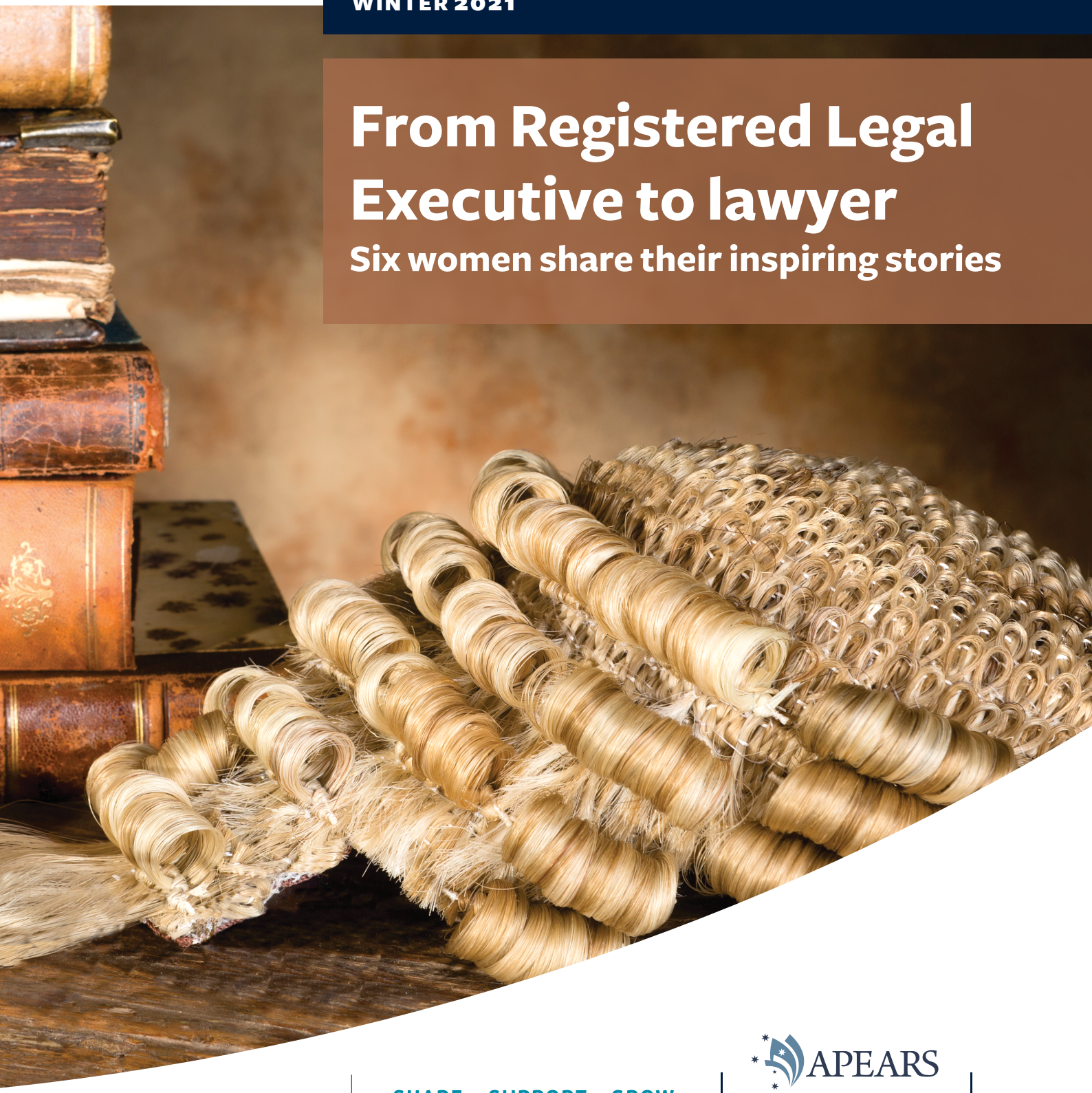
ENVOY

LEGAL EXECUTIVES NEW ZEALAND
RĀNGAI HĀPAI TURE O AOTEAROA

WINTER 2021

From Registered Legal Executive to lawyer

Six women share their inspiring stories



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RĀNGAI HĀPAI TURE O AOTEAROA

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FROM THE PRESIDENT

Tēnā koutou katoa

The cooler temperatures and the fact that we have already passed the shortest day, is a reminder of how fast 2021 is slipping by.

30th anniversaries
Together with the National Councillors and our Executive Officer, Jo Buckton, in May I attended Canterbury Southern Districts Branch's 30th anniversary celebratory dinner, in Christchurch. It was a most successful event and a very enjoyable evening.

Congratulations to the branch on reaching this milestone as a vibrant and growing branch. Thank you, on behalf of LENZ, to all the presidents of the branch and the committee members who have contributed to its success over the last 30 years. I was proud to be part of the celebration.

My congratulations to our Wellington Central Districts Branch that also turns 30 this year; thank you to all the presidents and committee members who have served the branch in that time. The branch committee is planning a celebration in Wellington in conjunction with our September conference. As a member of this branch, I look forward to seeing as many branch members as possible at that event.

2021 Legal Executives Conference in September
Our conference will be held on Monday-Tuesday, 6-7 September at the Museum of New Zealand Te Papa Tongarewa in Wellington and also by livestream.

The conference programme is available at: https://www.lawyerseducation.co.nz/shop/Conferences2021/22LEC.html I'm sure you will agree that we have an exciting programme planned for the two days. I am confident that you will benefit from attending — not only from an educational perspective, but also for the unique opportunity the conference provides for legal executives from across New Zealand to meet, network and share ideas.

The conference will also enable you to achieve all your annual CPD hours over the two days.



We are very appreciative of the assistance and support of NZLS CLE Ltd in arranging this biennial event.

NZLS CLE Ltd Property Law Conference - May
Not to be confused with our own conference, the two-day Property Law Conference is usually held in alternate years to our conference. However, COVID struck last year and the Property Law Conference was postponed to May this year.

I was very pleased to represent LENZ at the conference, together with Jo Buckton. It was wonderful to see a good number of LENZ members there, either representing their firms or attending with their employers or lawyer colleagues.

Membership renewals
This year, for the first time, the membership renewal process has been conducted entirely by email. At the time of writing, Jo reports that the process has been comparatively smooth. Thank you for your assistance in making it so.

Kaiārahi
Don't forget our Kaiārahi service that provides mentoring to our members. Experienced senior members are available as confidential mentors to offer support if you have questions or concerns regarding technical work matters and/or your personal wellbeing.

I encourage you to use this service if you have any issues that you would like support with; working together we can support each other.

I look forward to seeing you in Wellington at the conference!



Necia Parker



Northland

Education
Our health and wellbeing seminar, presented by Sara Crane in May, was very successful, as was our seminar on the bright-line rules presented by Annè Lensink of Villa Accounting.

The LENZ branch committees' training weekend was held at the national office in Auckland in early July; three members of our committee attended. It was a very useful event and we all learned a great deal.

Social events
We had drinks and nibbles immediately after the May health and wellbeing seminar – it was lovely that everyone stayed on for this relaxed gathering.

We held our annual Midwinter Long Lunch on 27 June. It was great to see so many members attend what is always the highlight of our branch's calendar. It was a very relaxed catch-up with good food, wine and company.



Nicky Dreadon
Northland Branch President



Auckland Waikato

Greetings from Auckland Waikato.

We are over halfway through the year already! We have noticed that everyone has been incredibly busy lately, and if you recognise this in yourself, I hope you can find ways to help reduce stress and prevent burnout.

Milestone membership for Waikato region
I am pleased to announce that the number of branch members in Waikato has officially passed 100, with 101 members in March 2021! This is very exciting as we hovered around 98/99 for quite some time. The number of Waikato-based members has nearly doubled since 2010. The Waikato region is large, so it is great to see that we have now achieved this milestone.

The NZLS CLE Ltd Legal Executives Conference is coming around fast. If you have not yet done so, talk with your employers, as I hope to see you all there.



Michelle Way
Auckland Waikato Branch President



Bay of Plenty Gisborne

We had some wonderful autumn days with the paddocks greening up after the long dry summer, but it is noticeably cooler now that winter is here.

I know most of you are experiencing very heavy workloads. Let's hope things ease up a bit over the winter months.

Social events
We had a good turnout in early April at each of our social events in Tauranga, Rotorua, Whakatane, Gisborne and Taupō. It is always lovely to catch up with other members to share experiences and support each another.

Midwinter social events were held in Tauranga, Rotorua, Whakatane, Gisborne and Taupō over June and early July; each was well-attended. It is always lovely to catch up with other members to share experiences and support each other.

Education
The branch held a very successful wellness seminar on 12 May with more than 100 members coming from across the region. Those who attended could tick off their CPD wellness requirements for the year. Annie Canning spoke in Tauranga and we livestreamed to specific venues in Gisborne, Taupō, Whakatane and Rotorua. Annie gave us some valuable tools and strategies to achieve balance in keys areas of health, wealth, relationships and in our careers. Light refreshments were provided in each location following the seminar.



Ally McEldowney
Bay of Plenty Gisborne Branch President

Wellington Central Districts

Hi from Wellington Central Districts!

Property market
In the conveyancing sector, particularly in Palmerston North where I am located, the property market continues to thrive. Thinking back to when I bought my house in 2010, it took me two open homes before I convinced myself I was brave enough to make an offer on the property. Mine was the only offer, it was significantly under the asking price and I had three weeks to confirm my conditions. I remember it being the most stressful thing I had ever done.

The market has dramatically changed since then and I very much feel for clients who are currently trying to purchase. So far, the extended bright-line rules introduced prior to Easter have not had an effect on the number of contracts flying across my desk. It will be interesting to see in time just what effect the extended rules might have.

Conference in September
The biennial NZLS CLE Ltd Legal Executives Conference is returning this year and will be held on 6-7 September at the Museum of New Zealand Te Papa Tongarewa in Wellington. This is always a great event, packed with a fantastic variety of speakers who have a wealth of knowledge. It is a great chance to complete all your annual CPD hours (plus a bit for next year!) in a two-day event.

The branch celebrates 30 years
To celebrate our branch's 30th anniversary, a dinner will be held in Wellington on Monday, 6 September at the end of the first day of the conference. Look out for our next quarterly newsletter for more details on this event.

Until next time, I wish everyone a happy winter.



Nicole Mangin
Wellington Central Districts Branch President



Nelson Marlborough

Nelson Marlborough members are still busy with plenty of work for everyone. Hopefully, we will have a chance to rest a little before easing into spring.

Branch breakfasts
In May, branch members enjoyed very successful social breakfasts in both Nelson and Blenheim. We had 23 in attendance; this was a brilliant turnout and the committee thanks all who came along.

Branch committee training weekend
The branch committees' training weekend in Auckland in July was well attended; newer committee members now see that being on a branch committee isn't as onerous as they may have thought. For those of you who are considering stepping up in future, these weekends are very enjoyable and worth attending if you ever get the opportunity.

Upcoming Trusts Act seminar
We are planning a seminar on the new Trusts Act. Now that we all know how to use Zoom, our Blenheim members will have the opportunity to attend online.

My term as branch president will be up later in the year. If you are interested in becoming a branch committee member or would like to take on the branch president role, please do not hesitate to make contact with me directly for a no-obligation chat.



Robyn Dewson
Nelson Marlborough Branch President

Canterbury Southern Districts

With wild weather and recent cold snaps, it certainly feels that winter is now upon us.

The branch committee and I hope that you are all keeping warm and flu-free, and enjoying some good binge-watching on Netflix or the like!

Seminars
We have held three seminars so far this year, with another to come later in the year. There is, of course, also the NZLS CLE Ltd Legal Executives Conference to be held in Wellington in September. These provide several opportunities for members to achieve all their required number of CPD hours — and more.

The most recent seminar, on 21 July, was on the bright-line test and Main Home Exemption.

Social events
Thank you to all the members who attended our 30th anniversary dinner at the Quality Hotel Elms in Christchurch on Friday, 21 May. What a great turn out for this celebration. It goes without saying that it is lovely to put faces to names and to catch up with people over a meal and drink, and to have a few laughs.

Branch committee
We are a friendly bunch, and always looking for fresh ideas and input from our members. If you have any suggestions for social events or seminars, please let us know, or email us at canterburysouthern@nzile.org.nz ■



Jo Langton
Canterbury Southern Districts Branch President



Single new law proposed for property distribution after death

A major review New Zealand's succession law has concluded that the Family Proceedings Act 1955 and the Law Reform (Testamentary Promises) Act 1949 should be repealed and replaced with a new Act providing for certain family members to claim 'family provision' from an estate.

In July 2019, the then Minister Responsible for the Law Commission, the Hon Andrew Little, requested the Commission to review succession law. This followed the Commission's report on the Property (Relationships) Act 1976 which identified the need for a separate examination of people's property rights when their spouse or partner died.

Paper released in April

In April this year, the Commission released a 247-page Issues Paper, *Review of Succession Law: Rights to a person's property on death*, setting the scene for the review and inviting submissions by 10 June. The document said that many parts of Aotearoa New Zealand's succession law had not been comprehensively reviewed in decades.

Much of the key legislation was drafted in the mid-20th century. Since that time, Aotearoa New Zealand has undergone significant social change, affecting the relationships we enter and what we think family means. The need for law-making to properly consider the Crown's obligations under Te Tiriti o Waitangi l Treaty of Waitangi is also better recognised by the Crown. The law may not have kept pace with these changes or the reasonable expectations of New Zealanders, the paper stated.

The paper said that the terms of reference for the report required the Commission to consider who should be entitled to claim property from a deceased person's estate, with a particular focus on the

deceased's partner and other members of the family. It also mandated examination of how issues of particular concern to Māori should be dealt with.

The document discussed both a conventional state law approach to succession law and an ao Māori approach, with the aim of permitting consideration of an ao Māori perspective without assuming it was appropriate for state law, rather than tikanga, to determine succession matters for Māori.

Commission's view: one new statute

The Commission noted that laws providing for claims against estates were currently found in several statutes, common law and equity. In order to make a new law clear and accessible, the Commission's preliminary view was that there should be a single, comprehensive statutory regime governing claims against estates. That would enable parties to refer to one source to understand their rights and obligations.

A single new Act should set out rules relating to relationship property entitlements — removing these from Part 8 of the Property (Relationships) Act 1976 — as well as family provision and contribution claims. The latter would mean repealing the Law Reform (Testamentary Promises) Act 1949 as well as the Family Protection Act 1955.

The Commission observed, however, that the proposed new legislation would not completely codify the law. Rather, it would be regarded as the principal source of law. The exception to that would be testamentary promises claims, which would be codified in the proposed statute. The Wills Act 2007 and possibly the remainder of the Administration Act 1969 would continue to sit alongside the new statute.

State succession law or tikanga for Māori?

The issues paper suggested that Māori could be given the choice as to whether state succession law or tikanga should apply to matters of succession. That would require adequate whānau, hapū and iwi support for dispute resolution.

A second option would be to prevent succession law from applying to particular property, so that the disposition of taonga would not be subject to state law but would instead be determined by tikanga.

Thirdly, better state law that appropriately recognised and facilitated the application of tikanga Māori could be created. Such an approach would embrace the 'third law' of Aotearoa New Zealand.

Relationship property

In respect of relationship property, the Commission proposed that a surviving partner to a qualifying relationship would have a right under the new Act to choose a division of relationship property on the death of his or her partner. If the partner chose a relationship property division, he or she would keep whatever gifts had been made for them under the will, and then receive from the estate the further property required to ensure the full value of the relationship property entitlement was obtained.

Eligibility to choose a division of relationship property would require a qualifying relationship of marriage, a civil union or a de facto relationship of three years or more. Where partners separated prior to the death of one of them, the survivor should remain eligible to claim under the new Act provided that no more than two years had elapsed between separation and the death. Courts would have the power to order an unequal division of property if there were extraordinary circumstances rendering equal sharing repugnant to justice.

Family provision regime

The Commission outlined four options for a new family provision regime.

1. A surviving partner who had insufficient resources to maintain a reasonable, independent standard of living, having regard to the economic consequences for that partner of the relationship or its ending, could be entitled to a family provision award from the estate to transition from the family joint venture.
2. Children of the deceased could be able to make claims for family provision awards to enable them to be maintained to a reasonable standard, and educated and assisted towards economic independence. The Commission suggested that the age limit for a 'child' could be defined as 18, 20 or 25 years.
3. The paper suggested that a disabled child of the deceased could be able to make a claim for a family provision award where the child did not have sufficient resources to enable him or her to maintain a reasonable standard of living.
4. The Commission said that a child of the deceased could have the right to claim for provision from the estate to recognise the importance of the parent-child relationship and to acknowledge that the child belonged to the

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family. Such an award would be available if a deceased failed to recognise one child in a will or the child received nothing on intestacy, and would be called a 'recognition' award.

Low understanding of succession law

The document noted that low levels of awareness and understanding of the law relating to succession — both among the public and among professional advisers — had been a key theme emerging from the Commission's research and preliminary engagement. Some lawyers had told the Commission that will-makers, surviving partners and many lawyers had little knowledge of the Property (Relationships) Act 1976 and how it applied on death. Similarly, there appeared to be little understanding of the importance of having a will and the rules relating to intestacy.

The paper accordingly suggested that further education of the public and of professional advisers was required. This could be done by way of a one-off education campaign coinciding with the implementation of the review's recommendations; education in secondary schools; making information available when people applied for marriage or civil union licences, or benefits; or requiring professionals to provide information to clients.

Revocation of wills on marriage/civil union no longer relevant

The Commission also said that section 18 of the Wills Act 2007, which provides for the revocation of wills in their entirety when people marry or enter a civil union, was no longer appropriate in contemporary Aotearoa New Zealand. It was now common for most couples to live together in a committed de facto relationship before marrying or entering into a civil union. A marriage was therefore often seen as a formalisation of an existing relationship, rather than a material change in commitment and obligation. Section 18 should accordingly be repealed.

Probate threshold to change?

The Commission recommended that the government should consider whether the monetary threshold for administering an estate without the need for a grant of probate or letters of administration should be raised. It also suggested that the government might want to give further consideration to permit courts to use oral or video recordings as evidence to validate testamentary intention.

The Commission plans to publish its final report on reform proposals before the end of this year. ■





Research reveals gap between law and public views on succession

Most New Zealanders think people should be allowed to leave family members out of their wills if they want to, despite the law setting out clear rules about people's obligation to provide for their relations.

That finding comes from a comprehensive survey into succession law carried out by the University of Otago and the Michael and Suzanne Borrin Foundation. The research, *Entitlements to Deceased People's Property in Aotearoa New Zealand: Public Attitudes and Values*, was released in April.

The researchers conducted 1,350 telephone interviews, including 'booster' interviews with additional Māori, Pacific and Asian responders to enable robust statistical analysis by ethnic groups.

Will-makers' prerogative to have choice

The overwhelming majority of those surveyed believed that free choice about how to dispose of one's property was paramount and, for that reason, will-makers should be able to exclude family members from their dispositions if they wished to do so. However, fewer Pacific, Asian, older and low-income respondents agreed with that perspective.

The survey reported that 80% of those who were surveyed thought that will-makers should be able to omit relations from their wills, with that view being particularly prevalent among those living with partners they were not married to (89%); young people (86%); and those with annual household incomes over $100,000. Fifty-five per cent of respondents said that free will was important in determining how estates were disposed of after death, while 49% of those who did not support omitting family members from dispositions said that obligations to relatives were paramount.

But want ability to challenge to remain

Despite the strong support for free choice in deciding on estate dispositions, 60% of respondents also supported spouses and partners being able to challenge wills which excluded them. Fifty-nine per cent said that children should be able to challenge wills. In addition, 41% believed that the parents of a deceased should be

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permitted to bring proceedings if they were excluded from a will, and 25% supported such a right for grandchildren under 18 years of age. Twenty-four per cent said that young stepchildren should also be allowed to bring claims.

In the case of a second marriage or relationship, 76% believed that a second wife should be entitled to at least a half-share of the family home if the will-maker had left the estate entirely to the children of a first marriage.

More than two-thirds of respondents agreed that an adult child who was struggling financially should have the right to challenge a will that left all of the assets to another adult child.

Bequest to charities

The research also probed New Zealanders' attitudes to how dispositions to charities should be balanced against family obligations. Eighty-seven per cent considered that disabled adult children should have the right to challenge wills which left estates entirely to charity. Eighty per cent supported allowing children under 18 years of age to bring claims when entire estates were left to charity and no provision was made for them.

In relation to adult children, the researchers reported that 56% of respondents said that adult children should have the right to bring proceedings if they were left nothing and the will-maker bequeathed his or her whole estate to charity.

Intestacy

In relation to intestacy, most respondents supported estates being shared between different parties, rather than one person receiving all of the assets.

Sixty-four per cent of those interviewed said that, if there was a surviving husband and two adult children, the husband should get more than one-third of the estate. In fact, 30% of respondents considered that the husband in such a scenario should receive everything. Sixteen per cent said that the husband should get more than half the estate and 19% said he should be given 50%. Less than 1% of those surveyed believed that adult children should receive the entire estate in such a scenario.

The survey revealed that approximately half of those interviewed had wills, although the percentage was lower for Māori, Pacific, Asian, younger and low-income respondents. ■

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CHANGING THE CULTURE OF A PROFESSION

Family dispute over jointly-purchased property



The importance of documenting or ensuring clear agreement between family members on financial matters has been underlined by a disagreement over whether money provided by a mother to her son's family was a loan or a gift.

Beenen v Beenen [2020] NZHC 3163 involved a dispute over a family-owned property in Northland. Angela Beenen and Mark Beenen were siblings and Suzanne was Mark's wife. The Northland property was originally owned by Angela and her husband; when they faced financial difficulties in 2004, the family purchased the property.

In order to do that, the siblings' parents sold the original family home and Mark and Suzanne sold their family home. The Northland property was then placed in the names of all of the family members. In 2007 Angela and her husband raised a $60,000 mortgage against the property. The family agreed that the home could be used as security for the advance, but that it was a personal loan to be repaid by Angela.

The family at the same time took out a $100,000 mortgage to pay for developments on the land. Mark and Suzanne said that they made all the mortgage payments, and funded running costs and rates between 2006 and 2011.

Major family dispute in 2009

Initially, Angela lived on the Northland property and again between 2011 and 2014, and Mark and Suzanne visited regularly. However, in 2009 there was a major family dispute, and Mark and Suzanne did not visit the property after that.

The siblings' mother, Phyllis Beenen, who had owned a two-fifths share of the Northland property, died in 2010 and a sibling of Angela and Mark died shortly after.

In 2011, Mark and Suzanne gave notice that they would no longer pay the mortgage and stopped paying the outgoings on the property.

In 2013, Mark and Suzanne wrote further to say they would never return to live at the property and wanted nothing more to do with it. They said they wished to dissolve their share and withdraw their funds from the business so all issues relating to Mark and Angela's mother's will could be resolved.

How to distribute proceeds of property sale?

After the estates and the respective wills were finalised, all parties agreed that Angela would hold a two-thirds share of the Northland property and Mark and Suzanne a one-third share. The issue in the court proceedings was how the proceeds of sale of the Northland property were to be distributed between Angela and Mark. The property had been leased to a couple, the Taylors, since 2015 and they wished to purchase it.

Loan or gift?

Justice Cull said that the key issue in the proceedings was whether $80,000 received by Mark and Suzanne from Phyllis Beenen in 2008 was a gift, or whether it was a loan and therefore liable for repayment from their share of the net proceeds of sale. Angela said that although no formal loan document was ever drawn up, it was always understood the sum was a loan and there was a moral obligation to repay it.

Conversely, Mark and Suzanne said that the funds were the residue from their father's estate and they were not obliged to repay the sum.

Justice Cull held that there was scant documentation in support of either view. However, she said that four items of correspondence referring to the sum as a debt had not been challenged by Mark and Suzanne, and Phyllis had been determined to allocate her assets evenly between her children. Further, no gift duty had been paid.

Justice Cull accordingly held that the $80,000 was a loan and should be repaid out of the net proceeds of sale of the property, divided equally among all of the children. ■



From Registered Legal Executive to lawyer

Six women share their inspiring stories

Excellent time management, huge mental discipline and being sure of what you want to achieve are the themes that emerged when we talked with five former Registered Legal Executives, and one current member, who are now (or studying to be) practising lawyers.

Whanganui-based Helen Hale is in her second year at the University of Waikato; in Auckland, Wendy Alexander (Norling Law) has just been admitted to the bar and Vector's Lisa Whitney-Hollick has just been capped and is about to be admitted; Tania Frederiks was admitted to the bar in 2020 and is a senior solicitor at Norris Ward McKinnon in Hamilton; Maree Adams is a director at Queenstown's Frankton Legal; and Vanassa McGoldrick has her own firm in Whangārei — McGoldrick Law.

Decisions to study for an LLB

All six women started out in various law office roles in their early working lives. After a number of years, however, they realised something was missing and yearned to be better recognised for their skills and intellect. On a personal basis, they wanted to further stretch themselves academically.



Lisa Whitney-Hollick

Lisa Whitney-Hollick, currently senior property legal partner at lines company Vector, says that she had dreamed of becoming a lawyer quite early on but life got in the way. "I worked as a legal secretary at Russell McVeagh. My boss saw my potential and urged me to study for my legal executive exams which I completed in 2003.

"I moved to Vector and my manager encouraged me to embark on a law degree, although I was a bit intimidated at the prospect of years of study ahead. He suggested that I take it in chunks, and that was hugely good advice. I've now got an LLB with first class honours."



Tania Frederiks

Tania Frederiks worked at three law firms before moving to a Morrinsville firm where she stayed 20 years. "I very much enjoyed the work and qualified as a legal executive in 2000. By 2015, one of the partners encouraged me to study for my LLB saying I was being paid a legal executive's salary to do a lawyer's job and I should get cracking. Rod was a superb mentor and wanted me to do the best in my chosen career."

Queenstown's Maree Adams has a rather different career path. "Initially I wanted to be a teacher, so I enrolled for a BA at Victoria University of Wellington. Not only did I pass a number of education-based papers, but I also fitted in papers in sociology, English and Māori language. I then did the usual OE, met my husband and returned to New Zealand.

"It was while we were travelling in the USA that I became interested in a possible paralegal role, but we came home to North Otago and I had my first baby. Law still hovered in the background so I put my toe in the water and studied at home for my legal executive qualification through Open Polytechnic. I soon got a job at Dean & Associates in Oamaru. This was great, but I was frustrated I couldn't do more complex legal work. The firm suggested that I should look more seriously at a law degree. To cut a long story short, I enrolled at the University of Otago for a year only — just to see how it went. I graduated in 2013," says Maree.

On leaving school, Albany-based Wendy Alexander worked as a legal search clerk. With her supervisor studying to become a legal executive, Wendy was inspired to do the same and continued to study by correspondence on her OE. "Arriving in London, I talked my way into a legal secretary role even though I was a very questionable typist! On my return home, I started work at Brookfields and was well-positioned to make use of my legal executive skills. I did debt collection work and became the firm's credit manager. And then left to, ultimately, have three baby boys! As a family, we returned to the UK where I sat their paralegal exams at the University of Strathclyde, and eventually we came home."

It was with the encouragement of the principals at Smith & Partners that she embarked on her LLB at AUT; Wendy was admitted to the bar on 28 June.

Whanganui-based Helen Hale was also a school leaver working in a law office. The contact with clients, problem-solving, process and transaction detail very much suited her. "Never boring," she says. A move to Palmerston North and working for Grant O'Donnell cemented her quest to start her legal executive qualification. "He was a great teacher and very particular." Helen qualified in 2002.

With a family move to Whanganui in 2011, Helen started work at Moore Law as assistant to the partners. Partner, Rob Moore, saw Helen's potential and suggested she use her skills to study for an LLB. "At first it all seemed too difficult to do, but eventually I thought I'd jump in and take it a year at a time. I'm now in my second year studying remotely for a Diploma in Law at the University of Waikato. I'm certainly working crazy hours, but I believe it will be well worth it. Alarm goes at 3.30am, study from 4-6.30am, a 40-hour working week and then time for the family in the evenings, or sometimes more

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study. Every three to four weeks I travel to Hamilton for tutorials." Helen self-deprecatingly adds, "It's a bit tiring."

"The situation at Waikato is quite challenging because it has only offered the remote-learning experience since Covid — it's the reason I'm studying for the shorter Diploma which I hope to finish at the end of 2022. However, there's no guarantee I can complete my LLB studying in this way. I believe it's quite discriminatory so I'm lobbying hard for remote learning to continue so I can complete my degree."

McGoldrick Law director, Vanassa McGoldrick, wanted to be a lawyer very early on, but there were no physically accessible law schools available to her. Vanassa has a hereditary condition, nail patella syndrome; she has no kneecaps or cartilage and no quadricep muscles. "Doctors did not believe I would ever walk and recommended amputating both my legs. Luckily, my parents didn't take their advice."

Due to her physical limitations, Vanassa has battled to achieve her academic goals for much of her life. "I wanted to be recognised as a high-ability individual, not someone who had to walk with crutches. I now have a mobility scooter. When I was at school, I was told it was best to learn to type. So type I did and became a highly sought-after legal secretary working for one of the best law firms in London! This further whetted my appetite for all things legal."

Back in New Zealand, Vanassa completed her legal executive qualification by correspondence and ended up working at Peak Rogers in Auckland.

"One of the lawyers there, Angus Rogers, became my mentor and inspired me to explore doing an LLB. He saw my ability, not my disability. My preference was to study at the University of Auckland as it's closest to home, but it wasn't physically accessible for me. Its law school dean, however, suggested I meet the University of Otago law school dean, Mark Henaghan, who allowed me — against the regulations — to study by correspondence. I was admitted to the bar in 2012."

Wanting to be better acknowledged

Although all six women we talked with were happy in their legal executive roles, they all yearned to achieve more. As well, they wanted to be better acknowledged for the high level of skill they brought to their roles in their law firms. They all agree they were pretty much doing a lawyer's job as Registered Legal Executives, except for appearing in court, signing guarantees and so on. Armed with an LLB and being admitted to the bar would very much vindicate their years of study and grind.

Maree says she can now enjoy working on an entire file. "Having control of all the items required gives me a deeper sense of satisfaction when I'm working on a client matter. Before, I could only do a specific number of tasks and then hand the file on to the lawyer responsible for it."



Maree Adams

All agree that returning to study was quite a jump. "It brought some significant changes in thinking. I used to sit in lectures and think, *that's not how it's done in practice,* but I needed to turn off my practical hat and let the theoretical brain work to focus on the *why* for the process, not the *how.* Being a legal executive is a very practical role which I enjoyed very much. Now I'm a lawyer I understand much better the reasons for so many of the processes. It gives me greater depth of understanding. I'm also a much better critical thinker," explains Tania.

Helen agrees. "The legal executive course, quite rightly, focuses on procedure and process, but now I'm at university studying I'm doing a great deal more deep thinking."



Helen Hale

"Like everyone else studying and working at the same time, I had to manage my time well — people with a disability tend to be very organised as they need to plan ahead with access to places and so on," Vanassa explains.

"I'm so grateful for the support of my family and friends as I studied. It was work, work and more work," says Lisa. "I used to study in every spare moment I had because of working full-time during my degree — like so many others. I sound like a geek, but I used to record lectures and listen to them while I was driving. I worked on the bus and on the ferry into work — there was no time to look out the window!"

Embarking on a law degree that usually takes four years of full-time study was overwhelming for all six women.

Maree admitted that breaking the course into small parts made it a bit easier to handle. “The big picture was too daunting and several times I almost chucked it in. I was even reluctant to do my Profs as I was so over it, but of course I pulled myself together and got admitted to the bar.”

“A shock to the system” is how Helen describes going back to study in 2020. “It had been 18 years since I studied. But I think that any mother who has juggled a responsible job, home responsibilities and so on, can continue to multi-task and study. And, after all, Registered Legal Executives can manage 10 settlements on a Friday!”



Wendy Alexander

Wendy's interest in dispute resolution spurred her to become a mediator, and then take the next big step to get her law degree. “Whilst studying for my LLB, I also managed to fit in a five-day intensive course at Harvard Law School in Boston on the 'Program on Negotiation, Mediating Disputes'. It was mind-blowing! I was the only legal executive there out of 48 attendees. One was a Justice of the Supreme Court of Australia, so I was in fairly august company. It very much opened my eyes about the many tools you can use to resolve disputes and to facilitate negotiation.”

Where to from here?

All six women are excited at what the future holds for their legal careers. Looking back at their years as Registered Legal Executives, they were all most appreciative that the skills they gained in that role gave them the springboard to study law at university. They were unanimous in their respect for Registered Legal Executives and the work they do as the 'engine room' of a law firm.

Tania has recently moved firms and is now established as a Senior Solicitor at Hamilton's Norris Ward McKinnon. “The change has been very positive as at NWM I'm only known as a lawyer, not a former RLE,” she says.

After she is admitted to the bar in August, Lisa anticipates that Vector will promote her to the role of legal counsel. “Some law firms and in-house legal teams still consider me a 'junior' — I've more than 30 years' legal executive experience! Ten of those years have been in-house. Vector has been terrific, and I'm so appreciative for their support and faith in me.”

Using the skills she gained at the Harvard Law School course, Wendy Alexander will further develop a mediation practice to help deliver pragmatic solutions for clients' problems.



Vanassa McGoldrick

Vanassa established her own firm two years ago as she was concerned that so many people did not have ready access to the law. “I wanted to do more legal aid work. My firm operates quite well with 70% legal aid and 30% private clients. It's such gratifying work.”

Post-Covid, Maree's firm (Frankton Legal) has started selling property so clients can enjoy a seamless real estate service. “My current focus is to help develop this in order to cement our firm's position in the Queenstown property market.”

Completing her Diploma in Law at the University of Waikato is Helen Hale's current goal. “At the same time the university has to be persuaded to retain remote learning so I can graduate with an LLB.”

Advice for budding lawyers

- Don't be put off by the hard work in going to university, it's completely worth it — Tania.
- It's never too late to do this; start slowly and don't skip lectures or tutorials — Lisa.
- Being an RLE has given me so much practical experience, it has set me up so well for the next step in my career — Helen.
- Some ambitious RLEs can be held back by self-doubt and an unencouraging firm culture. My advice is to reach for the stars and don't let anyone put you in a box — Wendy.
- LLB study is not to be undertaken lightly, but it has created very good opportunities for my career. If it's right for you, go for it! — Maree.
- If you want your degree badly enough, you'll never regret it — Vanassa.

Thank you to Helen, Lisa, Maree, Tania, Vanassa and Wendy for sharing your stories with us. We will follow your careers with great interest. ■

CASES UPDATE



Property

Court of Appeal rules on dispute over removal of townhouse balconies

In *Body Corporate Number 203780 v Bell [2020] NZCA 665*, leaks were identified on balconies in a townhouse development in 2012. The weathertightness issues became progressively worse and all unit owners agreed that remedial work, including recladding, was required.

However, the parties did not agree on whether the balconies should be removed or replaced in the course of carrying out the remedial work. Four unit owners wanted to remove their balconies, while the Bells wanted to retain theirs and also objected to the balconies being removed from the other units. At a body corporate annual general meeting, a resolution was passed by four votes to one that consents be granted to the units wanting to remove their balconies, subject to building consents being obtained.

The Bells brought High Court proceedings successfully challenging the validity of the resolution, with Justice Davison granting a declaration that the resolution was ultra vires and invalid. The body corporate appealed to the Court of Appeal.

The court said that the key issue was whether a body corporate could, by special resolution, permit one or more owners to decide that alterations would be made to their units in a way that materially altered the exterior appearance of the development in the context of a remedial project carried out by the body corporate.

The Court of Appeal allowed the appeal, setting aside the declaration that the resolution was ultra vires and invalid. The court said that the body corporate had a duty to carry out the remedial work under section 138 of the Unit Titles Act 2010. Their Honours said that, if there was a conflict between the duty of a unit owner to carry out remedial work under section 80(1)(g) and the body corporate's duty under section 138, then section 138 would prevail.

However, there was nothing in the resolution providing for a delegation of the remedial work that the body corporate was required to carry out, and intended to carry out. The issue therefore was whether the resolution was a valid exercise of the body corporate's power under section 80(1)(i) to consent to the removal of a balcony if an owner wished it removed, with the removal to be effected by the body corporate in the course of the remedial work.

The court held that the interests of other unit owners were protected by the section 80(1)(i) approval mechanism, and by their ability to apply to the High Court under section 210 in cases of injustice to a minority.

The resolution was a valid resolution and the order quashing it was set aside.

Second caveat permitted to protect children in property dispute with father

John Cowan owned a property in Wellington to which he had acquired sole legal title by survivorship following the death of his wife. Mrs Cowan died in 2019. In 2002 Mr and Mrs Cowan had entered into an agreement whereby he would sell and gift his share of the property to his daughter, Christine, who had

long occupied the property with her family.

In *Cowan v Cowan* [2021] NZCA 31, Mr Cowan admitted that he had signed the agreement but said he had entered into it at an unhappy time and without legal advice, and that no steps had ever been taken to sell the property to Christine. Instead, Mr Cowan entered into an agreement to sell the property to a developer and to use the proceeds for his own benefit. A further property in Carterton had been occupied by Christine's brother, Te Rahui.

The siblings lodged caveats over both properties, claiming interests in the land under an implied trust. The High Court declined an application for an order that the caveat over the Wellington property not lapse. The siblings accordingly sought the Court of Appeal's leave under section 146 of the Land Transfer Act 2017 to lodge a second caveat or, alternatively, an injunction restraining Mr Cowan from transferring the property.

The Court of Appeal ordered that the siblings could lodge a second caveat over the Wellington property protecting their claim to beneficial ownership and that John was to be permitted to enjoy sole occupancy of the Carterton property.

The court also directed the applicants to file proceedings in the High Court to establish their claim to the Wellington property.

Relationship property

"Everything relationship property litigation should not be"

The Court of Appeal has granted an appeal in a long-running relationship property case described by one of the judges as "everything relationship property litigation should not be." One of the lawyers described the matter as having "eaten its head off", while a judge summed the proceedings up in the sentence "Result: misery."

In *Preston v Preston* [2020] NZCA 679, Katherine and Grant Preston began a de facto relationship in 2009, married the following year and separated in 2015. Mr Preston owned a contracting company called Eastern Bay Thrusting Ltd which specialised in subsurface groundworks. In 2004, Mr Preston had settled the Grant Preston Family Trust, with the final beneficiaries being his two children by an earlier marriage. The trust purchased a section in 2005 and a home was completed on the land in 2007.

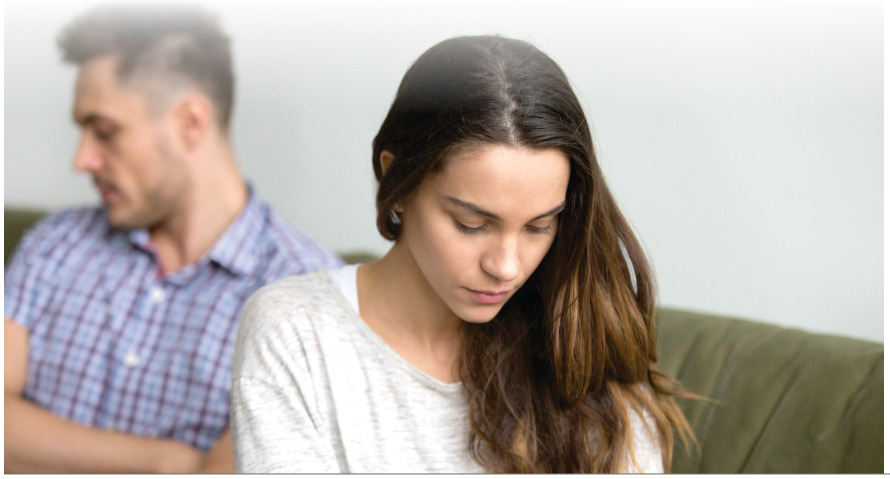
In 2008, Mr Preston transferred 99 of the 100 shares he owned in his company to the trust for $160,000. In 2010, he added — as discretionary beneficiaries of the trust — any wife or de facto partner of his. Mr and Mrs Preston purchased a holiday home in 2012 and settled it in the names of their respective trusts.

Following the parties' separation, there were three sets of High Court proceedings relating to property distribution. The Court of Appeal was then called on to rule on two main issues still outstanding.

The first of these was whether the 2010 amendment to Mr Preston's trust deed was a nuptial settlement for the purposes of section 182 of the Family Proceedings Act 1980. Mrs Preston had sought an award of part of the assets of the trust pursuant to section 182 but her application had been dismissed.

The Court of Appeal held that the amendment was a nuptial settlement, made in contemplation of marriage and intended to make provision for Mrs Preston in her capacity as Mr Preston's spouse. However, the lower court judge had not erred in declining to make an award as section 182 did not authorise "a grand march into the respondent's separate property or third party trust property to achieve economic equalisation in the name of contemporary family values." If property had been diverted into trusts, defeating relationship property interests, sections 44 and 44C of the Property (Relationships) Act 1976 were available.

Secondly, the Court of Appeal held that the High Court had erred in declining to allow Mrs Preston's trust to purchase the parties' holiday home for $337,000, its value at the time the trust exercised its pre-emptive buy-out right. The fact that the value of the property had risen by the time of the hearing was immaterial, as exercise of the right to purchase accrued a right to settle at the price applicable at the time notice was given. The appeal was allowed in that regard. ■



Welcome to new councillor Carla Rule

At the February AGM, Carla Rule, a Registered Legal Executive at Hamilton's Norris Ward McKinnon, was elected to the Legal Executives New Zealand Council as an independent councillor. Carla has kindly provided some background to her career.

In 2001 while I was living in Dublin, and embracing my OE in my early 20s, a temping agency placed me as a PA in the property team of a large central city law firm. This was my first taste of working in the legal profession — and I loved it!

Returning to New Zealand a year later, I moved back to Queenstown. Hailing from the deep, deep south I had spent a lot of my early post-high school years in Queenstown. While working as a legal secretary in a small property firm, I began my legal executive studies through Open Polytechnic.

A couple of years later I moved to Hamilton and continued to study for the Legal Executive Certificate (as it was then called) at WINTEC whilst I worked in a medium-sized central city law firm as a property legal assistant. Sixteen years ago, I moved to Norris Ward McKinnon (NWM) as PA to a partner in the commercial business team; this later developed into a legal executive position once I became qualified.

Completing the Diploma in Law

After the Waikato branch of the institute folded in 2009, Michelle Way and I represented Waikato members on the Auckland Branch committee (I stayed a year, Michelle is still on the committee). At the same time, and with the support of NWM, I started (and completed over three years) a Diploma in Law at the University of Waikato — studying part-time and working full-time. NWM has supported me endlessly on any professional endeavour I have turned my mind to, and for that I am very grateful. As every minute of my spare time was taken up working or studying at this time, I could not continue on the branch committee.

Fast forward to now and I still love my position at NWM — now as a Senior Registered Legal Executive in the firm's private client team. I deal mostly with residential property, specialising in first home buyers, but I am working on expanding my knowledge, expertise and client base further to include the greater private client field, specifically succession planning.

National Councillor

Being elected to the LENZ Council as an independent councillor in February was an honour; I feel privileged to work alongside some of the most amazing Registered Legal Executives in the country, all with such depth to their knowledge and experience. I love the work we do in promoting the role of Registered Legal Executives in the legal community and look forward to many more hours of constructive debate and strategic planning.



Carla Rule

Outside of work I play netball in the winter, compete in triathlons in the summer, hang out with my best furry friend Walter (Jack Russell x miniature poodle) and spend quality time with my extended family and friends. ■

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myTrove
Death notification service

In July 2016, Public Trust commissioned research by Executor Research that found, on average, it takes an executor 52.1 hours to fulfill executor duties, such as closing down the accounts of a person who has died. Executors can take between two months and a year to wind up an estate from start to finish.

myTrove (www.mytrove.co.nz) reduces the administrative burden encountered by grieving families, or lawyers/legal executives, by reducing paperwork and simplifying the process. In a simple online process, you can notify multiple organisations, many that require essentially the same information, and allow personal and official death data to work together.

Organisations that have relationships with the deceased receive notifications via myTrove, providing them with the details of the notifier (family member or executor) and verification of death from the Department of Internal Affairs, removing the need for a death certificate. The organisation can then quickly place a hold on the account and contact the notifier to complete formal account closure.

The myTrove service is free to those notifying a death and has already been used for over 6,000 notifications submitted by family members, lawyers, legal executives and executors. Currently notifications can be sent to Inland Revenue, the Department of Internal Affairs - DIA (Passports), Westpac, ASB, Kiwibank, BNZ, TSB, Fidelity Life, Asteron Life, Partners Life and Resolution Life (previously AMP). myTrove is actively working to add more organisations so that, eventually, you can use it to notify all organisations that need to be contacted.

Legal executives are involved in up to 80% of all estates that are managed by law firms. We encourage you to use myTrove as part of your estate closure process. We know it will save you time and effort, but we also know you will have ideas on how we could further improve myTrove to make it more valuable to you.

If you have suggestions, or would just like to understand more about how myTrove works, please contact Ross Hughson, Managing Director of Personal Information Management Ltd, at ross@pimhq.nz or 029 890 2220. ■

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Two new branch presidents

With the urgency of our day-to-day lives, we somehow overlooked properly introducing new branch presidents — Michelle Way from Auckland Waikato and Nicole Mangin, Wellington Central Districts. Apologies, but better late than never!

Michelle Way

I tell people I fell into being a legal executive.

At the end of my 6th form year at high school I found out that half the classes I wanted to do in 7th form had been dropped. So I decided to not waste another year at school on subjects I just wasn't interested in.

Starting study

Somehow I came across the legal executive certificate, thought it looked similar to my legal studies class from that final year at school, found that it was available at AUT, and applied.

I then did all six papers the following year, studying full-time at 17 years old.

It was only when I was in class that I discovered that most other students were working in law firms, and that was really the best way to learn. Which of course meant that I did not quite succeed in passing all six papers that year.

My plan at the end of the year was to get myself into a law firm; unfortunately no one wanted to employ an 18-year-old with no work experience and just three legal executive papers.

I ended up as a clerical support officer with the Legal Services Agency (legal aid); I only applied for the role because I saw the word 'legal' in the job description.

I stayed at Legal Services for almost five years while I resat the three papers I'd missed out on, and worked my way up from clerical support to grants officer. During this time I spent about three of those years trying to get a job in a law firm; I thought I'd never do it!

Finally in 2006, having graduated with my certificate in 2005, I got a job as a legal secretary in a law firm; taking a $10k pay cut was a sacrifice I was prepared to make. A year later I was a legal executive.

Branch committee

In 2009, Waikato Branch merged with Auckland Branch. Naively, I put my hand up to be one of the Waikato representatives on the branch committee.

I have been on the branch committee ever since, helping to plan all seminars and social events for Waikato members.

Branch president

Last year when our then-president, Pip Glasson, advised that she would be stepping down, I decided that it was probably my turn to step up. So far, I am using the role to learn as much as I can, so that our branch and LENZ can best serve our members.



Michelle Way

Outside of work I am an avid reader. Not just of books — I am always saving articles to my Pocket app — although finding the time to read them all can be a problem.

I also love listening to podcasts and watching good tv/documentaries — particularly crime/law-related, and spending time with my friends.

In January 2020, I became an aunt, but due to Covid, have not yet met my nephew. Hopefully that will happen sometime in the next year.

Nicole Mangin

"My path to become a Registered Legal Executive started because I was tired of working nights as a waitress/barista, and wanted a day-time job. My mother saw the job advert for Loughnans and nagged me to apply. I started as a junior and, as I progressed, the principal offered to support me whilst I studied for my legal executive qualification. It was one of my best decisions," says Nicole.

Nicole became a Registered Legal Executive in 2012, and a Fellow in 2020. "What I most enjoy about my job is the contact with clients. I really like working with our clients to help them achieve their goals. Conveyancing is such a positive area to be in — well most of the time anyway — and it's great to be able to help people."

Branch committee

Nicole says that Necia Parker (now LENZ President) shoulder-tapped her to join the branch committee when Necia was branch president. "I found it interesting being on the committee and after Sheryl Thornton resigned in 2020 after one year in the role, I thought I should get cracking and put my name forward for the branch presidency. And suddenly, I'm it."



Nicole Mangin

"I'm very much enjoying the role so far. It has been excellent to meet the presidents of the other five branches and the council. They all have different views and experiences, and I can learn a great deal and take it back to our branch. I'm keen to have more members involved in branch activities and to see more attend our seminars and social events."

With the branch's 30th anniversary this year, current and past branch members will be invited to a celebratory dinner on the Monday evening of LENZ's two-day biennial conference. "The dinner will be an excellent opportunity to catch up with many people, and to help motivate members to be more involved."

New professional goal

When we talked with Nicole in early June she added, almost as an afterthought, that she was in her first year of study towards an LLB at the University of Waikato.

She confesses that it was a response to last year's lockdown. "It was an awful time of course for everybody, but I decided that I needed to have more control of my life. This year I've enrolled for two half-year papers and a full-year paper. Completing a law degree will give me more choices in my professional life and opportunities to move ahead. I'm really busy because I'm still working full-time, but I think it will all be worthwhile in the end." ■

Toitū Te Whenua releases new tools in Landonline to streamline conveyancing process

To assist in quicker conveyancing processes, legal professionals can adopt new tools released by Toitū Te Whenua Land Information New Zealand's Modernising Landonline programme.



Andrea Watson, consulting solicitor, Modernising Landonline.

Toitū Te Whenua consulting solicitor, Andrea Watson, says it is essential that legal professionals can rely on Landonline to provide accurate information and be an efficient platform for land registrations.

"Landonline, New Zealand's land title register, is world-class. At 20 years old, however, our priority is to ensure that it can continue to meet the needs of today's customers," says Andrea.

"Over the last three years, we've been working with our registered users, incrementally co-designing several new features that make it easier to access and search title and survey information, and to transact title dealings and submit plans."

The new Landonline is due to be completed in 2023, after which Toitū Te Whenua will continue to update the system, but Andrea says not to wait till then to start using the new features.

Toitū Te Whenua is encouraging legal professionals to start using the new functionality as soon as it becomes available. This will allow users to start getting the benefit of the enhancements that these products bring.

A new way to search and order records

Web Search

"This new search function introduces the small things that users would expect from a modern web search tool, such as suggesting search terms as you type. You can use Web Search in a separate browser window to Landonline, it doesn't time out, and it will help you find what you're looking for faster. It also makes spatial searching faster and more intuitive," Andrea explains.

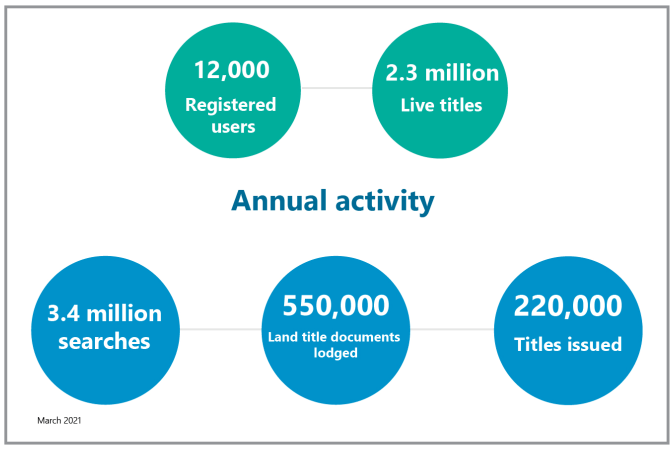
Customer feedback for Web Search is that once customers try it, they do not go back to searching in 'legacy' Landonline.

Accessing Web Search

Customers can use their Landonline credentials to log into the Web Search tool, which is accessed through the Toitū Te Whenua website. Gone are the days when customers need their digital certificate on the device they are using for their search. They can use Web Search from any device or location.

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A snapshot of Landonline activity for the year ended 30 June 2020.

From the Web Search landing page, customers can search for land records by entering key information such as address, title reference or registered owner of the property.

Streamlining conveyancing

There are now two new notice products available.

1. Notice of Change of Ownership that is being rolled out geographically, and
2. Notice to Mortgagee, which is steadily adding participating lenders.

As each territorial authority or lender comes on board, the option to use the new service will show up for eligible transactions.

"Rather than just looking at our piece of the puzzle, we've scrutinised how we can make things easier for conveyancing professionals too. We've been able to introduce a great deal of pre-population and automation into these notices. This reduces duplication and improves the accuracy and completeness of the data we all share," explains Andrea.

"Some customers already have access to both Notice options, and eventually these will be available to everyone. We recommend that you go to Landonline to see if you can begin using these services right now."

Notice of Change (NoC)

Conveyancing professionals have an obligation to advise the relevant territorial authority when ownership on a title changes. Toitū Te Whenua provides the option to populate a Notice of Change of Ownership as part of an e-dealing.

Notice of Change can currently be used when completing the following instruments for titles with onboarded councils:

- T - Transfer
- TSM - Transmission
- CN - Change/Correction of Name
- TPS - Transfer in exercise of Power of Sale
- CO - Court Order (where it affects a change in ownership), and
- A90 - Application under s90 Land Transfer Act 2017

In the 'prepare instrument' screen, use the Notice of Change button (Add NoC) at the bottom of the window: this will launch the NoC form. This automatically pre-populates the bulk of the information required for the form and notifies all parties that a NoC has been created.

To find out more about NoC and how it works, go to the Landonline page on the Toitū Te Whenua website at www.linz.govt.nz

Notice to mortgagee (NtM)

When a mortgage instrument is registered, Landonline will simultaneously inform the lender (if they are subscribed to the product) and the primary contact acting for the mortgagor. Customers will know if an institution is subscribed because a new field called 'bank client ref' will display on the post-registration search screen.

Andrea says that this facility means legal professionals no longer need to order searches and forward those searches to lenders. NtM also improves the speed with which financial institutions know the mortgage has been registered.

Working with customers

The uptake and success of Landonline's new services depend on customers actively using these intuitive tools, says Andrea.

"We are keen for everyone to try using these new tools. We want customers to have the confidence that they're straightforward and simple to use. Once people are familiar with the ease of using Search and Notices, we ask them to encourage others in their firms and networks to use them too."

Toitū Te Whenua is helping customers get on board with Modernising Land*online* by facilitating workshops and attending events such as the 2021 NZLS CLE Ltd Legal Executives Conference on 6-7 September in Wellington. Andrea says that the team is looking forward to sharing more Landonline developments then. ■

For more information on Modernising Landonline, or to provide feedback, go to www.linz.govt.nz/land/landonline

or email modernisinglandonline@linz.govt.nz

Thank you to Toitū Te Whenua Land Information New Zealand for providing this article.



New rules for incorporated societies in the pipeline

Updated legislation governing New Zealand's 24,000 incorporated societies is working its way through Parliament as the government moves to modernise the current 1908 statute.

The reform process has been a lengthy one. In 2014, the National-led government agreed to implement modern legislation and released a bill for comment the following year. It was not until March 2021, however, that legislation was finally introduced to the House.

Not throwing the baby out with the bath water

Minister of Commerce and Consumer Affairs, the Hon Dr David Clark, told Parliament that the bill would retain the best of the Incorporated Societies Act 1908 but would codify case law to make it more accessible. Much of the new regime would be modelled on the Companies Act 1993.

Dr Clark said there were two types of incorporated societies. The first were those that focused on the interests of members, such as sports, cultural and recreational clubs and some marae. Those organisations made up approximately 45% of incorporated societies.

The second type comprised bodies which focused on the greater good of society, including environmental protection organisations, animal welfare groups, industry associations, political parties and trade unions. There was also huge variation in the sizes of incorporated societies, ranging from New Zealand Rugby with more than $100 million in revenue, to far smaller entities.

"[T]he 24,000 incorporated societies in New Zealand are commonly

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known as clubs, associations or federations, and they operate for no financial gain for their members. They arrange the sporting events for our kids, the coaches in our clubs, the environmental petitions that they bring and the enriching of marae with Māori cultural values around the country — so, lots of things that we could recognise as very good for our society. It's important to have up-to-date legislation in this area."

Dr Clark said an illustration of how outdated the current law was could be seen in the fact that the maximum penalty for the late filing of financial reports was a shilling [10 cents in today's money but not today's value! — Ed].

The Minister said that incorporated societies were governed through democratic processes. Around 30% of registered charities in New Zealand were incorporated societies, while more than 55% were trusts.

The reforms would reduce the minimum number of society members from 15 to 10, stated the Minister.

To be modelled on the Companies Act

Formal officers' duties would be introduced, modelled on the directors' duties in the Companies Act. Similarly, there would in future be conflict of interest declarations, also drawn from company law.
Dr Clark said an important aspect of the law changes would be the introduction of a requirement for incorporated societies to have disputes resolution processes meaning that disagreements could be kept out of the courts.
Incorporated societies such as Grey Power and the Citizens Advice Bureau had already indicated they supported introducing such processes.

Other reforms include strengthening the provisions stating that incorporated societies do not operate for financial gain. Clause 3 of the bill sets out the purposes of the new legislation. These are to



provide for the incorporation of societies that are not carried on for the financial gain of their members; to promote high-quality governance; to make the law of societies more accessible; and to recognise the principles that:

- Members have the primary responsibility for holding a society to account
- Societies should promote the trust and confidence of their members
- Societies should be self-governing and free from inappropriate government interference, and
- Societies should not distribute profits to members

Key eligibility criteria

The proposed key eligibility criteria for societies are set out in clause 8, which states that they must have 10 or more members and a lawful purpose other than being carried on for the financial gain of members.

Every incorporated society will, in future, be required to have a governing body of three or more individuals who are members. Clauses 49 to 54 set out officers' duties, including acting in good faith and in the best interests of the society, exercising powers for a proper purpose and acting with reasonable care and diligence.

Subpart 7 of the bill deals with accounting records, financial reporting and annual returns. It prescribes new requirements for financial statements to be prepared and filed by all societies, with the specific requirements being based on the size of the society. Large societies will need to have their accounts audited.

More information about societies will be included on the register, and societies will have to file annual returns and keep their registry information current by notifying changes. The Registrar of Incorporated Societies will be given broader powers to inspect, copy and seize documents, and will be able to take enforcement proceedings if it is in the public interest.

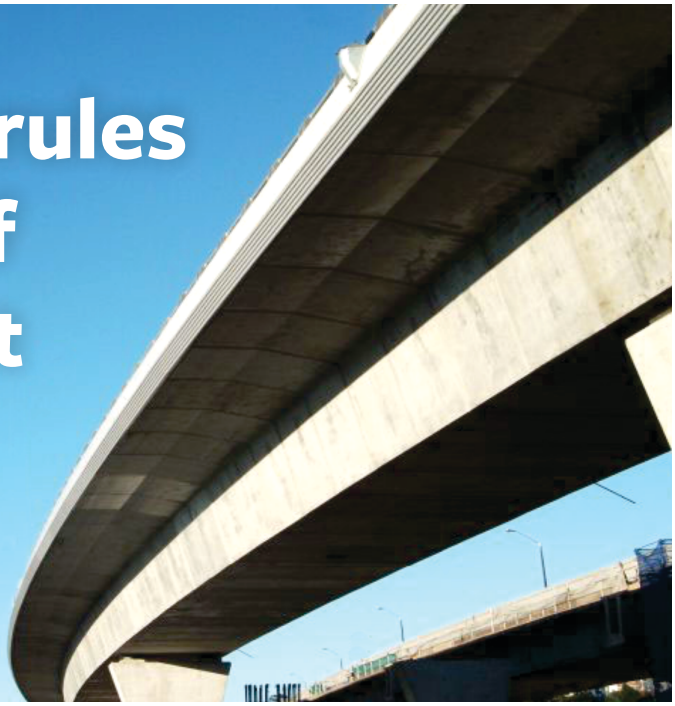
Transition period

The new law will have a transition period to enable existing societies to reregister under the new regime. Existing organisations will have to review and amend their constitutions to comply with the new rules.

It is expected that societies will have until 1 December 2025 to transition to the new regime, but that date could alter depending on when the bill is actually passed. The government intends that societies will have at least four years to make the required changes and reregister. ■

Court of Appeal rules on application of Public Works Act 1991

Two recent cases



The Public Works Act 1981(PWA) gives the Crown the power to compulsorily acquire land for public works.

If the property is subsequently no longer required by the Crown, section 40 provides that the former owners are entitled to have it offered back. There are exceptions if the land is required for another public purpose (section 40(1)(b)), or for an exchange (section 40(1)(c)), or in the circumstances set out in section 40(2).

Skyrocketing land values in New Zealand mean that property owners whose land has been compulsorily acquired will often be keen to buy back the land, even many years later, because its value has increased astronomically.

The Court of Appeal has in two recent cases examined the law relating to the acquisition of land and the requirement to offer it back. The option of an acquisition of less than the freehold title is dealt with in the first case, while the second explains the broad scope of the issues to be considered and the need to take the Treaty of Waitangi into account.

Acquisition of less than the freehold title

In *Dilworth Trust Board v Attorney-General & Ors* [2021] NZCA 48, the Dilworth Trust Board owned a substantial amount of land in Auckland. It relied on the income from its landholdings to sustain its charitable purposes — principally the school for disadvantaged boys established under the Dilworth Trust Deed in 1894.

During the 1960s and 1970s the New Zealand Transport Agency (NZTA) compulsorily acquired several parcels of land from Dilworth for the construction of the Newmarket Viaduct. In the 1980s, some land was offered back as required by section 40.

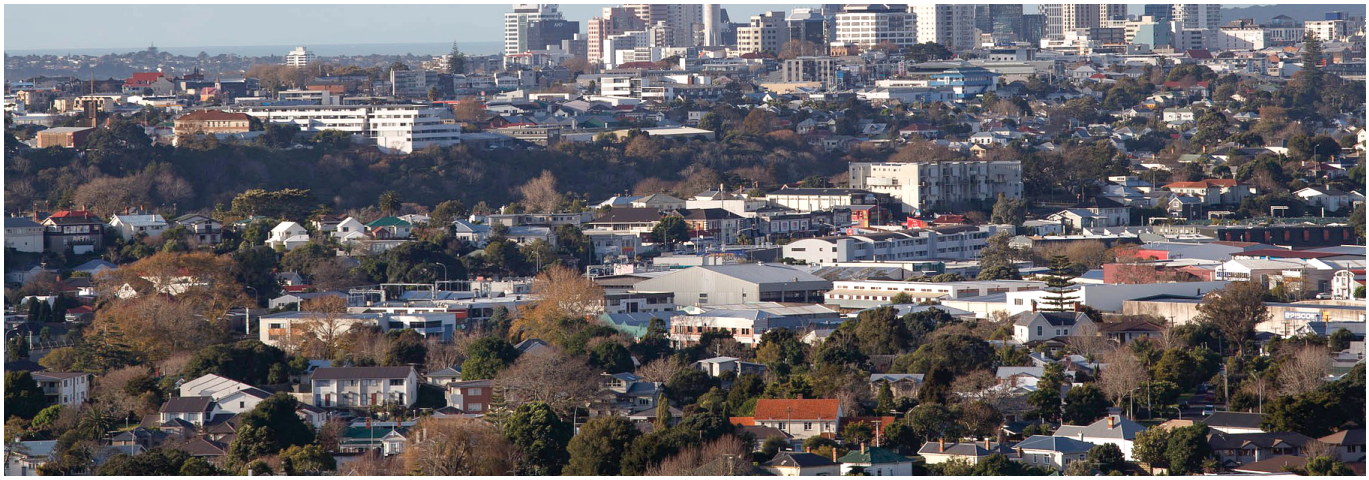
Two parcels of land were retained by NZTA: the Remaining First and Second Lands, and the Remaining Third Lands. During the mid-2000s, the viaduct was replaced, using a slightly different footprint. The subject land ran along and beneath the new viaduct. Access to and over the land continued to be required for monitoring, maintenance and repair of the new viaduct.

Despite that, Dilworth wished to reacquire the land. It accepted that any offer back would need to be on terms involving encumbrances that preserved NZTA's access and future use of the land. When Dilworth approached NZTA with that proposal, however, the agency maintained that the land was still required for the purpose of the viaduct and refused to offer it back.

Dilworth brought proceedings in the High Court seeking a declaration that NZTA was obliged to make an offer back. Justice Ellis held that the lands were no longer required for the original public work, but allowed the Crown

Continued on page 26...

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further time to consider whether the land would be required for one of the exceptions stated in section 40.

Dilworth filed an appeal against the High Court decision. Pending the hearing of the appeal, the Chief Executive of NZTA considered whether the land was required under one of the exceptions and concluded that the Remaining First and Second Lands were to be offered back to Dilworth, but the Remaining Third Lands were not required to be offered back as they were required for a bus layover for Auckland Transport.

The need for the bus layover had not been pleaded in the High Court and was invoked long after the date on which the High Court had found that NZTA had ceased to require the land.

The Court of Appeal noted that the new viaduct had required further land to be acquired. Agreements with Westfield, Robertson and 5 Mahura Street provided that the Crown would not acquire freehold titles, but only the land on which the piers were to be constructed, together with air rights. Leases were taken for the balance of the land during the construction period and encumbrances obtained to ensure ongoing access for monitoring and maintenance. Those agreements enabled the property owners to progress their own plans for their land, including, in the case of Westfield, the construction of a shopping centre.

The Court of Appeal said that the effect of section 40 was to impose a duty on the Crown to offer land back in a timely manner once it was no longer required. The authorities consistently stated that the section 40 process, including the assessment of alternatives, must take place within a reasonable time of the agency ceasing to need the land.

Justice Courtney said that whether or not land was no longer required for the original purpose under section 40(1)(a) was a question of fact, rather than one determined by the opinion of the landholding agency. The court could therefore determine the intention of the landholding agency in the light of objective circumstances.

On the facts of this case, there was no reason to think it was impracticable to make the section 40 assessment in 2012. Early recommendations to NZTA appeared to show a conscious effort to avoid triggering a section 40 process in relation to the viaduct. Section 40 was designed to prevent unfair land banking at the expense of the former owners.

In this case, NZTA had made an honest error about the ongoing need for the land but the wrongful retention of land following an honest mistake had the same impact for former landowners as deliberate land banking. Previous decisions had repeatedly emphasised the need for the Crown to act promptly. The High Court had been wrong to allow the Crown further time for consideration of sections 40(1)(b) and (c).

The Court of Appeal declined to consider the argument that the land was needed for a bus layover as it had not been raised at trial. The appeal was allowed and orders were made that the land must be offered back to Dilworth, subject to Dilworth entering into an arrangement of the type entered into by Westfield, Robertson and 5 Mahura Street.

Broad scope of issues and the need to take the Treaty of Waitangi into account

In *Minister for Land Information v Dromgool* [2021] NZCA 44, the Court of Appeal considered the interrelationship between the PWA and the Resource Management Act

1991 (RMA) and the role and obligations of the Minister for Land Information under section 186(1) of the RMA.

Top Energy Limited sought to acquire easements to enable the construction of an electricity transmission line between Kaikohe and Kaitaia. It made requests to the Minister under section 186(1), which provides that a network utility operator that is a requiring authority may apply to the Minister to have land required for a project or work acquired or taken under Part 2 of the PWA as if the project or work were a government work within the meaning of the latter legislation. Land may be acquired or taken if the Minister agrees to this.

The Minister gave her agreement and there were objections to the Environment Court from affected landowners. In its report on the objections, the Environment Court held that the Minister's response to a request under section 186(1) was fully discretionary. The court reported to the Minister that the taking of the land would be fair, sound and reasonably necessary.

The objectors appealed the Environment Court's report to the High Court and Justice Courtney allowed the appeal and set aside the Environment Court's report. The Minister appealed to the Court of Appeal, with the key issues being the role and obligations of the Minister under section 186(1) and whether the inquiry into the adequacy of consideration of alternatives under section 24(7) of the PWA was an inquiry into the adequacy of consideration of alternatives by the requiring authority, the Minister, or both.

The Court of Appeal allowed the Minister's appeal and confirmed the Environment Court's report, holding that when the Minister's agreement was sought under section 186, the Minister needed to be satisfied that the project of the network utility operator was capable of achieving a favourable report from the Environment Court under section 24(7) of the PWA.

Further, the Minister could withhold consent if the proposal was contrary to the purposes and principles of the RMA, or was undesirable for other reasons consistent with the statutory framework.

The Court of Appeal said that the Minister could also take into account policy considerations relevant to the proposed project or work. The Minister was being asked to lend the coercive powers of the state to the acquisition of land by another party. It was accordingly inappropriate to suggest that there was no room for the application of government policy and broad consideration of where the public interest lay. The relevant legislative policy and objects derived not just from considering the PWA but also the RMA, which required all decision-makers to take into account the principles of the Treaty of Waitangi. ■

Legal Executives New Zealand
RĀNGAI HĀPAI TURE O AOTEAROA

Kaiārahi service



The term *kaiārahi* means 'someone who guides; leader, mentor, counsellor'.

The institute (now LENZ) has long-acknowledged the importance of providing a support network for its members in both professional and personal capacities. We are pleased to have established our national Kaiārahi service to supplement the ongoing informal support offered through our branches via their networking events and seminars.

Whilst our members can access the professional counselling service provided by the New Zealand Law Society, we also saw a need for LENZ to provide members with direct and personal support on every level.

We have many senior members who are approachable and empathetic, and members who have specific technical knowledge that they are prepared to share.

We have a list of kaiārahi who are happy to be contacted.

If you would like to talk with a kaiārahi, please look at the contact list in the members' section of our website, or contact the National Office.

CONVEYANCING UPDATE

Penalties imposed by High Court for Overseas Investment Act breaches

Financial penalties were ordered by the High Court under the Overseas Investment Act 2005 for non-compliant land dealing in three separate cases in a matter of weeks earlier this year.

In the first case (*The Chief Executive of Land Information New Zealand v West Drury Holding Ltd* [2021] NZHC 704, the court held that West Drury Holding Ltd had breached the Act when it purchased sensitive land in Drury in June 2017 without consent; it imposed a penalty of $125,000 and legal costs of $15,000.

West Drury admitted that a shareholder, who held 39% of its shares, was an overseas person when the company purchased the $9.2 million property. The company was accordingly considered to be an overseas person and should have sought consent to buy the land.

West Drury told the court it had not known it needed to apply for consent as the shareholder held a residence-class visa. Justice van Bohemen acknowledged that there had been a misunderstanding of the rules, but said that this should have been avoided by undertaking appropriate enquiries.

In a second case (*The Chief Executive of Land Information New Zealand v Smith Road Farm Ltd* [2021] NZHC 795), the High Court directed overseas investors to pay $1.38 million in penalties, plus legal costs, for failing to obtain Overseas Investment Office (OIO) approval when purchasing five forestry blocks for $12.8 million. The purchasing family used relatives based in New Zealand to invest on their behalf and, although they knew that permission was required to buy the forestry blocks, they did not seek approval.

Justice Downs said that the breaches were serious because the properties were large and had been acquired for commercial gains. He accepted that discounts to the penalty were appropriate because the family had admitted the breaches and co-operated by disposing of the properties.



In the third case *(The Chief Executive of Land Information New Zealand v Bin Zhao* [2021] NZHC 857*)*, penalties of $49,000 and legal costs of $15,000 were ordered after an overseas investor failed to obtain consent from the OIO before entering into a long-term lease. The case was the first involving an overseas investor leasing land in New Zealand.

Justice Edwards said that breaches involving leases should not generally be regarded as less serious than those involving purchases of freehold land. Bin Zhao agreed to buy 20.5 hectares of land in Coatesville for $6 million but, although the agreement was conditional on OIO approval, approval was not sought.

The purchase did not proceed but a lease was entered into and approval was not sought for the lease. OIO Group Manager, Anna Wilson-Farrell, said that failing to seek consent to enter into a long-term lease should not be considered a low-level breach and the High Court decision had confirmed that.

Increased fees expected for title and survey services

In March and April, Land Information New Zealand consulted on proposed new fees for title and survey services offered through Landonline. LINZ said that fees had not changed since 2011 and needed to increase to recover the future costs of providing the services.

Proposed title fee increases would add between $10 and $40 to the conveyancing cost of buying or selling a house, and around $500 to the cost of lodging survey data for a small subdivision.

Acting Deputy Chief Executive Property Rights, Robbie Muir, said Landonline was being modernised and benefits were already being offered to customers, such as streamlining notifications of ownership and title changes and providing online public access to land information. The proposed new fees would allow LINZ to continue to build new services that add value for customers.

The increased fees are likely to take effect by September.



Transmission of trust property when a surviving trustee is incapacitated

The Registrar-General of Land has considered a case involving three trustee owners, in circumstances involving one trustee dying and another being removed for being incapable of performing their required functions. In order to change the ownership of the trust property on the register, it was necessary to register the transmission to the surviving trustees as well as the transfer by the surviving trustee to the sole remaining trustee with capacity.

The Registrar-General concluded that the capable trustee could complete the requirements to register the transmission on behalf of the incapacitated trustee, under section 118(2) of the Trustee Act 2019. This was on the basis that registering the transmission was a formal requirement that was necessary, along with registering a transfer, to complete the divesting and vesting of the trust property on removing the incapable trustee under sections 116 and 117.

The remaining trustee could accordingly sign the Authority and Instruction form on behalf of the former trustee, authorising registration both of the transmission by survivorship and the transfer.

Landonline system manager requirement now in force

Since 28 April 2021, it has been mandatory for all Landonline accounts to have a system manager. The change is intended to provide greater control over account details and user privileges.

The system manager must be a Landonline user and able to perform a variety of administrative functions within Landonline, including maintaining firm details and managing users associated with the account.

The trusted contact role remains unchanged.

Overseas investment regime fee changes expected

The Overseas Investment Office has consulted on funding options to cover the cost of the overseas investment regime, after a recent review found that the cost of the regime was not fully recovered from fees. The OIO's Group Manager, Vanessa Horne, said that the preferred option was to shift away from the current system of a single fee for applications for each investment pathway.

Instead, it was proposed that there be a differentiated fee structure, including lodgement, assessment and compliance monitoring fees for most investment pathways.

There should be different fee levels for standard and complex applications. ■

Sources: Toitū Te Whenua Land Information New Zealand; Courts of New Zealand.

Taxation update



Income tax and GST: treatment of meal expenses

Inland Revenue has issued an Exposure Draft relating to the income tax and GST treatment of meal expenses incurred by self-employed persons. The document also discussed the treatment of meal allowances paid to employees to illustrate the differences with the treatment of self-employed persons.

The document said that, generally, self-employed persons could not deduct meal expenditures for income tax purposes. This was because expenditure on the necessities of life such as meals, clothing and shelter could be described as incurred by a person in deriving assessable income for the purposes of the general permission in section DA1 of the Income Tax Act 2007. However, the Act denied deductions for expenditure or losses to the extent that they were of a private or domestic nature — the 'private limitation', section DA2(2).

An outgoing was of a private or domestic nature if it was exclusively referrable to living as an individual member of society, and domestic expenses were those relating to the household or family unit. Food fell into the private or domestic category.

In limited circumstances, however, money spent on food could be deducted, such as when the requirements of a taxpayer's business imposed extra meal costs.

This meant that there was a difference between self-employed taxpayers' meal expenses and those of other taxpayers. When employees received meal allowances or reimbursement while performing their duties, those expenditures were deductible to the employer, were exempt income of the employee and were not subject to fringe benefit tax. Self-employed persons who incorporated closely-held companies and became employees received the same treatment as other employees.

The Exposure Draft noted that meal expenses had been specifically dealt with by the Taxation Review Authority in a number of cases. In *Case E80*, Judge Barber undertook a comprehensive summary of the law relating to the deductibility of meal expenses. The taxpayer in question was the owner-driver of a furniture removal van who worked for a cartage contracting company. In carrying out his work, at times he stayed away from home overnight and took a number of meals 'on the road'. He claimed that the meals were necessary items of expenditure incurred in producing his income.

Judge Barber reviewed cases from Australia, the United Kingdom and New Zealand before stating that there was no necessary relationship between the man's expenditure on meals and the earning of his income. He had purchased the meals in order to live, rather than to perform his job. The expenditure was not incidental and relevant to the earning of income, but was rather incidental and relevant to the taxpayer's physical sustenance. Although the expenditure had been

made in the course of the cartage jobs, it had not been made in the course of earning income.

Judge Barber said that there were no grounds for distinguishing between meals eaten at home and meals eaten out of town, except perhaps where extra cost was incurred due to the taxpayer being required by the job to eat out of town. However, although the man had said in evidence that extra costs were incurred when he purchased meals on cartage trips, no evidence had been provided as to the quantum of the extra costs.

Deemed dividends

Comments on an Exposure Draft on deemed dividends closed on 27 May and are now being considered by Inland Revenue. The agency said that the document considered when a transfer of company value from a company to a shareholder was treated as a dividend for tax purposes, and was intended to replace the current 1984 document.

The focus was on the types of transactions that were often entered into between small and medium-sized companies and their shareholders. The document also considered when a transfer of value from a company to a shareholder was not treated as a dividend, and was instead taxed under other rules.

Negative interest payments and withholding tax

Inland Revenue has explained the application of the resident withholding tax and non-resident withholding tax rules to situations in which negative interest is charged on an advance of money or a loan. The department said it had been asked for clarification by banks and financial institutions, as they wished to have appropriate rules in place should the RWT and NRWT rules apply to negative interest payments, requiring them to withhold tax.

The Commissioner said that such payments would not be subject to withholding taxes. For the RWT and NRWT rules to apply, a payment must be made to a person by another person for money lent. Negative interest could not truly be said to be paid for money lent. If it was paid 'for' money lent, then it would be in return for the money lent. However, negative interest was paid to the person receiving the money and was not a return to a lender from a loan. That conclusion was consistent with the legislative history and case law on the meaning of 'interest'.



Report on new tax legislation available

The Taxation (Annual Rates for 2020-21, Feasibility Expenditure, and Remedial Matters) Act 2021 came into force on 30 March. It amended the Land Transfer Act 2017 by providing that a tax statement must contain the prescribed information. This means that tax information requirements can be prescribed in regulations, rather than by the Act. There will not be any immediate changes as the transitional provisions state that existing tax information requirements continue to apply until new regulations are made.

The Act is also amended to allow Land Information New Zealand to share tax information directly with Stats NZ. Stats NZ already receives this information from Inland Revenue to prepare the quarterly property transfer statistics reports but the amendments will avoid the double handling of information.

Other changes in the Act include allowing businesses to claim greater deductions for feasibility expenditure, loosening loss continuity rules and extending the bright-line test.

A special report has been prepared by Inland Revenue on the new legislation, providing information on land-related amendments, feasibility expenditure, purchase price allocation and unclaimed money. This can be found at https://www.taxtechnical.ird.govt.nz/-/media/project/ir/tt/pdfs/tib/volume-33---2021/tib-vol-33-no6-july.pdf ■

Sources: Inland Revenue; Toitū Te Whenua Land Information New Zealand.

Legal Executives New Zealand
RĀNGAI HĀPAI TURE O AOTEAROA

Registered Legal Executive and LENZ Fellow, **Maureen Sandö** retired at the end of June 2021 after a long and successful career.

Maureen has faithfully looked after the people of Taupō and Tūrangi for more than three decades; she has worked with Jensen Waymouth Lawyers for the past 21 years. Her persistent tenacity has delivered great results for her loyal clients; she is widely regarded as a local expert in the areas of estates, conveyancing and Māori land issues. Generations of clients have returned to Maureen for her approachability and her sharp sense of humour.

Maureen began her career in the accounts department of a Wellington law firm before making the jump to legal executive work in Taupō in 1987. In the early 1990s, Maureen completed her legal executive qualification. From there she never looked back, even establishing a regular presence for the firm in Tūrangi to meet clients.

Maureen was president of the Rotorua/Bay of Plenty/Gisborne Branch from 1998 to 2000. She attained Fellow membership status in 2001. Her dedication and commitment to the profession is highly respected and she will be missed as a highly valued member of the local legal community. In her retirement, Maureen will, however, still be actively involved around Taupō.

Maureen will continue to lead the charge with the Taupō Cosmopolitan Leisure Marchers. Although probably not at the same time as marching, Maureen may have a large glass in hand at Wineclub Taupō. She has had two terms as the club's president; she is also currently its Cellar Mistress.

Cheers to you Maureen – we hope you enjoy retired life; thank you for your hard work and dedication.



Maureen Sandö

It was 1963 when recently-retired Registered Legal Executive, **Kay Edwards**, started work as a legal secretary in Dunedin. “Those were the days of manual typewriters, carbon paper and office messengers. It's amazing to look back at how we operated in those days, but we did and our clients were happy,” says Kay.

First admitted as a Fellow in September 1976, Kay was one of our earliest members. She has held membership continuously from 1998, even when she tried briefly to retire a few years ago.

Moving to Queenstown in the mid-1970s, Kay briefly dabbled in a non-legal environment (the Europa petrol station in Frankton), but was soon back in the legal fray.

Approached by Queenstown's then only lawyer, Anderson Lloyd's Lloyd White, she assisted in conveyancing matters and ran the office. As Anderson Lloyd grew, Kay's legal executive career blossomed. She had some stints working for other law firms, and a brief retirement but soon returned to work as a Registered Legal Executive, “I got a bit bored,” she admits.

This year, however, at 74 years old Kay decided to retire properly. “I want time for my other life — gardening, tramping and e-biking. There'll also be more time for Altrusa, a service club I've been devoted to for years, and also the RSA that is a more recent interest of mine. The next few years are going to be good for me.”

Go well in your retirement Kay. We've enjoyed having you as a member for so long. ■



Kay Edwards
Photograph: Mountain Scene

We would like to celebrate your news. If you have professional news that you would like to share in a future issue of Envoy, *please email our Executive Officer, Jo Buckton: jo.buckton@nzile.org.nz with 'Envoy news' in the subject line.*





Questions of mental capacity for late prominent Sydney QC

Andrew Johnstone of APEARS, Sydney, Australia

The New South Wales Supreme Court recently reviewed the circumstances behind the multiple wills of a deceased barrister who developed dementia in his old age.

David Rofe QC enjoyed an opulent lifestyle that included a closeness with a number of high-profile people. His estate was valued at about A$27 million.

The testamentary instruments in play in the proceedings comprise 10 wills dated 23 January 1995, 28 March 2006, 18 February 2010, 17 November 2011, 10 August 2012, 5 March 2013, 14 August 2013, 11 February 2014, 8 March 2014 and 17 December 2014; and two codicils to the will of 8 March 2014, dated 10 July 2014 and 8 October 2014.

A crowded case

There is one plaintiff, Mr Illek, and 13 defendants ranging from nieces and nephews to carers and friends. Mr Illek was the accountant and adviser for Nicholas Llewellyn, one of the defendants.

In later life, Mr Rofe suffered from a form of dementia associated with vascular disease that was aggravated by a lifetime of heavy drinking. Although Mr Rofe's last will was drafted amid this diagnosis, it was signed more than two years before his death and months before his health took a turn for the worse.

Several of the disputed wills named Mr Illek as an executor: the will dated 14 August 2013; the will dated 11 February 2014; and the will dated 8 March 2014 together with the first codicil dated 10 July 2014. Mr Illek contends that the deceased lost testamentary capacity shortly after execution of the first codicil.

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Mr Illek also contends that the will dated 17 December 2014 is invalid for want of testamentary capacity and a lack of knowledge and approval, pointing to 'suspicious circumstances' attending its preparation and execution.

Disputed beneficiaries

One beneficiary of the last will was Nick Llewellyn who could receive $100,000, a portrait of Mr Rofe and a Queensland property — all pending the outcome of the ongoing hearing. Mr Llewellyn and Mr Rofe were in a 'love-hate' relationship during a time in which Mr Rofe was said to be in a vulnerable position. However, the 17 December 2014 will diminished Mr Llewellyn's entitlements *vis a vis* the will dated 8 March 2014 and the first codicil, dated 10 July 2014.

Mr Llewellyn was said to be a great source of anxiety for Mr Rofe, both financially and in his threats. A turning point in Mr Rofe's later life occurred when Mr Llewellyn was restricted from seeing him. This created a much more stable domestic environment in which Mr Rofe's financial assets were managed by an accountant.

Controversial claimant

Also involved in this case is key witness Kathy Jackson, a former national secretary of the Health Services Union who, in 2015, was found to have misappropriated funds from the union and ordered to repay A$1.4 million in compensation. Ms Jackson is a co-executor of Mr Rofe's estate and may receive A$3 million from the estate. Her application is being made by the trustee of her, at present, bankrupt estate.

Mr Rofe was introduced to Ms Jackson through the controversial broadcaster Alan Jones. They met shortly after Ms Jackson's trial; both shared a common sense of isolation and a common need for companionship. As such, Ms Jackson stepped in to care for Mr Rofe and to manage his personal affairs when needed.

More claimants

A number of other parties may receive a significant part of Mr Rofe's estate, including a former partner of 20 years who had moved from Melbourne to Sydney near the end of Mr Rofe's life to care for him and ensure that he was receiving proper medication. This friend was in regular contact with others about Mr Rofe's health, which formed part of the court's decision on whether his December 2014 will would be valid.

Framework for decision-making

In the judgment, His Honour Justice Lindsay noted that:

"104. The task of the Court is to carry out a deceased person's testamentary intentions, and to see that beneficiaries get what is due to them: In the *Goods of William Loveday* [1900] UKLawRpPro 13; [1900] P 154 at 156; *Bates v Messner* (1967) 67 SR (NSW) 187 at 189 and 191-192.

105. The object of the Court, in this judgment, is to identify the instrument, or instruments, which represent the last will of the deceased as a free and capable testator: *Tobin v Ezekiel* [2012] NSWCA 285; (2012) 83 NSWLR 757 at [44]. The focus for attention is upon identification of his final, formally expressed testamentary intentions.

106. The Court is not concerned with the formal validity of any of the deceased's testamentary instruments. They all comply with the formal requirements (now found, principally, in section 6 of the *Succession Act* 2006 NSW) for the due execution of a will or codicil. Nor is the Court concerned with its jurisdiction (under section 8 of the Act) to admit to probate an "informal will". The deceased ostensibly chose, from time to time, to embody his testamentary intentions in a formal instrument. The Court is concerned with the "essential" validity of competing testamentary instruments which, on their face, appear to be formally valid.

108. The question whether the Court is satisfied that a particular instrument (in the form of a will or codicil) is the last will of a free and capable testator is conventionally (and logically) analysed by reference to four main questions; namely:

(a) whether, at the time the will was made (or, possibly, at the time instructions were given for a will prepared by a solicitor), the testator had *testamentary capacity*.

(b) whether the will was made with the testator's *knowledge and approval* of its contents.

(c) whether the testator's execution of the will was obtained by an exercise of *undue influence* on the part of an identified individual or individuals.

(d) Whether the testator's execution of the will was obtained by the *fraud* of an identified individual or individuals."

There was much evidence provided in the form of emails, lawyers' notes (although the deceased preferred to use his own wording for wills based on an old precedent) and various medical practitioners.

His Honour noted, "If therefore, though mental disease may exist, it presents itself in such a degree and form as not to interfere with the capacity to make a rational disposal of property, why, it may be asked, should it be held to take away the right? It cannot be the object of the legislator to aggravate an affliction in itself so great by the depravation of a right the value of which is universally felt and acknowledged. If it be conceded, as we think it must be, that the only legitimate or rational ground for denying testamentary capacity to persons of unsound mind is the inability to take into account and give due effect to the considerations which ought to be present to the mind of a testator in making his will, and to influence his decision as to the disposal of his property, it follows that a degree or form of unsoundness which neither disturbs the exercise of the faculties necessary for such an act, nor is capable of influencing the result, ought not to take away the power of making a will, or place a person so circumstanced in a less advantageous position than others with regard to this right.

"It may be here not unimportant to advert to the law relating to unsoundness of mind arising from another cause — namely, from want of intelligence occasioned by defective organization, or by supervening physical infirmity or the decay of advancing age, as distinguished from mental derangement, such defect of intelligence being equally a cause of incapacity. In these cases, it is admitted on all hands that though the mental power may be reduced below the ordinary standard, yet if there be sufficient intelligence to understand and appreciate the testamentary act in its different bearings, the power to make a will remains. …"

This judgment can be found on AustLII: *Estate Rofe* [2021] NSWSC 257 (12 April 2021).

NB: Subject to allowing all parties to make submissions, Justice Lindsay made an order that the 17 December 2014 will be admitted to probate in solemn form. The proceedings will be brought back before him on 30 July 2021 for further consideration as to the division of estate property, costs, debts, etc.

This case is another in a long list of cases in which the question of testamentary capacity is reviewed and is relevant to those jurisdictions in which estate and wills laws have been based on the original English system, such as New Zealand. ■



To contact Andrew, please email him at andrew@apears.com.au
His full contact details are on page 18.

RECENT NEW AND UPGRADED MEMBERS

FELLOW:

Kirstin Dale Martin	Auckland
Jacqui Lea Wilkinson	Christchurch

ASSOCIATE:

Melissa Anne Cox	Tauranga
Denise Rita Cullen	Auckland
Nicola Marion Furness	Christchurch
Pamela Leonie Ingram	Te Awamutu
Carole Rae James	Rangiora
Mark Paul Jones	Auckland
Anne Marie Jury	Christchurch

AFFILIATE:

Rebecca Marie Colgan	Ashburton
Linda Janet Gilchrist	Napier
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