

NEWSLETTER

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New Rules For Loans And Consumer Credit

The Credit Contracts and Consumer Finance Act 2003 (“Act”) came into effect on 1 April 2005. It replaces the Credit Contracts Act 1981 (“CCA”) and is designed to simplify and update the laws relating to the provision of credit.

Why Change?

The provisions of the CCA were quite complicated and some of the concepts were not well understood. As a result, the purpose of the CCA, (to simplify the disclosure of financial terms such as the finance rate, interest rate and other charges to debtors), was often not achieved. Furthermore, the CCA did not provide any real means of redress for debtors with the result that its provisions tended to be disregarded by creditors.

The purpose of the new Act is to ensure that the interests of debtors who are entering into credit contracts are protected by ensuring that proper information is given to them as to the calculation of costs, fees, charges and interest charges in relation to the credit contract. Furthermore, it is designed to prevent oppressive terms or conduct by creditors.

Which Contracts Does The Act Apply To?

The Act is mainly concerned with “consumer credit contracts”. The key requirements for a consumer credit contract are:

- The debtor must be a natural person and must enter into the contract primarily for “personal, domestic household purposes”; **and**
- Interest and/or credit fees are payable, and/or a security interest is being taken by the creditor; **and**
- The creditor must be in the business of providing credit or makes a practice of doing so in the course of another business.

The Act does not apply to companies, incorporated societies or family trusts.

The requirement for a loan to be primarily for personal, domestic or household purposes should make it relatively easy to determine whether or not the Act applies. A good example is a loan for the purchase of a home. Clearly that would be for personal, domestic or household purposes in which case the loan is a consumer credit contract. However, if the loan is for the purchase of a rental property, it is not a consumer credit contract, as the debtors are not intending to occupy the house themselves.

In cases of doubt, the Act does provide that a declaration by the debtor that the credit is for use primarily for business or investment purposes (or both) rather than personal use, will generally be sufficient to ensure the contract falls outside the Act.

What Are The Advantages?

- The creditor must disclose in a format whereby the financial terms of the transaction can be easily understood (including the method of calculating interest, any penalty charges for early repayment of a loan and default interest charges).
- The debtor has the right to cancel the credit contract at any time before initial disclosure has been made and within three working days after that has occurred. In order to cancel a consumer credit contract, the debtor must give written notice and refund any money or return any property they have received under the contract.

- Creditors are now required to charge reasonable fees for credit (but this does not apply to the interest rates).
- The Court now has the right to “reopen” a credit contract if it considers the contract is oppressive or that a power contained in the contract has been or will be exercised in an oppressive manner or if a person has been induced to enter into a contract by oppressive means.
- The Court’s powers to reopen a consumer credit contract include situations where the debtor suffers unforeseen hardship and it was not foreseeable at the time the debtor entered into the contract that they would not be able to meet their obligations (for example illness, injury or loss of employment).
- A failure by a creditor to comply with the Act’s disclosure requirements means that the contract cannot be enforced.

In summary, the changes introduced by the Act should be of general benefit to all parties in that the process for disclosure of financial terms has been simplified.



However, time will tell whether the new Act proves effective in practice.

The Charities Act

The new Charities Act was passed by Parliament on 13 April 2005. It is the culmination of a process which began in 2001 when the Government released a discussion document as part of a review of the tax treatment of charities. The document arose out of concerns that:

- there were no means by which the public could identify legitimate charities as opposed to sham operations; and
- there was no way of monitoring charities claiming tax free status.

Following receipt of the submissions, Cabinet set up a working party to look specifically at registration, reporting and monitoring systems suitable to the New Zealand charitable sector.

From there a Bill was drafted which aimed to address some of the issues raised. The Social Services Committee reported back on the bill on 17 December 2004 and recommended that it be passed with amendments.

Charities Review

Although there is a procedure available to register charitable trusts, there was no system to monitor their ongoing activities or funding sources.

The Act establishes a Charities Commission to register and monitor charitable entities to ensure that those entities receiving tax relief, continue to carry out charitable purposes and provide a clear public benefit.

Key Provisions Of The New Act

Registration

Registration with the Charities Commission will be voluntary, but a charity will need to register to continue to retain its tax exemption. Charities wanting approved donee status will also have to register. People who donate to organisations with approved donee status can claim a tax rebate on their donation. Registered charities will no longer have to apply to the IRD for income tax exemption and approved donee status.

Charitable Purpose

In order to register, charities and approved donees will need to submit a copy of their rules or trust deed, and other information about current and proposed charitable purposes and activities. This information will then be assessed against the requirements of the charitable purposes test.

Charitable purposes must fall within one of these groups:

- The advancement of education;
- The advancement of religion;
- The relief of poverty; and
- Any other matter beneficial to the community

Compliance

Once a charitable organisation has registered with the Commission it will be issued with a unique registration number which must be displayed on all fundraising materials used (eg, *collection tins*) when money is collected from the public. This should provide the public with a high degree of confidence that an organisation is undertaking activities that are both charitable and in the public interest.

If a charity changes any or part of its core practices during the year (such as the organisation's charitable purpose) they must notify the Commission. This requirement should ensure that all information held on the register is as up to date as possible. Penalties will be imposed on organisations that fail to notify the Commission of these changes within a specified time.

How Does This Affect YOU?

The new Charities Act has important implications for those of you who are involved with a charitable organisation or collect rebates for charitable donations.



Further information can be obtained from the Ministry of Economic Development's website www.charities.govt.nz

Independent Contractors vs Employees – The Debate Continues

In New Zealand, workers are divided into two categories – independent contractors and employees. Is the distinction between the two important?

“Employees”

The Employment Relations Act 2000 defines an “employee” as any person ‘employed by an employer to do any work for hire or rewards under a contract of service.’

This definition includes home-workers or persons intending to work. It excludes volunteers who do not expect to be rewarded and do not receive rewards for work done voluntarily.

“Independent Contractors”

In contrast, “independent contractors” work for “principals” under contracts for service and are

typically seen as autonomous commercial operators.

Independent contractors are responsible for paying their own taxes.

Statutory Protections

Employees enjoy statutory protections contained in the Employment Relations Act 2000. Independent contractors do not and their relationship with a principal is governed by contract law. There is limited statutory protection for independent contractors contained in the Health and Safety and Employment Act 1992 and in the Human Rights Act 1993. The underlying philosophy behind this is that the bargaining position of an independent contractor with a principal is considered to be equal and it is assumed that independent contractors have the ability to take care of themselves in the market environment.

How To Tell The Difference

On occasion the Court must determine which category an individual belongs to. In doing so, it must consider all relevant matters – including those that are indicative of the parties' intentions. The Court cannot treat any statements made by persons that describe the nature of the relationship as determinative. Essentially, this means that a written contract that labels a party an "independent contractor" will not on its own determine the matter and the Court will look to other relevant matters to make a final determination.

Recent Case Law

In *Three Foot Six Limited v Bryson*, the Court of Appeal had to decide the relationship between the parties. In mid-2000, Mr Bryson was seconded from Weta Workshop to Three Foot Six Ltd and was engaged to work as an Onset Model Technician. Mr Bryson's conditions of employment were written and the written document took the form of a tax invoice. The conditions of Mr Bryson's employment described him as an independent

contractor. Over a year later, Mr Bryson was informed that his services were no longer required as Three Foot Six Ltd had made the decision to downsize its miniatures unit. Mr Bryson argued that he was unjustifiably dismissed but he had to first establish that he was an "employee" and therefore entitled to bring a claim under the Employment Relations Act 2000.

In analysing one of the tests commonly applied by the Courts, the Court of Appeal noted that while Mr Bryson may appear to be an "employee" (as found by the Employment Court) insufficient weight had been given to other relevant factors – specifically, the form of the contract and film industry practice. The Court of Appeal held he was an independent contractor.

Mr Bryson has appealed to the Supreme Court which has reserved its decision. The Supreme Court's decision should provide clarity and certainty in respect of the distinction between employees and independent contractors. In the interim, the debate continues.

News in Brief

Penalty Interest On Leases

Commercial tenants would do well to carefully consider the penalty interest provisions in their lease agreements. Some agreements specify a percentage rate while others refer to a percentage (say 5%) above the interest rate charged by the Landlord's bank. When the bank rate is high, some tenants can be paying 18% or more in penalty interest. And be warned – just because the landlord is not taking action at the tenant's failure to pay rent, does not mean that penalty interest is not accruing and the landlord may eventually come knocking for the whole amount owed.

Court Fees Update

Last year Court filing fees were increased substantially by the Government. The primary reason given was to ensure that the cost of justice was met by those utilising the system. The New Zealand Law Society and New Zealand Bar Association both opposed the increase and have continued to voice concerns. The good news is that those concerns have been heard and the Regulations Review Committee is reconsidering the increases because they are seen to be impeding access to justice. Watch this space for an update.

Update On The Christchurch Cycle Race

You may recall the article in 2004 on the Astrid Andersen case whereby an entrant in the Christchurch Cycle Race was killed. This was a result of Ms Andersen's failure to advise entrants that only part of the Port Road would be closed. Ms Andersen appealed her conviction to the Court of Appeal and was successful. Essentially the appeal turned on an interpretation of the relevant section of the Crimes Act and whether or not Ms Andersen's omission in pre-race instructions required negligence or recklessness on her part. If the former applied, Ms Andersen would have to have known that her omission was dangerous *if she turned her mind to it*. If the latter, she would have to have *actually known* that her omission was dangerous. The Court ruled that the latter standard applied and as the Crown had no evidence that Ms Andersen had actual knowledge there was no point in a new trial. Event organisers around the country are no doubt breathing a sigh of relief.



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