

## What's Happening at Halliwells



Alaire ready to skydive



And with a snake in Bali

- We have moved offices in New Plymouth – Now at 27 Eliot Street – in the newly renovated HTL Building.
- Our receptionist Shannon de Souza may be away from work for sometime having sustained a nasty knee injury at netball.
- We welcome Amanda Garvey (nee Withers) back from maternity leave.
- Kendyl Fake is sadly leaving Halliwells. She has accepted the offer of her 'dream job' with Sport Taranaki and started at the end of June.
- Jurnee Mead from Eltham starts as the new Junior this month. Welcome Jurnee.
- Alaire Kahupukoro is in Europe!! Home in July. Alaire with her friend Pae Skipper left in May for Bali, Singapore, Europe and UK. They have been having an amazing time – holding snakes in Asia, Eiffel Tower, London, Leaning tower of Piza, sky diving over the Swiss Alps...

## Traffic Law – Can you bike home from the pub?



You cannot be charged with a drink driving offence under New Zealand law while riding a bicycle, unless it has a motor. Excess Breath/Blood Alcohol (EBA) charges only apply if you drive or attempt to drive a motor vehicle, meaning a vehicle drawn or propelled by mechanical power (see sections 2, 11 and 12 of the Land Transport Act 1998 [the LTA]). A bicycle without a motor is not considered a motor vehicle (see *Lawrence vs Howlett* [1952]) nor is a bicycle with an electric motor of less than 300 watts (see NZ Gazette 25 July 2013).

However, this is not without risk. While EBA charges can only apply while driving motor vehicles, some other charges, such as careless driving, are not restricted to your activities with vehicles that have motors. Someone cycling home under the influence could be charged with careless driving if it can be shown they have used their bicycle carelessly or without reasonable consideration for other persons (see sections 2 and 8 of the LTA).



## New Office in New Plymouth...

**Halliwells New Plymouth office – Now in the newly renovated HTL Building at 27 Eliot Street.**

Clients are welcome to call Shannon 0800 425 549 or 06 278 5114 for an appointment to see Preston or Ken who alternate in New Plymouth on Thursday afternoons.

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# *InBrief* Over 100 Years of Integrity

## Should You Pay a Deposit?



Payment of deposits has become a normal part of everyday business, being commonplace in transactions from house purchases to building work.

However, what is best practice? There is always risk involved when paying money and receiving nothing tangible in return. What happens, for example, if a company or natural person becomes insolvent before completing the work you paid the deposit for? What if a property vendor has spent your deposit but cannot complete settlement on the day, because they owe their bank too much? Typically, you may then find yourself an unsecured creditor and it is quite possible that you will not recover all of your money.

While loss of a deposit happens rarely, you should always consider the risk when paying a deposit. For example, is the other party solvent? Always seek to pay the smallest amount possible and consider requiring security to be granted in return. In property transactions you should consider requiring a deposit to be held in trust as stakeholder until risks have been assessed and minimised.

**The requirement that deposits are paid to the NZ Real Estate Trust (NZRET) is becoming more common. There are added risks if your deposit is held by the NZRET instead of by the Real Estate Agent or a lawyer, mainly because the NZRET is not as heavily regulated as Real Estate Agents' or lawyers' Trust Accounts. You should contact us for advice before agreeing your deposit being held by the NZRET.**

## Building Amendment Act 2013 Update

From 1 January 2015 the Building Amendment Act 2013 (the Act) changed the rules around residential building works.

### These include the following:

- Works worth more than \$30,000 now require a written contract including the building timeframe, the process for varying the contract and the dispute resolution process.
- For works worth more than \$30,000, or if requested, a prescribed checklist must be provided together with information about the legal status of the builder, their dispute history, their skills, qualifications and licensing status.
- Work done to a household unit may automatically include a one year defect liability period in which the builder can be required to remedy defects.

### The Act also provides implied warranties in all works, that:

- the work will be completed within a stated or reasonable time and will be in accordance with the plans, the building consent, all laws and legal requirements and with all reasonable care and skill in a proper and competent manner, and
- supplied materials will be new (unless otherwise agreed) and suitable for the purpose for which they will be used.

## For Traders – *What are your obligations when selling goods online?*

Online auction websites (like TradeMe) can be an easy stepping-stone towards starting or growing a business. The systems are already in place and there are relatively few barriers to entry. As with any business it is important to be aware of your rights and obligations. Typically, running a business in an online auction environment is no different to running any other business. Outlined below are some issues to keep in mind.



wide definition, it may not always be easy to determine whether or not you are 'in trade'. If in doubt, talk to us.

Those in trade have wide obligations under the FTA, which details that you must:

- make it clear to potential buyers you are 'in trade';
- have a reasonable basis for claims that you make about your products or services,

- not make representations that mislead or deceive consumers about the product or their rights,
- not bury qualifications, limitations and other important terms in fine print or on a link-through web-page,
- not offer to sell goods or services that you do not reasonably believe you can supply. If you source goods from a supplier only once the product has been sold, you must ensure any representations you have made about availability and delivery times are accurate.

### Consumer Guarantees Act 1993 (CGA)

The CGA applies to goods and services you sell while 'in trade'. The CGA implies a warranty that the goods sold match their description, are fit for their purpose, are of acceptable quality and will last for a reasonable time having regard to the price. If you breach one of these implied warranties, you may be required to repair or replace the product within a reasonable time, or provide a full refund.

Many people fall into the trap of thinking these rules won't apply, because their business is small, part time or just a hobby. If you have any doubts about whether you are in trade or running a business, or if you are unsure of your obligations, you can seek legal advice.

*...it may not always be easy to determine  
whether or not you are 'in trade'.  
If in doubt, talk to us.*

## Trust Law: Trustees' Duties – *Are you at risk?*

You might have been asked by a friend or family member to be an independent trustee of a Trust. You may also have been appointed as an executor of someone's estate, which will often also make you a trustee of the estate assets.

Trustees have strict duties to the beneficiaries of the Trust. Most duties are contained in the Trustee Act 1956. In certain situations trustees can be held personally accountable for their actions or for failing to act, so it is important trustees understand their rights and obligations.

All trustees must know the terms of the Trust (or the terms of the Will as the case may be), and must ensure the Trust (or Will) is managed in an efficient and economic manner. Trustees should take all precautions that an ordinary prudent business person would take in managing similar affairs of his or her own – a trustee must act with care and diligence. An independent trustee is not a 'rubber stamp', meaning they must not blindly agree with and follow the instructions of the remaining trustees or settlors; trustees must carefully consider their decisions.

Trustees have a duty to make prudent investments. This duty applies to the methods trustees use to make the investment, rather than looking at the actual results of that investment. A failed investment is not necessarily a breach of trust as long as the trustees acted prudently when choosing that investment.

Trustees must be impartial. They must consider the needs of each beneficiary and have a duty to manage the Trust assets in the best interests of those beneficiaries in accordance with the terms of the Trust deed or Will. Trustees must avoid being

in a position of conflict between their duties to the Trust and its beneficiaries.

Trustees are accountable to beneficiaries. They must keep proper accounting records and may be required to give beneficiaries information and explanations as to the investment of and dealings with the Trust property.

A breach of trust by a trustee can mean he or she is personally liable to the beneficiaries for any loss caused, particularly if it was an intentional breach of trust, dishonesty or negligence that caused loss. If a trustee can demonstrate that he or she acted honestly and in good faith and that the breach of the terms of the Trust was unintentional on their part, that trustee would not ordinarily be liable to the beneficiaries for the consequences of their breach.

When a Trust enters into a contract with a third party the trustees will typically be personally liable to ensure that the contract is completed. They may have a right to be indemnified from the assets of the Trust (meaning the liability they incur will be paid for from the Trust assets); however they will lose that right of indemnity if they act in excess of their Trust powers or in breach of their Trust duties. In addition to this, any right to be indemnified is only useful if the Trust actually has realisable assets. Recent case law has seen an independent trustee personally liable for Trust IRD debt, as the remaining trustees had fled the country. While the independent trustee had the right to be indemnified, there were no Trust assets left to cover the debt. The independent trustee paid the IRD debt using their own funds.

## *Buyer Beware! AGAIN!*

From time to time we have reminded clients to let us look at documents before they sign. This applies particularly to Agreements for Sale and Purchase of land.

While many are 'simple' and 'straightforward' there may be hidden dangers, omissions or conditions that won't suit you and a myriad of other possibilities.

We can usually review these contracts and documents quickly or at least have a conversation about your plans.

Please also carefully consider obtaining a Land Information Memorandum (LIM) from your local authority and a builders inspection of any property you wish to purchase.

*These might save you.*