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AUTUMN 2020

ENVOY

The publication of The New Zealand Institute of Legal Executives Incorporated

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Overseas investment and tenancy laws to be reformed in 2020

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From the President

Tēnā koutou katoa



Welcome to the Autumn edition of *Envoy*, a little later than we planned due to extenuating circumstances, not least being the Covid-19 lockdown. I trust that you all have managed the adjustment to working from home and that you, your loved ones and colleagues have stayed safe.

The National Council met in March and identified a number of areas of focus for 2020 that I have listed below.

New branding
Last year we began a rebranding exercise to refresh the institute's look and feel. It had been more than 10 years since we last went through the exercise, so it was certainly due. Whilst we will retain our legal name of 'The New Zealand Institute of Legal Executives Incorporated' we will be known as 'Legal Executives New Zealand', with a new logo and new colours. Watch out for the new look in the Winter edition of *Envoy*.

Kaiārahi - a mentoring service for members
'Kaiārahi' means 'someone who guides; leader, mentor, counsellor.' Our Kaiārahi service will offer support for members who have questions or concerns regarding technical work matters or their personal well-being.

We will be looking for senior, experienced legal executives to provide support in this role. If you are interested, please see the advertisement on page 27.

Working on amendments to retirement village legislation
We continue to work on obtaining amendments to the Retirement Villages Act 2003 and to the Retirement Villages (General) Regulations 2006.

Thank you to all members who completed our survey earlier in the year regarding the practices in your firm in relation to occupation right agreements (ORAs). When things resemble normality a little more, we will email members asking for your firm's support for our submissions seeking the right for NZILE Fellows to provide the requisite independent legal advice to clients, and to witness and certify the ORAs.

Changing workplace culture
We represented legal executives on the New Zealand Law Society Culture Change Taskforce in 2018-19. We were also invited to participate in a panel discussion in February 2020 arranged by Allanah Colley, Ana Lenard and Bridget McLay, authors of *Purea Nei: Changing the culture of the legal profession.* Click ***here** to read the paper. An invitation to collaborate further has arisen out of that event.

Reviewing and updating NZILE policies and constitution
Other ongoing work includes ensuring that our policies remain fit for purpose and that our rules are ready for the proposed changes to the Incorporated Societies Act.

As a result of COVID-19, we will all have to adjust to a 'new normal' that may impact some members' jobs in the short term.

Please remember we are all in this together and that we - the NZILE Council and our staff - are here to support you in any way we can. Please don't hesitate to contact us.

Kia kaha



Necia Parker
President

***https://tinyurl.com/y853yv94**

Branch updates

Since these branch presidents wrote their reports, Covid-19 and the lockdown has changed New Zealand forever. Please be aware that some of the events mentioned below will have changed, be postponed or cancelled.

Northland

Christmas function
We had a very enjoyable Christmas social gathering at the Plough & Feather in Kerikeri on Sunday, 24 November.

Yet again, we had an amazing turnout of Far North members. It was a thoroughly enjoyable afternoon in the sun with great food and some bubbles . . . and a wee bit of shopping afterwards!



From left: *Louise Fryer, Leah Robb, Charlotte Timings, Amanda Perrin, Sheralee Carpenter, Alison Laing, Cherie Westlake and Gina Browning.*

On the right side of the table, from left: *Three obscured people (sorry!), Julie Jaggard and Amy Jones.*

Education
Earlier this year the branch sent an online survey to members seeking feedback on what they would like to see from our branch. Our thanks to those who participated. We want to provide the best support, education and social opportunities for members and, hopefully, encourage more member involvement in our social/networking events.

The branch committee is specifically looking at options to provide educational opportunities for members this year, including some short lunchtime seminars/webinars.

We have approached a number of local experts inviting them to present seminars on topics relevant to members and that include some local content. We are pleased to say a number have agreed to do this for the branch.

Whangarei members will be able to bring their lunches and attend in person. For members outside Whangarei, we will record the seminars.

We have also contacted Kāinga Ora and hope to have a longer half-day seminar presented later in the year.

Social
Included in the members' survey were some questions regarding preferences for social events.

Once we have analysed the survey responses, we will send out a newsletter with details of upcoming education and social/networking events based on member's feedback from the survey.

Nicky Dreadon
Northland Branch President



Auckland Waikato

I hope you all managed to have some well-earned time off over the summer break.

The branch celebrated the end of 2019 with a fantastic Christmas function for Waikato members. It was my first time experiencing the food at Gothenburg and the high praise I had heard following previous events was certainly justified. The evidence was clear to see (and taste!). The evening was a great opportunity for me to meet some of our lovely Waikato members and I look forward to meeting more of you at future events.

Unfortunately, Auckland's Christmas event had to be cancelled, but we have already started brainstorming ideas for the mid-winter function.

First 2020 seminar
We held our first seminar for the year on probate and letters of administration, presented by Registrar John Earles in both Hamilton and Auckland. Registrar Earles has been a great supporter of NZILE and we always receive very good feedback from members following his presentations. We were therefore very pleased to arrange this seminar for members.



I always welcome questions, comments and suggestions from members on how we can provide a better service to you all, so please don't hesitate to reach out! My contact details are on the back cover.

Pip Glasson
Auckland Waikato
Branch President



Bay of Plenty Gisborne

I hope you had an enjoyable break over the Christmas period. We certainly experienced some outstanding weather across the region over the summer months.

Our thoughts go out to those who lost loved ones and to the victims who are still recovering from the terrible disaster of Whakaari/White Island off the coast of Whakatāne on 9 December.

More conveyancing changes keeping us on our toes
Tax statements: All agreements entered into after 1 January 2020 now require IRD numbers to be included in the e-dealing, irrespective of whether it is a main-home exemption or not. Transactions entered into before 1 January 2020 can still use the 'main home exemption' in the e-dealing but only where a transfer is registered before 1 July.

People selling their main home should still be exempt from the bright-line tax.

10th edition ADLS/REINZ Sale and Purchase Agreement: The new agreement was released on 27 November 2019. There are a number of changes but I mention, in particular, 'means of service specified in subclause 1.4(3)(b).' Now, a notice is deemed to have been served when sent to the email address provided for the party or the party's lawyer on the back page of the agreement, or any other email address notified subsequently in writing by the party or the party's lawyer.

I recommend that when you receive the sale and purchase agreement you check the email address is correct and the 'Email Address for Service of Notices' has also been included. Most agreements that I have seen coming in do not include the email address for service. Some firms may have a general email address that is used for settlement confirmations or general enquiries and may want to provide this as the address for service. This practice will cover the lawyer in the event that they are away. It may also be good practice to request receipt confirmation from the recipient.

Branch news
Late last year we held end-of-year celebrations across the region: dinner in Gisborne at The Works Restaurant on 13 November, Tauranga members enjoyed a luncheon at Collar & Thai on 27 November, Rotorua members had breakfast at Third Place Café on 28 November and, last but not least, Taupō members got together for an evening meal at Dixie Browns on 6 December.

Around 40 people attended the Tauranga event. It was wonderful to see so many people getting together and taking the opportunity to meet one another, as most of the time we only deal with each other by phone or email.

Our first branch committee meeting of the year was held on 22 February. The committee met face-to-face in Tauranga, and focussed on planning events and seminars to be held throughout the year.

Our newsletter, *Central Talk*, was sent to branch members in March and email invitations will be sent for social events and seminars coming up across the region.

Ally McEldowney
Bay of Plenty Gisborne
Branch President





Wellington Central Districts

I hope you all had a lovely Christmas break, although it seems a long time ago now. The summer weather was pretty patchy in Wellington and not the stunner that we had in 2018-19.

December was truly manic for me and those of you I spoke with at that time said the same thing. This year started with a bang and many legal executives I have talked with around town say they are swamped with work for this time of year. I do hope you managed to take some time out to enjoy any late summer concerts and events in your area.

Seminars

The branch had arranged for Julie Gillatt, Titles Advisor, together with a team of experts at LINZ, to give a lunchtime seminar in Wellington on Wednesday, 22 April[1]. The seminar promised to be a very informative and practical session. Julie has also expressed an interest in presenting in other parts of our region.

Please let us know other topics for seminars you would like us to consider.

Social events

Thank you to members who attended Christmas functions last year. There were great turnouts in Wellington, New Plymouth, Palmerston North and Hawke's Bay. Everyone enjoyed a great night out and it was a fantastic opportunity to catch up with colleagues.

Please contact your regional representative if you have suggestions for social catch-ups in your area.

[1]This seminar has been deferred until later in the year.

*Branch/email	Location	Phone
Cheryl Whitworth	Hawke's Bay	06 873 0420
Pam Green	Manawatu	06 280 2629
Debbie Masters	Taranaki	06 757 5609
Sheryl Thornton	Wellington	04 462 0471

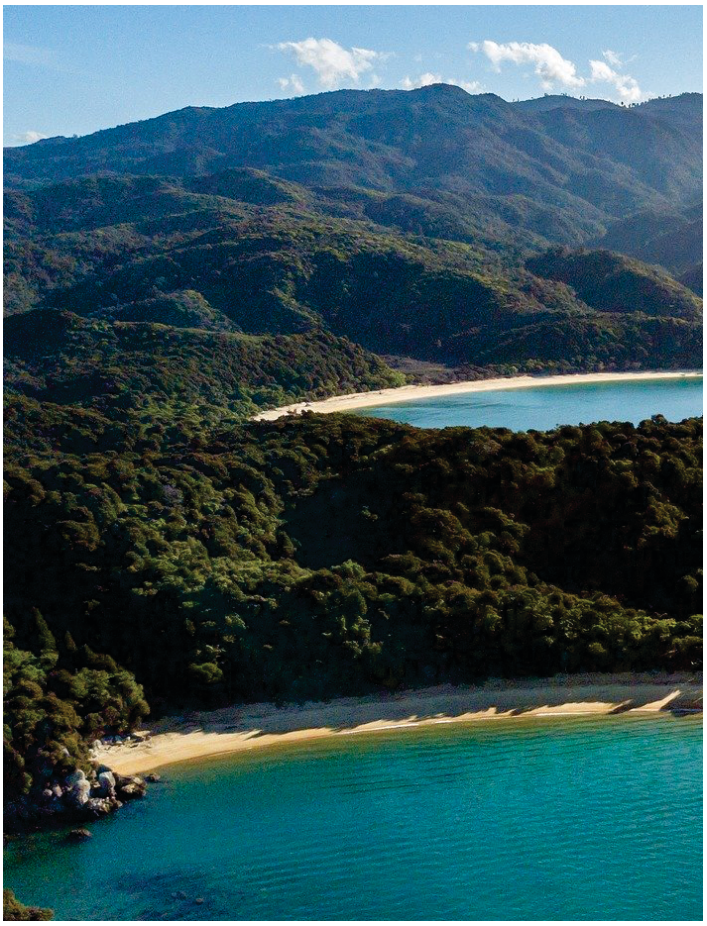
Tribute

Lastly, I pay tribute to my dear colleague at Buddle Findlay, Wayne Chapman, who passed away after a very short illness on 27 January aged 75 years. Some of you, and many in Wellington, would have come across Wayne in your legal careers. He was with the firm for 55 years (!) and was a fantastic teacher, mentor and guru of all things estates/trusts/property-related. The stories he could tell! Wayne was regularly called on to give expert evidence; he also sat on a number of disciplinary tribunals and committees for the NZLS over many years. Wayne is deeply missed by our firm across our three offices. He was a true 'legend' of a man.



Sheryl Thornton
Wellington Central Districts
Branch President

***cheryl@gifforddevine.co.nz** ***debbie.masters@nks.co.nz**
***pam@innesdean.co.nz** ***sheryl.thornton@buddlefindlay.com**



Nelson Marlborough

What a stunning summer we had, with some exceptionally warm days. In late January, four Arnoux's beaked whales visited Nelson Harbour. This provided much excitement in the area as this species of whale is quite rare.

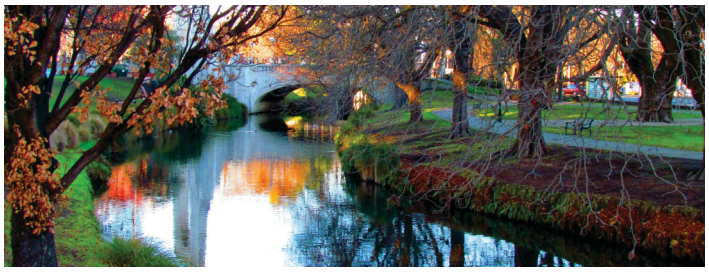
Seminar held in February
In February, Nelson Marlborough Branch held its first, and very successful, seminar for the year in conjunction with Tasman District Council. Council representatives gave an update on water and rates issues as well as discussing encroachments onto legal roads and Part IVA of the Conservation Act. The branch plans another two seminars before June to assist members with meeting their CPD requirements.

It is my intention that our committee works on a video-feed for Blenheim members this year, so that all branch members have the opportunity to participate in our seminars. Watch this space for updates.



All the best for the coming year, and enjoy the cooler evenings with the change of seasons.

Robyn Dewson
Nelson Marlborough
Branch President



Canterbury Southern Districts

The year is whizzing by and I can't believe autumn has arrived!

Seminars
We have hit the ground running with seminars for 2020. The first, held in February, was a roaring success. It was presented by Duncan Terris who spoke about the 10th edition of the ADLS/REINZ Agreement for Sale and Purchase.

Our next seminar was scheduled for the end of April on the topic of mindfulness, although it is now deferred until later this year – we hope! To be presented by the Mental Health Foundation, the purpose of this free-to-members seminar is to promote workplace wellbeing.

Our seminars continue to be held in Christchurch for local members. They are available to branch members outside of Christchurch via our ever-improving live-streaming service.

Social events
We are a social bunch and have some good events planned for Christchurch members, including a 'Paint and Sip' evening, tenpin bowling and, later in the year, a movie night. Keep an eye out for your invitation and don't forget to RSVP!

Our regional representatives arrange periodic get-togethers, such as lunches and dinners, to ensure members in their areas have the opportunity to meet and socialise. The representatives do a wonderful job of arranging these events.

Your branch is here for you
We are committed to provide members with informative and topical seminars that are relevant to you. We strive to arrange social events that you will enjoy and that will bring us together so that we can continue to put faces to names and network within our profession.



Your branch committee members and regional representatives are friendly and approachable, and always welcome your suggestions for events or seminars.

If you would like to be part of the committee and help to promote the profession in our region, please email our new address - ***here**.

Jo Langton
Canterbury Southern Districts
Branch President

***canterburysouthern@nzile.org.nz**



New trust law comes into force early next year

This year legal executives should familiarise themselves with the Trusts Act 2019, as the countdown for it coming into force on 30 January 2021 gathers momentum. This legislation is the first comprehensive overhaul of trust law in more than six decades and will reshape the landscape for the 500,000 or so trusts in this country.

New Zealanders hold far more property in trusts than owners do in other similar nations. The *New Zealand Herald* revealed earlier this year that around 325,000 properties had trusts involved in their ownership structures. Per capita, this country has four times as much real estate in trusts than is the case in Australia and the United Kingdom.

Applies to almost every trust – current and new

The 2019 legislation will apply to almost all existing trusts, as well as to new trusts. Current trusts will have 18 months to transition for compliance with the new Act, while all new trusts should be drafted in anticipation of the new regime.

The outdated Trustee Act 1956 and Perpetuities Act 1964 are repealed by the new law. In future, the maximum time that a trust can endure will be 125 years from the date of its creation. The common law rule against perpetuities is repealed.

Section 3 of the 2019 Act provides that its purpose is to:

- Restate and reform New Zealand trust law by setting out core principles relating to express trusts

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- Provide for default administration rules
- Create mechanisms for the resolution of trust-related disputes, and
- Make trust law more accessible.

Section 4 requires every person or court acting under the legislation to have regard to two key principles.

1. A trust should be administered in a way that is consistent with its terms and objectives, and
2. Administration should avoid unnecessary cost and complexity.

Under the new regime, trusts will not begin until a nominal settlement sum has actually been paid. That is a departure from the current situation in which many trusts are established with deeds recording nominal settlement amounts, such as $100, but the sum is not actually paid to the trust as the settlor intends to settle more significant assets on the trust.

Legal executives will need to ensure both that the nominal sum is paid, and that this is clearly recorded, to avoid later uncertainty as to when the trust commenced.

The 2019 Act also makes major changes to trustees' duties with Part 3 setting out both mandatory and default requirements. Section 21 states that, in performing the mandatory duties set out in sections 23-27 and the default duties in sections 29-38, trustees must have regard to the context and objectives of the trust.

Trustee mandatory requirements

Section 22 specifies that the duties set out in sections 23-27 are mandatory: they must be performed by the trustee and may not be modified or excluded by the terms of the trust. Section 23 requires trustees to know the terms of the trust, while section 24 requires them to act in accordance with those terms.

Section 25 binds trustees to act honestly and in good faith. By virtue of section 26, trustees are placed under a duty to hold or deal with trust property, and otherwise act for the benefit of the beneficiaries in accordance with the trust. In the case of a trust for a permitted purpose, trustees must act to further the permitted purpose, in accordance with the trust's terms. The last of the mandatory duties is to exercise trustee's powers for proper purposes.

Trustee default duties

Default duties set out in the legislation include duties to invest prudently, act impartially, avoid conflicts of interest and not to profit from the trusteeship of a trust. Default duties are not mandatory and can be modified or excluded by the trust deed.

Legal executives acting in relation to trusts should ensure that clients are made aware of the effects of this modification.

Once the new law takes effect, trusts will no longer be able to limit trustees' liability for breach of trust resulting from gross negligence, wilful misconduct or dishonesty.

New record-keeping requirements

Legal executives should also make sure that clients understand the record-keeping requirements that will be imposed on trustees. Trustees will be required to keep the core documents listed in section 45, including the trust deed (including any variations), records of the trust property, written contracts, and accounting records and financial statements prepared during the trustee's trusteeship.

Section 46 provides that, not only must trustees keep the documents specified in subsections (a) and (b) of section 45 themselves, but they must also be satisfied that at least one of the trustees holds the other documents listed in section 45.

Information provided to beneficiaries

The new law also sets out what information must be provided to beneficiaries. Section 50 states that the purpose of sections 51-55 is to ensure that beneficiaries have sufficient information to enable the terms of the trust and the trustees' duties to be enforced against the trustees. Sections 51-55 do not apply to charitable trusts or other trusts for a permitted purpose that do not have beneficiaries.

Section 51 states there is a presumption that trustees must make available to every beneficiary, or representative of a beneficiary, basic trust information including:

- The fact that a person is a beneficiary
- The name and contact details of the trustee/s
- Trustee appointment and retirement details, and
- The right of the beneficiary to request a copy of the terms of the trust or trust information.

By virtue of section 52, there is a presumption that trustees must, within a reasonable period of time, give beneficiaries or their representatives trust information that has been requested. Section 53 sets out the factors to be taken into account in deciding whether the presumption applies. This will mean that, for example, if a trustee considers that a beneficiary is unlikely ever to receive a distribution from the trust, the trustee is not required to provide information about the trust.

Section 54 provides that if, in specified circumstances, no beneficiary has any trust information, the trustee must apply to the court for directions as to whether the trustee's decisions about information provision are reasonable, and as to alternative means by which the trustee can be held accountable and the trust can be enforced.

Simpler to remove trustees

A significant change in the new legislation is that it simplifies the process to remove trustees due to incapacity and to vest property in the new trustees. This should reduce costs for dealing with trustees who have age-related conditions including dementia and Alzheimer's.

The Act states that a number of people may remove trustees. These are persons named in the trust deed as having the power to remove trustees, the remaining trustees if no-one has the power, or a person holding an enduring power of attorney over the property of a trustee who no longer has capacity.

Everyone must become familiar with the new Act

With the new law coming into force on 30 January 2021, there is sufficient time (and opportunity) to encourage clients to review trust deeds. Legal executives should ensure that trustees are familiar with their new duties, as well as with record-keeping and information-provision rules. There may be increased time and cost required to administer some trusts, which could result in clients deciding to re-order their affairs. ■



Resource Management Act changes will affect conveyancing

The shape of the most comprehensive reform of the Resource Management Act 1991 (RMA) in the almost three decades since it was passed is expected to be unveiled in mid-2020 when specific reform proposals and key legislative provisions will be released. The changes will have a major impact on conveyancing, including expected amendments to rules for planning and development.

Review panel established

In July 2019, the government announced a comprehensive review of the law and set up the Resource Management Review Panel, chaired by retired Court of Appeal Judge, Tony Randerson. The Environment Minister, the Hon David Parker, said that the Resource Management Act was responsible for managing both New Zealand's built and natural environments, but it had been under-performing.

"That is not an acceptable outcome in a country that values the protection of the environment while properly housing our people."

In November last year, the review panel released a discussion document setting out options for reform. Mr Parker said that the paper looked at what changes were needed to fix the system to ensure that the country had liveable urban and rural areas, and that Māori had an effective role in the resource management system. It also canvassed how to improve deteriorating freshwater quality and biodiversity, and what the response to climate change should be.

"The proposals are indicative of the range of possibilities. For example, whether the RMA's core purpose of sustainable management should change or if legislation dealing with urban development and environmental management should be separated," said Mr Parker.

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Major urban development pressures

The discussion document, entitled *Transforming the resource management system: Opportunities for change*, said that serious challenges to New Zealand's ability to respond quickly to urban development pressures and to house people in liveable communities had emerged since the RMA was passed in 1991. Successive governments had amended the legislation and ad hoc measures had been adopted to try to address the issues New Zealand faced.

However, the time was now ripe for a comprehensive review of the Act and other significant legislation comprising the resource management system. The overall aim was to improve environmental outcomes, and to enable better and timely development in urban areas and elsewhere within environmental limits.

The paper said that New Zealand was becoming increasingly urbanised. Between 2008 and 2018, New Zealand's population had increased by 14.7%, with 99% of that growth being in urban areas. Rapid changes in rural land use had also increased stress on ecosystems. Between 2002 and 2016, the proportion of farmland used for dairy had grown by 42%, accompanied by a corresponding decrease in the land area used for sheep and beef.

Water quality issues

Water pollution affected almost all rivers and many aquifers in farming areas and a transition was needed to achieve sustainable land use and ensure cumulative environmental effects were sustainable across generations. The panel said that the system had not responded well to change because it lacked clear environmental protections, the benefits of urban development were not recognised and there was a focus on managing the effects of resource use rather than planning to achieve outcomes.

Decisions made through the resource management system had also favoured existing users and uses and had, accordingly, failed to provide properly for future generations, poorer communities and Māori/iwi.

> "That is not an acceptable outcome in a country that values the protection of the environment while properly housing our people."

Preliminary ideas for reform

The paper outlined preliminary ideas for reform of the resource management system. It said that the problems identified with the current law and its implementation suggested that reconfiguration of the legislative architecture of resource management was required. This could be achieved by creating separate pieces of legislation for dealing with environmental management and land use planning for development, rather than retaining the current integrated approach.

A second option would be to reform the purposes and principles set out in the current Act, including by providing recognition of, and the strategic focus for, necessary housing and infrastructure development, as well as better reflecting te ao Māori.

Thirdly, alignment and integration could be achieved by agreeing on some common principles to be broadly applied across the resource management system. One way to do that would be to use strategic and integrated planning, known as spatial planning.

This would encompass consideration of economic, environmental, social and cultural wellbeing. It would also require a long-term time horizon and a focus on integrating environmental protection, land and natural resource use and infrastructure decision-making, including funding and financing.

Spatial planning provisions needed

The panel said that there was currently no consistent framework for spatial planning in New Zealand. Some councils were making progress in developing integrated and long-term spatial plans without a legislative framework. However, there were barriers to achieving this, including insufficient legislative mandate and weight, fragmented governance and decision-making arrangements, and poor incentives for local authorities to co-ordinate work on planning for and funding infrastructure.

The paper suggested that an overarching strategic planning statute could be created to sit above the RMA and other statutes such as the Local Government Act 2002 and the Land Transport Management Act 2003. That might 'elevate' aspects of Part 2 of the RMA and other important principles.

Alternatively, the document mooted that spatial planning could be provided for within the Local Government Act, with statutory linkages to the RMA and other relevant legislation.

A third option could be to provide for spatial planning at regional levels only, or to require spatial plans for all regions, or only for major urban centres.

The paper emphasised that addressing climate change and natural hazards were important goals, but noted that the RMA currently had a limited role in climate change mitigation. The paper suggested that the emissions trading scheme could be maintained as the main policy tool to address climate change mitigation, or references to climate change mitigation could be added to Part 2 of the RMA. National direction could be developed to encourage the types of activities needed to facilitate New Zealand's transition to a low-carbon economy.

Detailed reform proposals due mid-year

Submissions on the discussion paper closed on 3 February 2020. The review panel will report to the government by the middle of this year with detailed reform proposals. ■



Pip Glasson, Sheryl Thornton, Jo Langton and Ally McEldowney

Introducing our new branch presidents

In the Summer 2019 edition of Envoy *the four new branch presidents briefly introduced themselves in their first branch reports. For this Autumn 2020 issue, they all have the opportunity to outline more broadly their professional experiences as well as giving us a glimpse of their personal lives.*

Enjoying the Bay of Plenty's warm climate - *Ally McEldowney - Bay of Plenty Gisborne*



View from Mt Maunganui

My legal career began in 2004 as personal assistant to a partner in a small law firm in Blenheim. I was thrown straight into it from day one! I enjoyed the challenge, however, and felt I had found an occupation that interested me and would give me job satisfaction.

After a year in the Blenheim firm, I decided that law was definitely the career for me and began studying to become a legal executive. It was quite challenging as it had been a number of years since I had done any study, and I was juggling full-time work with raising two young children.

With my qualification completed in 2008, I continued to support the law firm partner as a litigation PA while also working as a legal executive specialising in trusts and conveyancing. Working in a small firm, I gained a good knowledge in most areas of law.

Experience in Rarotonga

In 2012, my family moved to the Cook Islands for a few months and I worked in a law firm in Rarotonga. It was quite an experience, sometimes frustrating, as nothing happens fast in Rarotonga. My work included preparing applications ready for court as court approval was required to enable purchasers to buy leasehold property.

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Returning to New Zealand
After Rarotonga, our family moved to Oamaru where I secured a legal executive role in a small law firm. Again, working for a small firm I had good exposure to all aspects of law, but specialised mainly in conveyancing and trusts. My NZILE involvement began while I was in Oamaru when I was social convenor for Canterbury Westland Branch (as it was then called).

Living in the warmer Bay of Plenty
Seeking a warmer climate, in 2015 our family moved to the Bay of Plenty. I now work for Holland Beckett Law, a large law firm in Tauranga. My areas of practice are conveyancing, wills and powers of attorney. With Tauranga being the 'retirement village capital of New Zealand', I often work on occupation right agreements.

NZILE involvement
After moving to Tauranga, I was approached to take on the role of branch secretary as the previous secretary had just resigned the position and moved out of the region. Four years later, in 2019, I was elected as president when Raewyn Miller completed the maximum four consecutive years as branch president.

I look forward to continuing Raewyn's good work and also working with the National Council to continue to promote the role of Registered Legal Executives within the legal community.

Away from work, I enjoy being in the company of my family, reading, walking our two dogs and travelling. We are currently planning a big trip to Europe in 2021.

Law has always been my focus - *Jo Langton - Canterbury Southern Districts*


Governors Bay, Lyttelton Harbour

I always wanted to work in law. When I was 18, I started a job as the office junior/receptionist in a small law office in Newton, Auckland. After a few months, and having seen the legal executive's role within the firm, my goal was to become a legal executive.

My employer suggested I should first become a legal secretary to see how I enjoyed that, so I completed a two-part secretarial course that took around eight months. I then moved into more of a secretarial role within the firm and helped the legal executive where possible with administrative tasks.

Becoming qualified
My employer could see that I was hungry to learn, and she offered flexible hours so that I could attend AUT to begin my legal executive studies. I completed two papers by the time I was 19 before moving back to Christchurch to be with family. I then had some years away from study while I travelled overseas. Once back in Christchurch I had a family, but picked up my studies again in my mid-20s and completed the qualification at the end of 2014 while working part-time and looking after my two young children.

Joining the branch
Completing the diploma, I felt such a sense of achievement; I quickly applied to the institute to become registered. On registration, I immediately joined the committee of Canterbury Westland Branch (as the branch was then called). Initially I helped out where I could, then in 2016 I was elected to the treasurer's role. I held that position until I was elected president at the branch's 2019 AGM.

I feel very lucky and excited to be the president of Canterbury Southern Districts Branch. I'm looking forward to working with the presidents of the other branches and the National Council to promote the growth of legal executives and to make positive changes for our future in the legal community.

When I'm not at work, my hobbies include hanging out with my two children, Sophia (10) and Billy (5), and doing anything outdoors.

A passion for the law - *Pip Glasson - Auckland Waikato*


Marokopa Falls, Waitomo

It was in 2007, when I moved from Christchurch to Auckland and worked as a legal secretary at Wilson McKay, that I discovered my passion for law. The firm was extremely supportive of my desire to study law further and I completed the legal executive diploma studying part-time through AUT.

After graduating in 2011, I took a break from work to travel around Europe. On my return I took up a fixed-term role (covering for maternity leave) at Duncan Cotterill's Auckland office. Nine years later I'm still there after the short-term situation became a permanent position.

Enjoying the wide variety of work
My main practice areas are residential conveyancing and working within our banking and finance team. I love the variety of work that this split provides. I find the experience gained assisting lenders with their transactions and enforcements offers transferrable insights when acting for my private clients.

I have been a member of Auckland Waikato Branch committee for the past five years, have helped modernise the branch newsletter and assisted with organising a number of the branch's social events. I am delighted to step up to the larger role of president and I'm looking forward to working with the institute's other branches.

Outside work I enjoy playing board games with friends and gaming on PlayStation 4 (and virtual reality).

It all began with nominee company mortgages! - *Sheryl Thornton - Wellington Central Districts*


Cape Palliser lighthouse

I have only ever worked in law - I'm not sure I know how to do anything else!

When I was 17, in the school holidays I worked at a small law firm in Auckland. The day after the last of my sixth form exams, I started full-time work at that firm. I was really thrown in the deep-end - which was probably a good thing. Our first computer came to me via the boss saying, "Right - now you can do nominee company mortgages." I had to figure out what those were first.

I started studying for the legal executive certificate (as it then was) the following year. That was probably good because I was still in 'study mode' having so recently left school. Those were the days when you had to attend lectures in person. There was no email or internet! Settlements, of course, were conducted in person and I often found myself flying all around Auckland city on a Friday with documents and cheques in hand.

Moving to a large firm
After a year, I moved to Bell Gully, working in banking and finance. In 1990, I relocated to the firm's Wellington office and continued my studies at Wellington Polytechnic, and graduated the following year.

Into litigation
After about nine months, I was offered a position at Macalister Mazengarb, working for Hugh Rennie (now a QC). That was the beginning of my move into the litigation environment and it was a fantastic job.

When three litigation partners established Harbour Chambers, they asked me to be their first employee. I worked there until 1995 when I had my first child. When he was about 18 months old I went to work for Helen Cull QC (now Justice Cull). A second son came along two years later.

I contracted for various law firms around Wellington before returning to work part-time for Helen Cull. We were working on some pretty high profile cases (all secret squirrel of course!) and I was a member of the Bain defence team for the second and last trial. That was quite something else; it was all -consuming with things coming at us from all angles. We were all working crazy long hours with just three of us in Wellington. After the trial, I left chambers to study at Victoria University. No rest for the wicked.

While I was studying, however, I answered an advertisement for a job at Buddle Findlay - just because I wanted to see what was out there. Well . . . I have now been here for nine-plus years. Not sure quite how that happened!

I was initially employed in the firm's litigation team working on mortgage enforcement/insolvency for the banks. Not having done this work before, it was a real learning curve. After six years I moved to the property team, doing commercial and private client work. There was always some cross-over between the two teams and there still is from time to time, although the insolvency work petered out somewhat once the 2007-08 global financial crisis ended.

Outside work I enjoy classic cars and racing, travel, and socialising with family and friends. I am always up for a chat with other legal executives and happy to help wherever I can. One of the most valuable things in this job is finding great mentors. I am very lucky to have had that throughout my career. I guess I have always been very 'selective' who I have worked for!

Enjoy our local branch
I encourage members to join their branch committees. Being a committee member is not an onerous job and we are all very welcoming. It is a great way to become involved and have a say, and to make new connections with others from the branch and around the country. Those connections are treasured. ■

Conveyancing update



Landonline rebuild ramping up in 2020

This year Land Information New Zealand will continue work on the staged rebuild of Landonline. LINZ completed its first external pilot in 2019 with customers using and providing feedback on Landonline Web Search, which will replace the current e-Search function. It is currently planned for release in June 2020.

Landonline Web Search will enable users to search from any device that has internet access. Specialist software and digital certificates will not be required. Users will also be able to search for a property on a map with aerial photography and there will be an improved search address function.

LINZ said that the 2019 pilot had focused on a small group of 16 registered e-Search customers from five firms and entities ranging across real estate, finance, valuation, architecture and territorial authorities. Customers had been surveyed at the end of the pilot and their feedback had been positive. Users stated that the system was easy to use and navigate, and it provided mobility that enabled people to work from home or out in the field.

LINZ said that, between January and March 2020, it would introduce more registered e-Search customers to the pilot, with the goal of expanding it to 100 users by March.

Guidelines for addressing in-fill developments released

The Surveyor-General has issued new guidelines for councils to make available additional guidance and options for providing addresses for in-fill developments. Individual property addresses that can be quickly identified are important both for routine deliveries and in the event of emergencies.

In-fill development is becoming increasingly common in urban areas and there has been concern by developers and property owners not associated with developments about the requiring of changes to existing addresses, including road names. The guidelines provide surveyors, developers and others with more information about how addresses are to be created.

Authority and Identity Requirements for E-Dealing Guideline 2018 – LINZG20775 updated

In January 2020, LINZ updated the 2018 guideline to authority and identity requirements for e-dealing. The guideline assists practitioners to understand their obligations when making e-dealing certifications regarding authority and identity.

The updated guideline is available *__here__ on LINZ's website.

Thresholds for Australian investments in New Zealand increased

Higher thresholds for Australian investments in significant business assets (SBAs) in this country have taken effect for the period from 1 January 2020 to 31 December 2020. Australian investments in SBAs are exempt from requirements to obtain prior consent from the Overseas Investment Office if they are under specified amounts.

LINZ said the thresholds were adjusted each year. The thresholds for 2020 are:

- $537 million if the investor is an Australian non-government investor, and
- $111 million if the investor is an Australian government investor.

Land Valuation Proceedings Bill reform underway

Late last year, the Parliamentary Counsel Office sought feedback on a draft new Land Valuation Proceedings Bill before it was introduced to Parliament. The exposure draft of the new law was prepared and released for public submissions so that any flaws could be pointed out before the legislation was introduced to the House.

The current Land Valuation Proceedings Act 1948 is dated and written in outmoded language. The reform aims to make it more accessible and to reduce regulatory costs. The Bill re-enacts the 1948 legislation by restating it in modern language and drafting style, without changing the substance of the law.

The Land Valuation Proceedings Act provides for the Land Valuation Tribunal that deals with objections relating to property valuation and the taking of land

*__https://www.linz.govt.nz/regulatory/20775__

under the Public Works Act 1981. Each region has its own Land Valuation Tribunal, comprising a District Court Judge and two registered valuers. Owners, occupiers or bodies corporate can lodge objections to valuation decisions with the Tribunal, following reviews by district councils or Quotable Value.

Submissions on the exposure draft closed on 28 February.

Shape of relationship property law reform unclear

The scope of any changes to the Property (Relationships) Act 1976 remains unclear following a Law Commission review and the receipt of proposals by the government.

The Law Commission carried out a wide-ranging review and concluded that the Act, in its current form, was no longer satisfactory. In July last year, the Commission recommended 140 changes and said a new Relationship Property Act should be passed.

The commission also said that there should be a separate review of relationships that ended when one of the partners died, and that this should be carried out within the ambit of an overall review of succession law.

In its November 2019 response to the Law Commission's recommendations, the government said that it agreed that there should be a review of succession law. The remainder of the suggestions would be put on hold while a succession law review was carried out, as a return to differing rules for relationships ending by separation and by death would be undesirable.

Minister of Justice, the Hon Andrew Little, had asked the Law Commission to review succession law in July 2019.

New finance condition in 10th Edition of REINZ/ADLS Sale and Purchase Agreement form

The Real Estate Institute of New Zealand said that alterations to clauses governing finance conditions in the 10th Edition of the REINZ/ADLS Sale and Purchase Agreement require buyers to demonstrate that they could not secure finance for the purchase.



Previously, REINZ said that a buyer's statement that he or she could not raise finance had been accepted as sufficient to prevent the agreement from becoming unconditional. Under the new edition, however, evidence of a failure to obtain finance would be needed. That evidence might comprise a letter from the purchaser's bank confirming that there were insufficient funds.

REINZ Chief Executive, Bindi Norwell, said this was a significant change and prospective purchasers should ensure they obtained legal advice before signing documents, or they could be required to complete the purchase.

Other amendments to the form include revision of the GST clauses, the incorporation of a procedure for resolving disputes between buyers and sellers, and the inclusion of an optional toxicology report condition.

Residential land statements must be completed

The Overseas Investment Office (OIO) has reminded law firms to complete residential land statements. Late last year, the Office issued a compliance letter to a law firm after it failed to fill out a statement. The statements capture a person or company's eligibility to acquire an interest in residential land. Section 51A of the Overseas Investment Act 2005 requires the statements to be completed when residential land is transferred.

Section 51C specifies that the statement must be provided by the client to the conveyancer or lawyer before a transfer is lodged. The OIO said that the statements were an important safeguard against potentially serious breaches of the Act.

A civil penalty of up to $20,000 applies for breaches of section 51C. ■

Sources: Parliamentary Council Office; Land Information New Zealand; Overseas Investment Office; New Zealand Law Society; www.beehive.govt.nz.

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Overseas investment and tenancy laws to be reformed in 2020

Legal executives carrying out commercial and conveyancing work need to pay particular attention to overseas investment rules to ensure international purchasers are not caught out. The government continues to make law changes in this field and the Overseas Investment Office (OIO) is taking a tougher approach to enforcement.

Overseas investment

Associate Finance Minister, the Hon David Parker, said late last year that the government would introduce a bill early in 2020 to create a new national interest test for the sale of New Zealand's most sensitive and high-risk assets to overseas buyers. The Minister said that, under the current law, assets such as ports, airports, telecommunications infrastructure, electricity and other critical infrastructure were not assessed through a national-interest lens.

“We are introducing a number of new powers, consistent with global best practice, to protect New Zealanders' best interests in such important – often monopoly – assets.”

The government said it was also responding to concerns about overseas investment in water bottling and would, accordingly, in future require the impact on water quality and sustainability of a water bottling enterprise to be considered when an investment in sensitive land was assessed.

The 2020 reforms will follow a 2018 law change that largely prohibited foreign purchasers from buying residential homes.

Mr Parker said that, under the 2020 reforms, a government 'call in' power would apply to the sale of New Zealand's most strategically-important assets, such as firms developing military technology and direct suppliers to this country's defence and security agencies. This would apply to assets not currently screened under the Overseas Investment Act 2005.

“The power would only be used to control those investments that pose a significant risk to our national security or public order,” said the Minister.

“These tests could also be used to control investments in significant media entities where these are likely to damage our security or our democracy.”

Mr Parker said that the new powers would be used rarely and only when they were necessary to protect New Zealand. Enforcement powers would also be strengthened, with the maximum fixed penalty for failing to comply being increased from $300,000 to $10 million for corporates.

Mr Parker said that the provisions of an existing Ministerial Directive would be written into the Act, requiring overseas investments in farmland to demonstrate substantial benefit to this country. This

would require evidence that something substantially new would be added, or there would be additional value created for the economy.

The OIO said the 2020 changes would also give Māori values greater recognition, with the aim of improving awareness of, and access to, culturally-sensitive areas. The Office said that it would no longer review a range of low-risk transactions, including those by fundamentally New Zealand companies.

In addition to these law changes, the OIO has in recent years increased its enforcement action. In 2018, the Office sought a civil enforcement penalty in only one court case. By contrast, last year there were multiple applications. The two key areas of breach were failure to obtain consent for a purchase and failure to comply with the conditions of consents.

In July 2019, the High Court ordered the owners of two rural properties in Warkworth to pay $2.95 million to the Crown after an investigation found the purchases had been made without consent. In October 2019, an Austrian countess, who bought $13.4 million worth of New Zealand farm land, was fined $10,000 after the purchase was completed without the proper authority. It was accepted that the actions of the countess had been inadvertent and the man who set up the purchase had committed the breach, but there was no power to take action against him.

In December 2019, in *Chief Executive of Land Information New Zealand v FFG Investment Ltd [2019] NZHC 3293*, the High Court fined FFG Investment and Grand Sky $123,000 for failing to obtain consent from the OIO for the purchase of property considered sensitive land because it adjoined a reserve.

Upcoming residential tenancy law changes

Changes to residential tenancy laws will also be made by the government in 2020. Associate Minister of Housing (Public Housing), the Hon Kris Faafoi, announced late last year that a bill to amend the Residential Tenancies Act 1986 would be introduced to Parliament in the first half of this year.

The Minister said that the bill would prohibit landlords from ending periodic tenancies without a reason. The legislation would set out nine specific reasons that would be able to be used for terminating periodic tenancies.

Mr Faafoi said that fixed-term tenancies would in future become periodic tenancies at the end of the fixed term, unless the landlord and tenant agreed otherwise, the tenant gave notice or the landlord gave notice using one of the nine specific grounds. Notice periods to end periodic tenancies would be 63 days when the landlord or a family member required the property to live in, and 90 days when the property was sold with a stipulation of vacant possession.

Other changes would include permitting tenants to add minor fittings to premises when there was little risk attached to the installation and removal, and requiring all requests by tenants for fixed-term tenancies to be considered, with requests not being unreasonably declined. ■

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CHANGING THE CULTURE OF A PROFESSION

Cases update



Property

Dispute over standard for repair of earthquake-damaged home

In *Bruce & Anor v IAG NZ Ltd* [2019] NZCA 590, Joanne and Stephen Bruce owned a house that was built to a very high standard; it was completed in 2006. The house won Gold awards in the 2006 Master Builders' House of the Year competition.

The property was damaged in the Christchurch earthquakes and the insurer, IAG, elected to repair it rather than to rebuild. The insurance policy stated that repairs were to be completed to 'the same condition and extent as when the house was new.' If that was not practicable, repairs were to be 'as close as is reasonably possible to that condition and extent.'

The repairs required were extensive. The concrete slab on which the house and garage sat was no longer level, so the house was lifted in order to excavate and repair the slab.

However, the builder engaged by IAG did not meet the policy's 'as new' standard in a number of respects. The Bruces pleaded 135 defects. Shortly before trial, IAG conceded almost all of the defects, with only four being disputed at trial. The issues were the floor level, the verticality of the interior walls, the quality of wall finishes and the fireplace.

The High Court judge held that, in each of the first three areas, the work failed to meet the contractual standard.

However, the Bruces did not accept the judge's view that a combination of remedial work and damages would sufficiently compensate them. They argued that the work had to be done again and appealed to the Court of Appeal. The fireplace issue was not pursued on appeal.

IAG cross-appealed, arguing that it was not practicable to achieve an as-when-new standard in relation to the wall verticalities and the trial judge should have concluded that the work met the fallback standard of 'as close as is reasonably possible.'

The Court of Appeal granted the appeal in part, setting aside the finding that the Bruces had not established that there was a reasonable and practicable way to remedy the wall verticalities and uneven floor levels and holding that these issues must be decided at a second trial. The cross-appeal was dismissed.

Multiple court proceedings about earth mound

Speargrass Holdings Ltd & Ors v van Brandenburg & Ors [2019] NZCA 564 involved a dispute between the owners of neighbouring properties in the Wakatipu Basin about a substantial earth mound said to adversely affect residential amenity. Speargrass commenced three proceedings in the High Court.

The first of these was an appeal from an Environment Court decision granting consent to the Flax Trust (of which the first respondents are trustees) for a substantial earth mound formed along the northern boundary of land owned by the trust adjacent to land owned by Speargrass.

Secondly, there was an application for judicial review of decisions by the Queenstown Lakes District Council relating to resource consents for the earthworks.

Thirdly, there was an originating application under section 333 of the Property Law Act 2007 seeking an order for removal of the mound.

The three proceedings were dealt with together by the High Court, which allowed the appeal against the Environment Court's decision. The High Court held that the council had erred in relation to the consents but declined to grant relief, and it found that the mound was an unauthorised structure under the Property Law Act but refused to make a non-recurrence order.

Speargrass appealed to the Court of Appeal against the refusal of judicial review and the decision not to make orders under the Property Law Act.

The Court of Appeal dismissed the appeal, agreeing with the High Court that the Flax Trust had been prejudiced by the delay in commencing judicial review proceedings. Granting relief to Speargrass at this late stage would mean the Flax Trust had wasted expenditure and would, in effect, be forced to start again.

In relation to the Property Law Act proceedings, Justice Cooper said that the High Court judge had been justified in declining the application for complete removal of the mound when she concluded that she could not, on the evidence, determine an optimum height for it.

Wills

Earlier will ruled valid after capacity concerns for testatrix

Manley & Church v Manley & Ors [2019] NZHC 3477 involved an application for a declaration that the will of the deceased, Stephanie Manley, dated 15 May 2017, be declared invalid and a will dated 3 April 2007 be granted probate.

The plaintiffs had originally applied for probate of the May 2017 will but that was refused by the High Court registry on the grounds that Mrs Manley might not have had testamentary capacity at the time it was executed. The reason for the refusal was that the death certificate of 93-year-old Mrs Manley recorded that she had suffered from dementia.

The plaintiffs were unable to obtain an affidavit from a medical practitioner to confirm that Mrs Manley had testamentary capacity when she executed the May 2017 will. They, accordingly, decided to seek probate of the earlier will, which was largely similar.

The consent of the defendant beneficiaries was obtained to the making of a declaration that the 2017 will be declared invalid and the earlier will be granted probate.

Justice Whata observed that Mrs Manley's cognitive status had been assessed as declining in December 2016, with her short-term memory being particularly impaired. A medical assessment in January 2017 indicated ongoing mild cognitive impairment, as did a further assessment in April 2017.

His Honour said that, while it was not a clear case, given that all of the affected beneficiaries approved, he was prepared to find there was sufficient doubt about Mrs Manley's competence in May 2017 that the will executed then should be declared invalid.

The effect of that declaration would be that the 2007 will would be granted probate, as there was no issue of testamentary capacity in relation to that document.

Trustees removed for incapacity – three cases

In December 2019, Associate Judge Lester granted three applications on the papers under the Trustee Act 1956 and the High Court Rules 2016. In *Jones v Jones* [2019] NZHC 3402, the applicants were trustees of the Shirley Jones Family Trust. They sought the removal of Ms Jones as a trustee on the grounds that she lacked capacity due to advancing dementia. A medical assessment confirmed the diagnosis.

Associate Judge Lester said that such applications were now routinely made by way of originating application, which was a cost-effective and practical procedure to adopt. As Ms Jones was incapacitated, r 4.30 of the High Court Rules required her to have a litigation guardian unless the court decided otherwise. His Honour said he was satisfied that it would serve no purpose to appoint a litigation guardian in this case, due to the nature of the application and Ms Jones's incapacity.

An order removing her as a trustee was made pursuant to the court's inherent jurisdiction to appoint and remove trustees. A further order was made vesting the trust property in the remaining trustees.

In *West v West* [2019] NZHC 3400, an order had been made removing Jean West as one of the trustees of the West Family Trust due to her advanced dementia. Ms West was removed as a trustee under section 43 of the Trustee Act and the powers created by the trust deed.

This was an application to vest the trust property in the current trustees. Associate Judge Lester granted the order under section 52 of the Trustee Act, holding that it was not necessary for Ms West to have a litigation guardian.

Similar orders were made in *Guise v Guise* [2019] NZHC 3387 that involved an application to remove Donald Guise as a trustee of the Donald Guise Trust following a devastating stroke that left him unable to communicate or manage business or property affairs to any degree.

The court held that Mr Guise did not require a litigation guardian and made an order under the court's inherent jurisdiction removing him as a trustee. An order was made vesting the trust's property in the remaining trustees. Associate Judge Lester noted that the application to remove Mr Guise had been made under section 51 of the Act, or under the court's inherent jurisdiction. As no replacement trustee for Mr Guise was sought, the section 51 jurisdiction could not be invoked. ■



New Zealand Institute of Legal Executives



A professional life well-achieved

Jenny Stenning's 22 years of service to NZILE

After a legal executive career of close to 50 years, Jenny Stenning retired in 2019 still enjoying her work and still very much liking the interaction with clients.

Jenny worked as a bookkeeper after leaving school, until the accountant suggested that she become a legal executive. She attended night school to qualify while working at Shale and Burns, before moving to Brookfields where she worked for 15 years.

Jenny's first legal executive work was debt collection for a funeral director client, which she says was harrowing at times. She then started doing conveyancing, and wills and estates work, eventually ending up with a client base that also included trusts and small commercial work.

“I liked the variety. I hated being tunnel-visioned into one area because I found it completely boring.”

Jenny's career included employment at Carson & Co for 11 years, before she moved to Duncan Horrocks Law (later Duncan King Law); she remained there until her retirement in March 2019.

NZILE Council tenure

Jenny served on the NZILE Council for 22 years between 1985 and 2007 - an incredible period of service. “The institute was very small when I joined the Council,” Jenny recalls. She and other councillors worked to sustain the institute and achieve better outcomes for legal executives.

However, although there has been significant progress, Jenny believes that the work of legal executives is still not properly acknowledged.

“We add a lot of value that is not recognised. Maybe it is a little bit more now than it was. I got introduced years ago as the person who was cheapest to do the job! So we've come a long way since then.”

Jenny would like to see greater statutory recognition for Registered Legal Executives, including under the Lawyers and Conveyancers Act 2006.

“You tend to get recognition within the law firm you work for, but to have national recognition the same as conveyancers would be great.”

NZILE life membership granted last year

Jenny's contribution to NZILE was rewarded with the granting of life membership at the institute's 2019 AGM in November.

Ian Jespersen, a former president of Auckland Waikato Branch and a National Councillor who has known Jenny for very many years gave an address at the AGM that outlined her 22 years on the Council. (Excerpts from Ian's speech are in the box to the right.)

Retirement

After Jenny retired in March last year, she and her partner holidayed in Hawaii and met up with Canadian friends.

Within a few months of her return to New Zealand, Jenny was diagnosed with breast cancer and underwent a double mastectomy. She also had chemotherapy and is still receiving Herceptin infusions every three weeks. Those will continue until October and Jenny feels fortunate that the medication is now publicly funded. Her first Herceptin treatment cost $9,000; subsequent infusions have been $6,000 each.

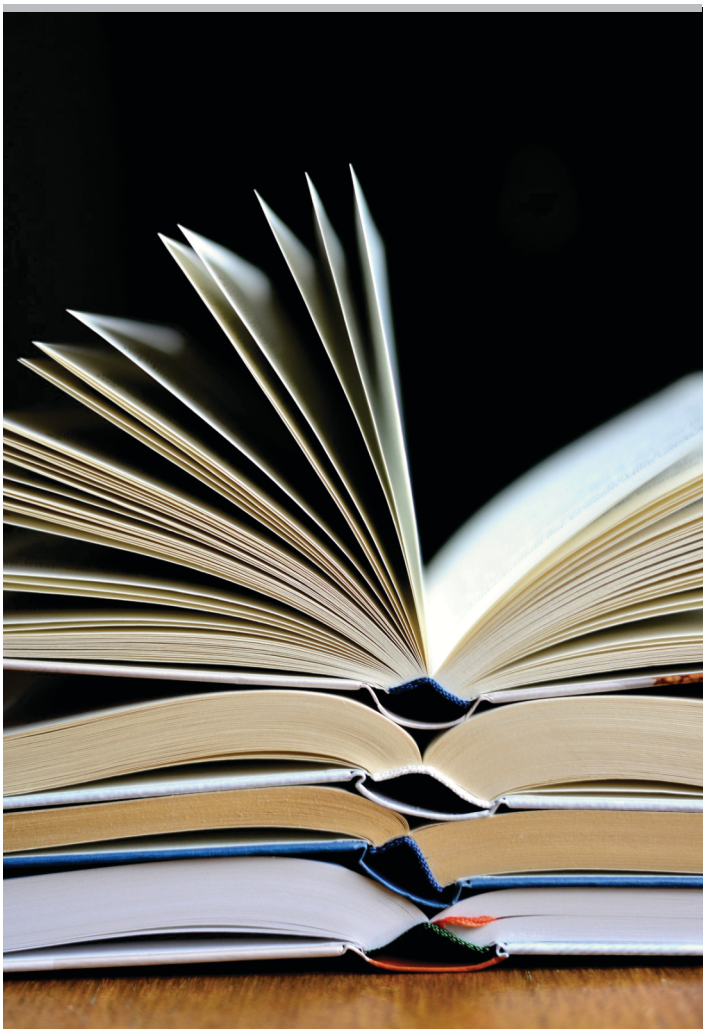
The first year of Jenny's retirement has been somewhat dominated by doctors and hospital visits. “I can think of better things to do,” she says ruefully.

Jenny hopes that the future will enable her to focus on more pleasant pastimes. She maintains a life-long interest in sport, continuing to watch cricket after playing for Auckland and touring India when she was younger. Jenny also played hockey for Auckland, and an interest in rugby league was fostered by her father. They used to attend Warriors' matches together as he was “a league man through and through.”

Jenny also follows soccer and tennis. She enjoys musicals and orchestral performances, and has attended many shows.

Jenny has been a Justice of the Peace for more than 20 years.

Looking back on her career she sums up her approach as, “You've just got to treat everybody the same and do the best.”



Life membership of NZILE for Jenny

Jenny served 22 years on the institute's Council in the period 1985 to 2007, including serving six years as secretary-treasurer (between 1991 and 1997) and serving a further term of three years as treasurer (between 2004 and 2007). She served the Council, institute and legal executives with great energy, consummate skill and dedication, much of it through times when the institute did not have the full-time Executive Officer we have today.

Jenny was instrumental, along with the late Hugh McGuinness, in keeping the institute alive through periods of great difficulty. She was there with Hugh travelling widely throughout New Zealand promoting the cause of the institute and advocating strongly for the growth and recognition of the organisation. It is fair to say that Jenny may be regarded as being pivotal in the progression of the institute as we know it today.

Jenny was a key player in many of the institute's advances in such issues as recognition for Fellows to take statutory declarations and recognition under the PPPR Amendment Act for legal executives to have the right to witness enduring powers of attorney.

I think that if you asked Jenny about her successes for the institute she would concentrate more on those matters where we did not quite make it such as recognition under the Lawyers and Conveyancers Act.

Jenny was flexible in her approach to matters whether it was a game of cricket, the practice of law or changes in technology. She was always ready to adapt and support where required.

Her wicked, but dry, sense of humour has clearly been an asset and has helped her through all these many years of hard work in difficult circumstances. And it is no doubt helping her through her current health battles.

Jenny, we thank you for everything that you have done for the institute and everything you have done for the law and for your fellow legal practitioners.

We welcome you back to the institute post-retirement – this time as a life member.

You are so deserving of this award of life membership of the New Zealand Institute of Legal Executives. I trust that you will accept this recognition as a clear statement of the esteem and respect that we have for you, and your hard work and dedication over so many years. ■

Ian Jespersen

Correct approach to curing testator's breach of moral duty examined in Lotto win case

The moral duty of a father to his four adult children and six grandchildren has been considered by the High Court in the case of a $17 million estate. There was no provision made for either children or grandchildren in the testator's will, but they were named as discretionary beneficiaries under a trust that inherited the residue of the estate.

The High Court discussed in detail whether a percentage approach to provision was the correct means of remedying a will-maker's breach, and canvassed the purpose of family protection legislation.

Lotto win of $16.7 million

In *Carson v Lane* [2019] NZHC 3259, David Carson had a Lotto win of $16.7 million in 2009. He made a will in 2010, whereby he bequeathed $500,000 each to his niece Michelle Sutherland and another niece, and his residuary estate to his stepson Raymond. Mr Carson refused to provide his lawyers with any details about his natural children, saying they were not interested in contact with him and 'had been paid out many years prior.'

In 2014, Mr Carson made a new will leaving Ms Sutherland $500,000, Raymond a house and the residue to the Carson Family Trust. The beneficiaries of the trust were Lincoln University, his son Wayde's children and grandchildren, other relations of Wayde, and charities or others nominated by the trustees.

Lawyer had noted concerns over will provisions

Mr Carson's lawyer, Anissa Bain, had regular conversations with him about his estate, expressing concern about his lack of provision for his children and his reduced provision for Raymond. Ms Bain said she had explained many times to Mr Carson that he had a moral obligation to his children and risked claims being made against his estate after his death if he did not make provision for them.

The testator remained steadfast in his refusal to write his children into his will, but eventually decided to make them discretionary beneficiaries under the trust. He said he wanted to leave a legacy that would last beyond himself and believed this could be done through enabling research about Galloway cattle, potentially in conjunction with Lincoln University.

Following Mr Carson's death, the children applied under the Family Protection Act 1955 for provision to be made out of the estate for their proper maintenance and support. They claimed that Mr Carson had a moral obligation to provide for them and, by failing to do so, had breached that duty, having regard to the size of the estate, lack of competing moral claims and the children's personal circumstances. They each sought 20% of the estate. The grandchildren also sought provision.

The executors in their defence to the claim submitted that the children were discretionary beneficiaries of the trust to which the residuary estate passed, and an award of $1 million each would appropriately recognise their claims.

Percentage approach or lump sum?

Justice Thomas said that a percentage approach was often taken in the case of small estates and where there were a number of disadvantaged claimants, but he did not accept that the percentage approach was appropriate in the case of a large estate such as this one. It did not fit with the duty under the Family Protection Act to assess what was adequate for the proper maintenance and support of the claimant.

His Honour said that reliance in percentages taken in other cases could also create a misleading impression, for example, when there was a separate inter-vivos trust. Percentages should neither be treated as placing some sort of cap on awards, nor used as a means to inflate an award in the case of a large estate.

Justice Thomas said that an award under the Act was not for the purpose of holding a deceased to account for unacceptable behaviour during his or her lifetime. Similarly, it was not for the court to punish Mr Carson should it be found that he had deliberately tried to prevent the children from claiming against the estate by naming them as discretionary beneficiaries.

His Honour stated that Mr Carson had displayed a lack of interest in the children, leading to devastating consequences for them and resulting in feelings of abandonment. Those feelings were exacerbated by the lack of provision in their father's will.

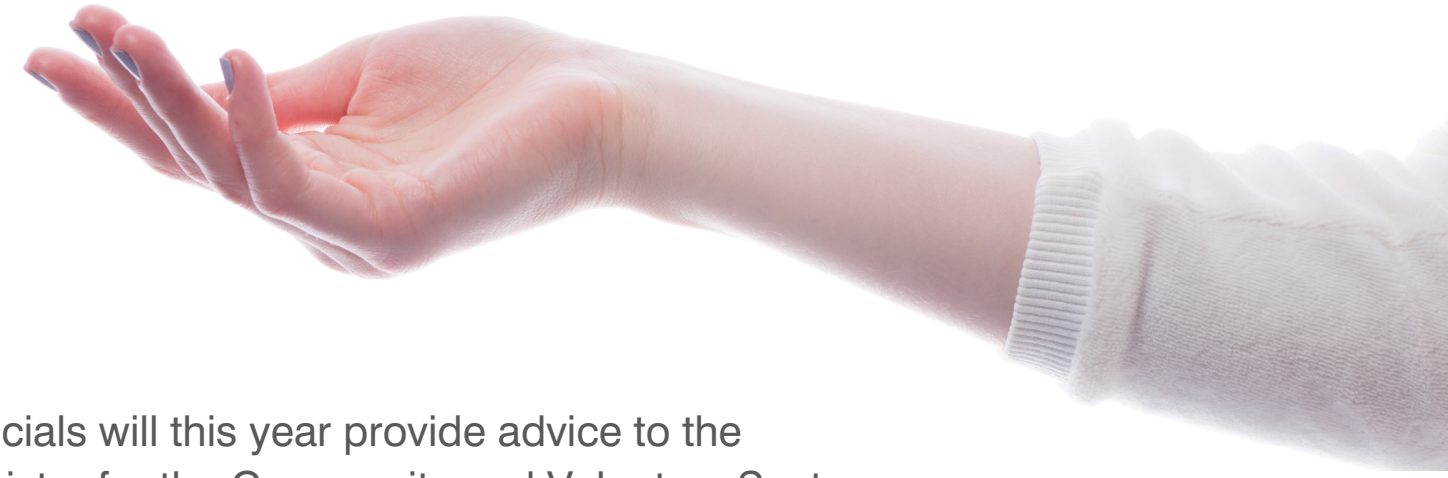
The court held that a provision of 20% to each of the children would amount to $3 million for each child and would clearly amount to a rewriting of Mr Carson's will. It would leave only 20% in the trust and would effectively defeat his wishes regarding the farm properties and the Galloway cattle.

Lump sums awarded to the four children

Justice Thomas held that a provision of $1.25 million was to be made for each child, with the children remaining as discretionary beneficiaries. That sum would be life-changing for the children but would not defeat Mr Carson's wishes. No award was made to the grandchildren.

The court stated that, while a loving grandfather might well make some provision for his grandchildren in his will, that did not mean that he had failed in his moral duty towards them if he did not do so. ■

Charities Act review continues with advice to minister



Officials will this year provide advice to the Minister for the Community and Voluntary Sector on the specific issues to be dealt with in the ongoing review of the Charities Act 2005.

Is the legislation fit for purpose?

In May 2018, the then Minister, the Hon Peeni Henare, launched a comprehensive review of the legislation. He stated that it regulated more than 27,000 charities and it was timely to review whether it was fit for purpose, as it had been in force for more than a decade.

"A lot has changed in the charities sector, and it is important to make sure that the Act is still working well for all those who operate within it."

Terms of reference for the review were approved by Cabinet in mid-2018 and formal consultation began later that year. A discussion document, *Modernising the Charities Act 2005*, was released in February 2019 and the Department of Internal Affairs set up the Charities Reference Group to work on modernising the law. In March-April 2019, 27 consultation meetings about the law reform were held around the country.

Submissions summary released

A summary of the submissions made by more than 360 submitters was released by Internal Affairs in December 2019. The document said that around a third of submitters had suggested that the scope of the review should be broadened to include the definition of charitable purpose, tax issues, and other legislation impacting on charities, such as the Incorporated Societies Act 1908.

Half of the submissions stated that the key challenges for the sector were the sustainability and financial viability of organisations, recruitment of good people to governance and staff roles, retaining good reputations and compliance costs.

Those submitters identified greater collaboration, new technology and finding alternative income sources as ways for the sector to deal with these challenges. Some people suggested that the vision of the charities sector set out in the discussion document should be widened to consider the role of government in partnering and empowering the sector, and the principles of Te Tiriti o Waitangi and te ao Māori.

Many submissions expressed concern about a lack of capacity and capability in the sector, and said that further support was needed from the government in order to enable charities to meet their statutory obligations. A third of submitters favoured reducing reporting requirements for small charities. They said this could be done by increasing the maximum expenditure of a tier 4 charity, introducing a 'micro entity' or 'tier 5' reporting tier and simplifying current reporting forms.

More analysis later in the year

The submissions are currently being analysed and further decisions on the review are expected later in 2020. ■



Dispute over whether Ireland or New Zealand is court-appropriate forum

Disagreements between family members over wills are made even more complicated when there are assets in more than one country and parties are domiciled in different nations.

The High Court and the Court of Appeal were recently required to consider whether New Zealand or Ireland was the most appropriate jurisdiction in which to deal with a case involving a dispute over an estate and other property.

Setting the scene

In *Christie & Anor v Foster* [2019] NZCA 623, Sophie Foster was the youngest of three children born to Gwendolen and Gordon Foster. Sophie lived in New Zealand and her siblings Michelle and Robert lived in Ireland. Sophie and Michelle had been estranged for most of their adult lives. Michelle had no family of her own and was a beneficiary; she had struggled with mental health issues from an early age.

The three children were born in England but the family moved to Ireland in 1966. Sophie and her husband emigrated to New Zealand in 1986 and she had lived here ever since. The Foster parents visited New Zealand several times and bought land in this country.

When Gordon died in December 2010, there was a property in New Zealand called Rosa House which was registered in the names of Sophie and her two parents as joint tenants. The most important legal consequence of joint tenancy is the right of survivorship: if one of the joint tenants dies, that tenant's interest in a property automatically passes to the remaining joint tenants. Gordon's interest in Rosa House accordingly accrued to his wife and Sophie, and did not form part of his estate.

Following Gordon's death, his wife decided to move to New Zealand. She purchased another property here and registered it in her and Sophie's names as joint tenants. Later that year, Gwendolen and Sophie returned to Dublin. Sophie said that this was for her mother to sell the family home in Ireland and pack up her belongings to ship to New Zealand.

However, Gwendolen never returned to New Zealand. Sophie asserted that this was because Michelle pressured her mother into staying in Ireland and that, as a result of Michell's undue influence, Gwendolen changed lawyers and took actions that were adverse to Sophie's interests.

Gwendolen withdrew $902,305 from a joint account in her and Sophie's name. It was accepted that all the money in the account belonged to Gwendolen. In 2013, Gwendolen unilaterally severed the joint tenancies of the two New Zealand properties, making Gwendolen and Sophie tenants in common.

In 2014, Gwendolen instructed her lawyers to register a caveat against Sophie's half interests in the two properties, on the basis of a constructive trust. Gwendolen executed her last will in Ireland in 2016. It made no provision for Sophie. Michelle was the primary beneficiary.



Undue influence asserted

Sophie filed court proceedings, claiming that the timing of the last will, her mother's age, her medical history and the contents of the last will demonstrated that the dispositions had been procured by Michelle by undue influence. Counsel for the trustees and executors submitted that the severance of the joint tenancies had been done to enable Gwendolen to retrieve a property wholly funded by her from the operation of a joint tenancy, in the face of Sophie's refusal to allow it to be sold.

Sophie filed caveat proceedings in Ireland's High Court to prevent probate from being granted to the Irish executors. Subsequently, she filed New Zealand proceedings arguing that her mother had not had testamentary capacity when she signed the will and it had been procured by undue influence. Sophie also pleaded undue influence in relation to the severance of the joint tenancies and the withdrawal of the money from the bank account.

A month later, Sophie's brother Robert filed proceedings in the Irish High Court, challenging the will on the grounds of Michelle's undue influence.

In response to Sophie's proceedings, the Irish executors and Michelle filed appearances under protest to jurisdiction under rule 5.49 of the High Court Rules. The basis of the protest to jurisdiction was that Ireland was the most suitable jurisdiction for the matters in dispute to be dealt with. They argued that Sophie would have a fair opportunity to prove her claim and receive justice in Ireland, including claims for testamentary promise and inadequate provision from her mother's estate under the Irish Succession Act.

Family protection provisions are similar in Ireland

Like New Zealand's Family Protection Act 1955, Ireland's Succession Act 1965 confers jurisdiction for the court to make provision from an estate for the benefit of a child of the deceased.

The filing of the protests to the jurisdiction in New Zealand triggered rule 6.29 of the High Court Rules, which gives the court discretion whether to assume jurisdiction if service of a proceeding has been effected out of the jurisdiction without leave.

The trustees accepted that claims relating to land must be determined by the law of the country in which the land is situated – in this case, New Zealand. However, they submitted that this factor was outweighed by countervailing matters. The High Court held that only a New Zealand court had jurisdiction over the land claim. The trustees appealed and Sophie cross-appealed, raising additional claims of proprietary estoppel and institutional constructive trust.

The Court of Appeal judgment was delivered by Justice French. Her Honour said that the severance of the joint tenancies could not have been challenged on the grounds of undue influence either in law or equity during Gwendolen's lifetime and there was no available challenge against her estate that would entitle Sophie to reverse the severance. The proper target of any undue influence claim was the will.

Our High Court says Irish courts can apply New Zealand law

Whether Sophie chose to pursue a claim in Ireland under the Succession Act was her decision, but the court was satisfied that the Irish High Court was capable of applying New Zealand law to the realty-based claims. It would also be open to an Irish court to apply the provisions of the Family Protection Act when dealing with the New Zealand realty as part of the residual estate, if necessary.

The subject matter of the proceeding was located in New Zealand and the law governing the claim would be New Zealand law. However, those factors were not determinative of the issue of the appropriate forum.

It was common sense that all of the litigation relating to Sophie's claims and the two Irish proceedings should be heard and determined by the same court. That could only be the High Court of Ireland as it was the only forum that could deal comprehensively with the interests of all three children and all issues, including that of undue influence. The appeal was allowed and the cross-appeal was dismissed.

Care must be taken with cross-border assets

Increasing mobility and cross-border relationships mean that in future it will be more common for assets to be held in two or more jurisdictions. The implications of that should be discussed with clients when wills are drafted. ■

Testamentary capacity and an unhappy nephew

Andrew Johnstone of APEARS, Sydney, Australia



Testamentary capacity is a vexed legal issue on both sides of the Tasman. Here in Australia, we have a long history of many cases being brought to the courts that question the will-maker's cognitive ability.

A recent case in New South Wales highlighted the consistent approach from the courts to the test for testamentary capacity. The test is set out in *Banks v Goodfellow* (1870) as:

1. That the will-maker understands the nature of the act, that is, they are making a will, what that means and its effect.
2. That the will-maker understands the extent of the 'property' they are disposing of in the will.
3. That the will-maker is able to comprehend and appreciates the claims to which they ought to give effect, that is, they have an understanding of the people for whom they ought reasonably to make some provision in their will.
4. That there is no disorder of the mind which would affect the dispositions in the will.

Capacity challenged by one executor

In *Estate of Blanche Minnie Condon* [2020] NSWSC 19, Mrs Condon made a will on 22 November 2016 and died on 13 December 2016. The executors were Mrs Condon's niece and nephew, Robyn Price and Bruce Phillips. Another nephew, Andrew Battenberg, challenged the will made just before Mrs Condon's death, asserting his aunt did not have capacity to do so.

The judge said, “Mr Battenberg disputes that the deceased had testamentary capacity when she made the 2016 Will. He also contends there were suspicious circumstances that call into question the deceased having known and approved the contents of the 2016 Will at the time it was executed.”

Andrew Battenberg also filed a cross-claim seeking probate of a will from 2006, which the other two executors alleged was a fraudulent document. The judge would not hear that issue until the decision was made on the 2016 will; if that will was held to be valid then the 2006 will would be void anyway.

Background

The facts and judgment run to 26 pages; a brief summary is below.

Mrs Condon lived alone but had regular contact with her executors, one of whom - in early November 2016 - she asked to contact a lawyer to make a new will. At the ensuing meeting she gave the lawyer (Aaron O'Rourke) a copy of a will from 1997. Mrs Condon had made handwritten notes on that 1997 will to act as instructions for her new will.

At that meeting, Mr O'Rourke read back every line in the 1997 will to Mrs Condon and discussed each of the beneficiaries. He also made notations on it to reflect Mrs Condon's instructions. Included in these were: “(b writing 'no gift' below the word 'delete', next to clause 3(c)”. Those words were included after Mrs Condon advised Mr O'Rourke that she did not want Mr Battenberg to receive any gift, that she wanted to 'take him out' and that she didn't 'want Robyn and Bruce to have any contact with him.'

When asked by Mr O'Rourke to confirm that she wanted Andrew to be removed from her will, Mrs Condon responded that she did, that it had been her intention to remove him for some time and it was the main reason she wanted to redo her will.

Within two weeks, Mr O'Rourke returned to see Mrs Condon with her new will for signing. Mrs Condon took the will from him and read the entire document aloud. She noted one minor spelling error in her god-daughter's name. She then executed this will and Mr O'Rourke and his wife witnessed it. They left the original executed will with Mrs Condon.

Will was executed

“If a will is rational on its face and is proved to have been duly executed, there is a presumption that the testator was mentally



competent and had testamentary capacity: *Re Hodges; Shorter v Hodges, at 706E; Tobin v Ezekiel* (2012) 83 NSWLR 757; [2012] NSWCA 285."

In this case, the will was 'normal' and was duly executed. Her nephew, Andrew Battenberg, however contended that on the date the 2016 will was executed, Mrs Condon was not competent. He stated that she was in hospital on that date when in fact she wasn't, also that she had made a comment (probably as a joke) that she kept her will under the cats' bed. Mr Battenberg also asserted that on 28 October 2016, Mrs Condon had been scratched by a cat and then six weeks later had died from septicaemia.

Unfortunately for Mr Battenberg, other evidence came to the fore. It said that, in August 2016, Mrs Condon had taken part in a university memory and aging study assessing her cognitive condition; her condition was assessed as normal. The local GP had noted on 28 October that the scratch had healed. On 9 December, the GP also commented to Mrs Condon's cardiologist that, "Cognitively she is very well."

The judge stated, "It follows that I am also satisfied that there is affirmative evidence that the deceased knew and approved, in the relevant sense, the contents of the 2016 Will."

He further awarded costs against the erring nephew.

Will by text?

In other brief news, in *Re Nichol; Nichol v Nichol* [2017] QSC 220, the Queensland Court has found that an unsent text message on a mobile phone was a valid will!

There is more to come in the Winter issue with other strange wills from around the world. ■

Regards from Australia
Andrew Johnstone
APEARS

APEARS

To contact Andrew, please email him at andrew@apears.com.au - his full contact details are on page 15.

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