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## NEWSLETTER

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### OUR NEW WEBSITE!

Check out our new website [www.smlaw.co.nz](http://www.smlaw.co.nz) to see the numerous ways we can be of service to you.

Clients who are buying or refinancing - don't proceed without first checking out our mortgage broking service "LawLend" – details in our website.

### IMPROVING OUR SERVICE TO YOU

We have recently implemented a new "real time" internet banking facility via ASB Bank Limited. This enables us to direct credit to your bank account as *cleared funds* – on settlement day (e.g. where you have bought/sold or refinanced) any credit balance in your account with us – this means the funds are available to you *immediately* – on settlement day – no more waiting for trust cheques to clear!

### ONLINE CONVEYANCING!

To *further* enhance our service to our clients and our colleagues in the real estate industry we have implemented the KeyTrack Online Conveyancing System. This is an internet based software enabling our clients and other interested parties (with our client's consent) to view

conveyancing data online in a secure environment.

When we commence a new conveyancing transaction we create an "online file" which can be accessed by you (and other interested parties with your consent) by using your password – thus enabling you to follow the progress of the transaction as it proceeds.

As a client or interested party you will also receive automated text alerts and emails, once certain milestones are reached i.e. as each condition is satisfied, the transaction has become unconditional, or it has settled and keys can be released.

We are confident that our conveyancing clients and their real estate advisors will value this added benefit in dealing with **Swayne McDonald & Co** (click on the KeyTrack icon at [www.smlaw.co.nz](http://www.smlaw.co.nz) for more details).

### RETIREMENT VILLAGES ACT 2003

The Retirement Villages Act 2003 ("the Act") was passed on 22 October 2002. Parts of the Act came into force in February 2004.

The remainder will come in to force later in the year.

### CONTENTS

**Our new Website!..... 1**

**Improving our Service to you..... 1**

**Online Conveyancing!..... 1**

**Retirement Villages Act 2003..... 1**

*Purpose.....2*

*What is a retirement village?.....2*

*Registration.....2*

**Putting the brakes on Dodgy Dealers??..... 2**

*Online Register.....3*

*Dealing With Disputes.....3*

**"Home-Made Wills – A Cheap Option?..... 3**

*Home Made Wills.....3*

*Potential Problems.....4*

**Why is Due Diligence important when buying a business?..... 4**

*Why do we have due diligence? ..4*

*What will you find?.....4*

*Risk Avoidance.....4*

*Our Thoughts.....4*

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

## Purpose

The purpose of the Act is to provide greater protection to residents of Retirement Villages and their property rights, by providing a clear legal framework for residents, intending residents and operators.

## What is a retirement village?

The definition in the Act is broad and includes any property or building that contains 2 or more residential units providing residential accommodation together with services and/or facilities for persons predominantly in their retirement (and their spouses), and for which they pay a capital sum as consideration.

## Registration

The Act requires the operators of all new and existing Villages to lodge an application for registration with the Registrar of Retirement Villages. If a Village is not registered, it is unlawful for an operator to make any offer of occupation or permit the publication of any advertisement relating to the Village.

It is important to note that the fact that a Village is registered does not mean that it has the approval of the Registrar or the Crown.

The Act provides increased protection by requiring:

1. That the industry complies with a Code of Practice that has been approved by the Senior Citizens' Minister.
2. That every Village has a Code of Resident's Rights.
3. That the Occupation Right Agreement contains a number of standard terms.

4. That an intending resident receives:

- A copy of the Code of Practice.
- A copy of the Code of Resident's Rights.
- A comprehensive disclosure statement. The disclosure requirements go some way to ensuring that intending residents have the ability to make informed decisions before investing their money in a Village. The statement must outline all essential information, including:

All entry, occupancy and exit costs and the terms of payment (exit costs apply when a resident moves out or passes away). The terms and conditions of residence.

- Sale and disposal arrangements.
  - A suggestion that intending residents obtain independent legal advice.
5. That an intending resident be given a 15 day 'cooling off' period to cancel the agreement.
  6. That each Village has a statutory supervisor and that the effect of the Act is monitored by a Retirement Commissioner.
  7. That an operator provides and makes known a facility for dealing with complaints along with a dispute resolution procedure.
  8. That intending residents obtain independent legal

advice before signing the occupation agreement.

9. That new penalties for breaches of the legislation be provided including:

- Suspension of registration.
- Voiding the agreement.
- Being charged with a summary offence.

Although the increased need for protection arises due to a number of factors, the most obvious must be that Retirement Village operators are dealing with potentially vulnerable members of society - people who are acquiring the right to occupy a property in a Village while not necessarily acquiring a corresponding saleable interest in the property.

## PUTTING THE BRAKES ON DODGY DEALERS??

On 15 December 2003 the Motor Vehicle Sales Act (MVSA) came into effect replacing the Motor Vehicle Dealers Act 1975. The purpose of the MVSA is promotion and protection of consumer interests in relation to motor vehicle sales. Accordingly, the MSVA has implemented significant changes in the law relating to car dealers and their trading activities.

The MVSA has deregulated the car sales industry by replacing licensing requirements of car dealers with a new system of registration that applies to "motor vehicle traders". The MVSA defines a "motor vehicle trader" ("trader") as any person whose business is motor vehicle trading and includes car market operators, importers, wholesalers, auctioneers and consultants.

Persons who hold themselves out as carrying on the business of motor vehicle trading, and persons who sell more than six vehicles or import more than three vehicles in any twelve month period will also be treated as traders (unless they can prove that they are not doing so for the primary purpose of gain).

### Online Register

Those that fall within the MVSA definition of a trader must be registered on the Motor Vehicle Traders Register ("MVTR") by 31 March 2004. Consumers can check if traders are registered or have been banned from registration through the online MVTR.

The legislative change of most interest to those buying or selling vehicles is the Suppliers Information Notice ("SIN") that traders must display on all used vehicles. A SIN contains crucial information for the consumer. In particular, it must tell you whether or not a trader is registered and the registration number must be displayed.

It must disclose details of any security interests registered against the vehicle and provide a summary of rights available to the consumer. Information about the actual distance traveled by the vehicle must be provided. If the motor vehicle trader believes the odometer reading is incorrect, the SIN must clearly state this. The Commerce Commission is the appropriate agency for consumers to contact for enforcement of SIN requirements.

### Dealing With Disputes

Previously where problems with traders arose consumers had to file claims to the Motor Vehicles Disputes Tribunal (MVDT) through the Motor Vehicle Dealers Institute.

Now consumers can approach the MVDT directly.

- The MVDT can now hear claims under a wider range of laws including the Consumer Guarantees Act, Fair Trading Act, and Sale of Goods Act.
- Claims can be made against registered traders and unregistered traders if the consumer can show the trader was in the business of selling vehicles.
- The MVDT could previously only hear claims relating to used vehicles but it is now empowered to hear claims relating to new vehicles of a value up to \$50,000.
- Consumers can claim for a wide range of grievances and the remedies available from the MVDT are also broad.

While the MVSA goes some distance to providing increased consumer protection against legitimately registered traders, there remains no incentive for rogues who illegally import and sell cars each year to legitimize their "business". If you are intending on purchasing a used vehicle, ensure you see the SIN before you buy!!

### "HOME-MADE WILLS – A CHEAP OPTION?"

In a recent High Court case in Hamilton the difficulties and pitfalls of drafting and executing your own Will were highlighted when the Court heard of a person that created and signed two Wills on the same day.

#### Home Made Wills

Mr Madsen had obtained a 'home made will kit' and used it to record his testamentary intentions. The problem arose

after he died, in March 2001, when it was discovered that he had executed two documents both of which purported to be his last Will and Testament.

The two documents were dated "8<sup>th</sup> December 2000" and "8<sup>th</sup> 2000" respectively. Both documents were signed by the same witnesses, and the evidence presented to the Court established that the Wills were signed on the same day, but no one could remember which one had been signed first. There was no question that Mr Madsen had testamentary capacity to sign both documents.

The difficulty arose when the trustees tried to obtain probate for the Wills. It required a formal application to the High Court and required all people affected by the Wills, and who might have some claim to the estate, being served with the proceedings and being required to instruct solicitors to represent them. Fortunately, it was accepted by all concerned that both documents should be granted probate as the Wills were essentially of the same effect, with one Will being slightly more detailed version of the other. In those circumstances, where there was essentially no dispute over the Wills, the Court was able to make orders that suited all parties.

If there had have been a dispute, or if the contents of the Wills were significantly different to each other the case would not have been so straight forward.

In any event the matter was not resolved until it went to Court in November 2003, some 18 months after Mr Madsen's death.

The Court awarded costs of \$3,337.50 to each of the two groups of beneficiaries, both of whom were represented by solicitors.

Those costs, as well as those of the solicitors for the estate, and

the disbursements incurred in the proceedings, were all paid from the estate. The costs awarded were undoubtedly used up in legal fees.

### **Potential Problems**

A home made will kit may be cheaper to prepare than a will prepared by your lawyer, but this case clearly demonstrates that mistakes may cost a lot more than the savings made. In addition there are dangers in preparing your own Will. If it is incorrectly signed or witnessed, it will not be valid, and in preparing your own Will you run the risk that it will not adequately deal with the distribution of your assets, and the beneficiaries will need to resort to costly legal proceedings.

The law relating to Wills and their administration is very specific, and strictly adhered to, and the Court is very conservative when dealing with estate matters as its only guidance is the written wishes of the person who has now died.

If those wishes are ambiguous, or there is a problem with the execution of the will, the beneficiaries will suffer due to costs and delays as a result.

### **WHY IS DUE DILIGENCE IMPORTANT WHEN BUYING A BUSINESS?**

"Due diligence" is a phrase used to describe a process of business investigations. A purchaser will often insert a due diligence clause as a condition to be satisfied in an agreement to purchase a business or shares in a company which operates that business.

#### **Why do we have due diligence?**

The main objective of due diligence is to extract information about the important areas of the business to be purchased.

Through the process due diligence provides the purchaser with greater certainty as to the likely future performance and earnings of the target business.

Engaging the appropriate experts (i.e. lawyers, accountants, financiers and others) an investigation is undertaken into the contracts, financial statements, supply arrangements and other information related to that business.

#### **What will you find?**

Due diligence can identify a purchaser's exposure to third parties in the event of non-compliance by the vendor under various regulations and legislation affecting the business. It can identify those areas of the business which are vulnerable in terms of contractual arrangements with either suppliers or customers.

Due diligence may result in:

- the purchase price being affirmed or re-negotiated;
- additional conditions or covenants being added to the agreement;
- better allocation of the purchase price, for example, minimising the value of the personal goodwill in the business and increasing the value of plant, equipment and stock in trade in order to maximise future taxation benefits.

In some cases, due diligence may result in the cancellation of the contract.

#### **Risk Avoidance**

No matter how thorough the due diligence process, risks still exist in purchasing a business, and enforceable warranties and indemnities from the vendor need to be included in the

agreement for sale and purchase to protect the purchaser. However, these warranties and indemnities have to be enforced for the purchaser to receive the benefit of them.

A vendor seldom rolls over and pays up on a failed warranty. A purchaser may also find the vendor has disappeared, or spent the proceeds of the sale by the time the purchaser realises the warranties are needed. The purchaser also has to bear the time and cost burden of that enforcement. Hence the need to obtain as much information as possible through the due diligence process before proceeding with the purchase.

#### **Our Thoughts**

If you intend to purchase a business in the future, you should ensure that, as a minimum, your lawyer and accountant are involved in the due diligence process. Ideally, both these professional advisers should be involved as early as possible so that a clear and coordinated approach to the due diligence can be adopted.

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