Swayne McDonald
LAWYERS

NEWSLETTER

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INSIDE THIS EDITION

Changes to the Privacy Act

The Privacy Act 2020 replaced the Privacy Act 1993, and came into force on 1 December 2020. The exponential change in the use of technology in society since 1993 together with globalisation, was a driving force for the necessary change to New Zealand's privacy laws.

The central information privacy principles within the Act regarding how agencies collect, use, disclose and store personal information, fundamentally remain the same, with exceptions. However, enforcement of and penalties under the Act, particularly by the Privacy Commissioner, are now extended and strengthened.

This article touches on the more salient changes to the Act.

Breach notification - Where an agency (generally a business or organisation) breaches privacy that causes serious harm to someone or is likely to cause serious harm, it must notify the Privacy Commissioner immediately and any persons affected by the breach. Under the 1993 Act, this was not mandatory, only encouraged. Now, where agencies do not comply, they can be fined up to $10,000. Online tools are available for agencies to lodge such notifications.

Compliance notices - If an agency is not meeting its obligations under the Act, the Privacy Commissioner may serve a compliance notice to that agency to do something or to stop doing something.

Access requests - The Act makes it easier and more efficient for people to access information about themselves that is held by an agency. Generally, complaints regarding privacy often arise where an agency refuses to provide information held about a person, to that person, upon their request. The Privacy Commissioner can now make binding decisions relating to complaints such as these.

Information sent overseas - Agencies can only send personal information overseas provided there are either protections in place that comply with the Privacy Act 2020, the overseas privacy safeguards are similar to the Privacy Act 2020, or the relevant individual to

which the personal information relates to, authorises such disclosure.

Overseas businesses may be subject to the Privacy Act even if they do not have a physical office in New Zealand. There may be exemptions to this depending on how the personal information is used, i.e. with cloud-based businesses, however, this is yet to be contested.

New offences - Four new offences have been introduced under the Act which may result in a fine of up to $10,000, namely:

1. Impersonating someone or claiming to have someone's authority to obtain personal information or destroying/altering the personal information.
2. Destroying a document after someone has specifically requested it.
3. Breaching the Privacy Commissioner's compliance order.
4. Failing to report a serious breach notification.

Where you wish to discuss or learn further about your privacy rights as an individual or your obligations as a business owner, it is suggested to get in touch with a lawyer.

If you are a business owner and you have not already reviewed your privacy terms and conditions, now is the time to do this and ensure that you have protocols in place to provide personal information to customers carefully and efficiently, if requested.

Virtually witnessed documents – are they valid?

The main purpose of having a witness to a document is to authenticate that the person signing was in fact the person noted on the document.

The implementation of electronic signatures was already common practice and with the advancement of technology, was always likely to increase in use. In New Zealand, however, law requires that for an electronic signature to be legitimate, it must comply with the following:

1. The document must identify the signatory.
2. The electronic signature is as reliable as appropriate for the purpose of the document being signed.
3. A signature is presumed to be 'as reliable as appropriate' if it has been provided by the signatory with their knowledge and consent. It must be an accurate signature and the electronic document cannot be changed once it has been signed.
4. The person receiving the signature fully permits the use of it in electronic form.

These requirements are to ensure that electronically signed documents are correctly executed and that the signatory is fully aware that they are legally bound to the documents which they electronically sign. Just because the document was not signed in 'wet ink', does not mean the document or contract does not exist.

Witnessing serves as a safeguard against forgery and duress, however it has been argued that face to face interaction is still the best way to achieve this.

The onset of the Covid-19 pandemic forced businesses and individuals to find alternative ways to sign documents that required witnessing. In response to Covid-19, the New Zealand Government implemented multiple immediate modification orders under section 15 of the Epidemic Preparedness Act 2006 relating to the requirements of signing and witnessing wills, enduring powers of attorney, deeds, oaths and declarations. These temporary orders modified the witnessing requirements of specific legislation and allowed for certain documents to be witnessed virtually through the use of platforms such as Zoom, Skype and FaceTime.

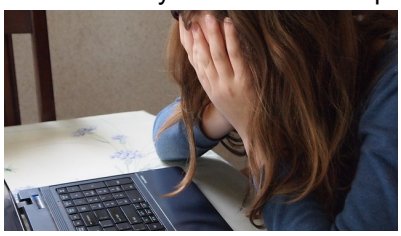
Many banks and commercial institutions in New Zealand are now allowing electronic signatures and virtual witnessing, provided that a clause is inserted into each document which specifies that the documents were virtually witnessed and the signatory has been adequately identified in accordance with Anti-Money Laundering legislation.

So yes – virtually witnessed documents are valid. However, caution should be taken when witnessing is required for a contract that is covered under the law of another country or jurisdiction that has not yet introduced or allowed for remote witnessing.

Online harassment: where and how to get help

In an ever-expanding digital world, we will inevitably find ourselves the victim of some form of harmful digital communication. The definition of a harmful digital communication is ever-increasing, no doubt we have all seen or experienced what is probably the most common form of online abuse: the 'comments' section of the likes of Facebook, YouTube or your favourite online newspaper. However, a harmful digital communication can come in many forms such as trolling, doxing, bullying, cyberstalking, e-bile, false rumours, deepfake videos, online sexual harassment, physical threats

and revenge pornography. It is easy to see that any of these types of harmful digital communications could greatly impact the life of the victim.



There are a variety of ways one can try to handle a harmful digital communication. Some may find it easy not to read the comments, others may seek professional help to deal with their emotions or to call out the perpetrators.

But what happens when it goes too far, when we can no longer avoid the harassment? The first hurdle to overcome, for some people, is the embarrassment and potential feelings of guilt over their digital harassment. The second hurdle is the general feeling that there is little to no point in reporting the issue because there is nothing the law can do to help. However, things are changing. Born out of an increasing concern to address harmful digital communications, New Zealand implemented The Harmful Digital Communications Act 2015. There to deter, prevent and mitigate harmful digital communications, it has a number of key aspects, one being the appointment of an approved agency to assist with resolving complaints. This agency is called Netsafe.

A criminal offence is committed where a person posts a digital communication with the intention of causing harm to their victim, which an ordinary reasonable person put in the same position as the victim, would also experience that harm and where the posting of the digital communication does cause harm. Harm is defined under the Act to be serious emotional distress, and there are a number of factors that are considered when determining if an online post has caused harm. These include, but are not limited to, repetition of the post, the language used and the age and characteristics of the victim.

If the person committing the offence is found guilty, they can expect to receive a term in prison that does not exceed two years or a fine of no more than $50,000. So, if you are the victim of an unwanted harmful digital communication you should not suffer in silence. You can report your incident via the Netsafe website. Once you have completed the form, it will be reviewed and you will be contacted with advice. And whilst Netsafe are not an enforcement agency, they are backed up by new powers given to the District Court who are now able to make orders in favour of those who experience harm from harmful digital communications.

The more we report what happens to us, the better equipped Netsafe will be to manage the problem and make changes that matter, resulting in a safer online world for everyone.

Insider's guide to the Disputes Tribunal

If you have an issue you are unable to reach a resolution on, the Disputes Tribunal may well be your next step. They can look into a variety of claims that are less than $30,000 in value.

You can apply online via www.disputestribunal.govt.nz or via a paper Claim Form. When you apply, you will be asked to provide your name, address and phone number (you, the Applicant) and the name and contact details of the person or organisation that you are making a complaint about (the Respondent).

You will then need to give a clear summary of your issue. This must include what happened, when and where it happened, what went wrong, what you have done so far to resolve the issue, the total amount you wish to claim and details of any insurance policies you hold that may cover your claim. As this is your issue, you will be familiar with every minute detail, however, when completing your summary, take time to consider the reader, the referee and the Respondent. You should also provide evidence to support your claim, for instance this could include a contract, receipts, quotes, correspondence, photographs, professional opinions, witnesses and so forth. A copy of everything you provide to the Disputes Tribunal will also go to the Respondent.

Once you have submitted your claim you will be sent a notice that will detail the time, date and location of the hearing. Notice will also be given to the Respondent, who may then defend the claim. If the Respondent provides any of their own evidence to the Disputes Tribunal, a copy must also be forward to you. You may then respond, if you feel it is appropriate. Again, whatever you provide to the Disputes Tribunal, will also be sent to the Respondent.

You and the Respondent will then attend the disputes hearing. Lawyers are not allowed to be present or represent you. However, you can request to have a support person with you but they are not entitled to speak during the hearing. The referee will begin the process by asking you to summarise your claim, this will then be followed by the Respondent being asked to summarise their response. During the hearing the referee may ask questions of each of you, they are not trying to catch you out, they are simply trying to get a clearer picture and a deeper understanding of the issue. This will assist them with the final decision. That said, once the hearing is

finalised the referee may ask both you and the Respondent if you would like to attempt to come to an agreement between yourselves. If this is something you both wish to consider you may request a break from the hearing to collect your thoughts. However, if you would rather, the referee can make the final binding decision. You should note that if the case is reasonably complex, the referee may wish to consider matters further after the hearing has finished. This may result in the decision being posted to you.

There are also a variety of other tribunals that cover motor vehicles claims, tenancy issues and even employment issues. This means disagreements and claims can potentially be settled without a lawyer.

Snippets

Traps when buying a used car

While the process of buying a used car is usually completed without legal advice, it is useful to refresh the checklist of the key points you should follow. This is particularly important if there is no intermediary, such as a used car dealership, overseeing the purchase.

There are some key points to reflect upon. Firstly, the person or entity registered on the Motor Vehicle Dealer Register is the one responsible for the vehicle, not necessarily the legal owner. This person or entity is entitled to possession however, and must ensure the car is roadworthy. This particular Register does not record legal ownership. Legal ownership is based on a sale and purchase agreement for the vehicle. If this document is not available (and it is quite common for either party not to have one or it becomes misplaced) then there are search services available that trawl the relevant agencies to help establish a chain of ownership.

A logical place to start is to check whether any debt is secured against the vehicle. This query can be satisfied by searching the Personal Property Securities Register. If you complete the car purchase and have not ensured that any loan charge against the car has been cleared by the previous owner, then repossession of the car may still occur if the previous owner defaults on the loan secured against the car. Regardless of the fact you have paid the purchase price for the car and registered yourself as the owner, the existing loan is a matter of public record and as such, puts you on notice that the debt secured against your new car purchase exists.

If this were to happen, you would still have legal rights against the seller, however it would be extremely inconvenient to be car-less and chasing funds from the seller who was less than honest with you in the first place.

The purchase of a used car is a common transaction and is often made in haste. However, follow the check list and be sure to avoid the traps.

Leaving chattels under a will

There is a presumption often made by the will maker that they can leave the chattels they have to the executors and the family to sort out once they have died. A generic chattels clause is inserted in the will and the rest is left to chance.

Let it be known that chattels division issues cause a great deal of friction and angst for a grieving family, more often than it should. The deceased would never have intended these consequences.

Specific thought, instructions and drafting are needed with your lawyer when considering a will. Some options include:

- If specific gifts from the chattels are to go to a specific person, then state that under the gift section of the will.
- If you are making a list, including the gifts in a document, state in the will that there is a list - the Court asks to see the list if it is mentioned in the will itself.
- Make sure at least one of the Executors is in the family group and can organise and control the family in respect of chattels issues – nothing should be taken or distributed other than in accordance with the will protocols.
- If a spouse survives the deceased and is a second wife/husband or long term partner, then if the deceased has children from a previous relationship the status of the chattels requires some decisions. While the surviving spouse / partner has relationship property rights, the deceased's children have rights too.

As careful planning is needed, the advice is to make haste slowly, understand that grief and emotions at the time around a death can blur clear thinking. Keep your lawyer in the loop to help chart the best course.

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

Swayne McDonald Lawyers
Manurewa Office 09 267 2700 Botany Junction Office 09 265 2700
Postal: P O Box 75 442 Manurewa, Auckland 2243
advice@smlaw.co.nz
www.smlaw.co.nz