dispute between parents, especially when the dispute involves their children. In recognition of this, the Ministry of Justice is currently running a pilot programme known as "Family Mediation" in the North Shore, Hamilton, Porirua and Christchurch Family Courts.

### What are they?

Family mediations are an opportunity for people who are involved in proceedings before the Family Court to reach their own agreements with the assistance of a qualified mediator.

### Where do they take place?

The mediations are held away from the court environment in the mediators' own rooms.

### Who attends?

A lawyer will be appointed by the Family Court to represent the children at the mediation. Parties can choose to have their lawyers present but generally they are designed for the parties to do the talking, away from the formalities and evidential requirements of a Family Court hearing.

### How do we take part?

Parties can elect to participate in the family mediation after the counselling process is completed. All parties must sign a written consent to participate in the mediation but it will not usually be considered appropriate where there are issues of domestic violence.

### What happens at the end of the Mediation?

The mediator will assist the parties to reach an agreement but the mediator cannot make court orders. If parties wish to formalise the agreement into an order, this can be done by filing the agreement in the Family Court in the form of a signed consent. The parties' lawyers and lawyer for the child can assist with the preparation of the consent. If no agreement is reached, the matter returns to the court to follow the usual process.

### Is the Mediation private?

The mediations are private and confidential to the people directly involved in the process.

## Noisy Neighbours – What are your Rights?

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Most of us are used to living in an environment where there is a certain amount of noise. However, there are also times when noise can become excessive and can interfere with the peace, comfort and convenience of other people.

### How do you make a complaint about noise?

The Resource Management Act 1991 ("RMA") imposes obligations on occupiers of land to ensure noise does not exceed a reasonable level. The RMA deals with problems with excessive and unreasonable noise and provides various remedies. The environmental health sections of local district or city councils administer the noise control provisions of the RMA.

### What is excessive?

Your local authority will not take action unless it considers the noise to be excessive or unreasonable. Excessive noise is defined as any noise that is 'under human control and of such a nature as to unreasonably interfere with the peace, comfort, and convenience of any person (other than a person in or at the place from which the noise is being emitted), but specifically excludes noise from aircraft in flights, vehicles on the road and trains.



### What is the process?

Local authority enforcement officers can issue excessive noise directions or abatement notices to control noxious elements, adverse effects on the environment or unreasonable noise. When a complaint of "excessive noise" is made to the local authority an enforcement officer will then be sent to the address. If the officer considers the noise to be excessive, either an excessive noise direction or an abatement notice will be issued to the occupiers of the address.

Excessive noise directions are short-term notices that last for 72 hours. These notices are usually issued in cases where the problem is easily resolved, for instance, turning down the volume dial of a stereo if it is too loud. Abatement notices last indefinitely until either the council is willing to remove them or until an appeal is lodged and is decided upon by the courts. Such problems are usually more serious and occur over a longer period, for instance, industrial noise.

If a noise direction or abatement notice is ignored the officer has the right to enter the property and seize and impound the source of the noise.

A policeman must accompany the officer if the building is a dwelling house. The officer can also issue an infringement notice imposing instant fines between \$500 and \$750, or the occupier may face a penalty of up to \$10,000 if successfully prosecuted.

## News in Brief

### Increase to Paid Parental Leave

On 1 July 2005 the maximum rate for parental leave increased from \$346 a week to \$357 a week. The increase will apply to new applicants for parental leave and those currently receiving it. The duration of paid parental leave will also increase from 13 weeks to 14 weeks by the end of this year.

### Independent Contractor or Employee: Bryson vs Three Foot Six Ltd

Remember Mr Bryson from our May/June edition? He was the onset model technician working in the film industry who was found by the Court of Appeal to be doing so as an independent contractor and not as an employee.

Mr Bryson appealed that decision to the Supreme Court who have now allowed the appeal by reinstating the original decision of the Employment Court which found Mr Bryson to be an employee.

In reaching its decision, the Supreme Court has done so on the basis that the Employment Court did not make any errors of law and that it had based its decision on the particular circumstances of Mr Bryson's employment. The decision is however not to be treated as affecting the status of any other employee in the film industry.

To that extent, the Supreme Court has not provided the clarity hoped for on the issue, as to whether an individual is an independent contractor or an employee. It appears therefore that the issue is one which will tend to be decided on the individual circumstances of each case rather than on general principles.

### An Introduction to the Kyoto Protocol Part One

Confused about the Kyoto Protocol? How did it come about? What does it provide for? And, what is all the recent fuss about?

The United Nations Framework Convention on Climate Change ("the UNFCCC"), adopted in 1992, sets the overall framework for inter-governmental efforts to respond to the effects of

### So...

If you suffer from noisy neighbours, and it cannot be satisfactorily resolved by talking to your neighbours (or if you do not feel comfortable doing so) contact your local council for assistance.

climate change and reduce greenhouse gas emissions. It recognises that the climate system is a shared resource – the stability of which can be affected by industrial and other emissions of carbon dioxide. Ultimately, the Kyoto Protocol was born out of the participating countries' attempts to consolidate and crystalize the UNFCCC's original aims.

New Zealand's entry to the UNFCCC was made on 21 March 1994 and the UNFCCC lists New Zealand as one of the wealthier countries that have special obligations to assist developing countries with financial and technological support.

The UNFCCC set a voluntary goal for participating developed countries to reduce greenhouse-gas emissions to 1990 levels by 2000. Possibly because it was a voluntary goal, most countries did not meet it. However, the UNFCCC recognised and anticipated that the convention was essentially a framework that required more teeth in order to be effective. Negotiations at conferences of parties to the convention led to the Kyoto Protocol which, amongst other things, sets binding targets for participating countries to reduce carbon dioxide and greenhouse-gas emissions by 5.2% percent below 1990 levels before 2012.

The Kyoto Protocol was adopted in 1997 in Kyoto, Japan and came into effect on 16 February 2005. Since then it has given rise to a number of concerns resulting from unanticipated consequences – in particular, what was supposed to be an additional source of income to our country now appears as though it may be a major expense.



What is the Kyoto Protocol about? How does it work and why will it cost us? What will it mean for Joe and Jo Bloggs with their 2.5 children, picket fence and coal range? Watch this space in our next edition for the feature article.

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