

# Fineprint

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## Payment for Work on Public Holidays

A timely reminder

**If your existing employment agreement does not provide for penal rates for work on public holidays then it must be amended to comply with the Holidays Act 2003 by 1 April 2005 at the latest.**

As signalled in the Spring 2004 issue of Fineprint, the government has now passed the Holidays Amendment Act 2004 to address what Minister of Labour, Paul Swain, referred to as the “unintended consequences of the Holidays Act 2003”.

These unintended consequences included:

- An anomaly which allowed some employees to claim penal rates twice (under their employment agreement and under the Act) for working on a public holiday;
- Concerns about employees abusing their sick leave entitlements by “pulling a sickie” on a public holiday and still claiming penal rates; and
- Concern that employers were not able to require employees to provide proof of illness or injury (such as a medical certificate) until the employee had been absent from work for three days or more.

The previously repealed the Holidays Act 1981 was notoriously complicated, and the new Act and most recent amendment have attempted to provide a fair and workable regime for paid rest and recreation for all employees. There has already been significant media comment on the changes introduced by the Holidays Act 2003. What follows here is a summary of the tidying up of the “unintended consequences” dealt with in the Holidays Amendment Act 2004 and a timely reminder about dates for compliance.

### “Time and a half” on public holidays

The Amendment Act provides that employees who work on public holidays must be paid at least time and a half for work on a public holiday.

Section 50 of the Act, as amended, now provides that if an

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employee works on any part of a public holiday the employee must be paid the greater of:

- The employee's relevant daily pay less "penal rates" plus half that amount again; or
- The employee's relevant daily pay including all existing "penal rates".

"Penal rates" are defined as any identifiable additional amount that is payable to compensate the employee for working on a particular day of the week or a public holiday.

So, if employees under an existing employment agreement are entitled to penal rates of time and a half or better, they will not be entitled to any additional payment under the Act. However, if an existing employment agreement provides for penal rates which amount to less than time and a half then the employer will have to top up the employee's payment to comply with the Act.

### Transitional period

The Amendment Act has extended the transitional period that was originally provided for in the 2003 legislation.

For employers who already pay penal rates for work on public holidays the Amendment Act extends the period for compliance to

1 April 2007 (previously 1 April 2004). This extension of time is intended to ensure that employers and employees have adequate time to negotiate changes to comply with the Act in cases where penal rates are already paid.

For existing employment agreements that do not have any provision for penal rates

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**"...it is extremely important that employers understand the changes and their own obligations..."**

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on public holidays then these must be amended by 1 April 2005 to provide for at least time and a half.

Remember that all new agreements entered into after 1 April 2004 must provide for time and a half penal rates.

### Sick/bereavement leave

The Holidays Act 2003 caused doubt as to whether or not an employee on sick or bereavement leave on a public holiday that otherwise would have been a working day might have been able to claim payment at penal rates (time and a half).

The Amendment Act now makes it quite

clear that employees who take sick or bereavement leave on a public holiday are only entitled to be paid the relevant daily pay for that day, and not time and a half.

### Proof of entitlement for sick leave

The Act originally provided that an employer could only require an employee to produce a medical certificate if the sick leave was for a period of three or more consecutive calendar days.

The Amendment Act now provides that an employer may require a medical certificate for any period of leave provided the employer:

- Has reasonable grounds to suspect the sick leave being taken by the employee is not genuine;
- Informs the employee as early as possible after forming this suspicion that a medical certificate is required; and
- Agrees to meet the employee's reasonable cost in obtaining a medical certificate.

With the compliance date of 1 April 2005 almost upon us, it is extremely important that employers understand the changes and their own obligations. If you need help in interpreting or implementing the Holidays Amendment Act 2004, please don't hesitate to call us.

# Tax Treatment of Deceased Estates

## Planned changes

**Changes to the taxation treatment of assets passing on the death of their owner were announced by the Minister of Finance in July last year. This article explains which changes are proposed and what readers may be able to do to minimise the impact.**

Currently, there are no clear guidelines on how assets in deceased estates are treated for tax purposes. The Inland Revenue Department's (IRD) practice is said to be inconsistent and sometimes arbitrary. Planned new legislation will introduce a consistent taxation regime for these assets.

### Private assets not liable

Most assets belonging to deceased estates are private assets not used in a taxable activity, and they will continue to pass to the beneficiaries of the estate without any tax consequences.

### Assets in taxable activities

However, assets used by the deceased in taxable activities, such as farming and rental properties, potentially have a number of revenue consequences when their owner dies. These include:

- If the estate sells such assets, whether to a beneficiary of the estate or otherwise, then any excess of the sale price over the depreciated book value will give rise to taxable income as depreciation recoveries, to a maximum of the depreciation actually recovered;

- If the Will bequeaths such assets to a beneficiary, does that transfer trigger taxable depreciation recoveries? This is where the IRD's practice has allegedly been inconsistent, with the department sometimes claiming tax and sometimes not. Under the proposed legislation, the IRD will uniformly always claim taxable depreciation recoveries based on the market value of the asset at death;
- If there is a transfer of farming assets, either as a sale by the estate or as a bequest directly to a beneficiary, is there a taxable supply requirement for which

# Changing Face of the Neighbourhood Pharmacy

The landscape is altered forever

**The retail pharmacy playing field has changed markedly over the past few years, and is continuing to change even faster with the legislation that was passed in September 2004. This feature article looks at these changes and the impact on retail pharmacies, and the general public, New Zealand-wide.**

In New Zealand we have moved from 1,200 community pharmacies in the early 1990s to about 900 now. This major reduction can be broadly attributed to some recent changes. These can be summarised:

- The introduction of Primary Care Organisations (PHOs) which pay doctors and pharmacists;
- Far greater access to pharmaceuticals by the general public – without means testing;
- Pharmacists' drive to reduce the availability of the range of similar-type drugs to the public;
- The reduction in the remuneration paid by the government (by PHOs) to pharmacists;
- Recent changes in pharmacy ownership laws; and
- Pharmacist's cost cutting with drugs.

Given the above scenario, many neighbourhood retail pharmacies now cannot be sustained. Some have simply

closed down; others have merged with other retail outlets in order to provide both a reasonable level of financial return and to spread the financial risk.

## New legislation

Until September last year when the legislation was repealed, the Pharmacy Act 1970 controlled pharmacy ownership. In effect, non-pharmacists could only own up to 25% of one pharmacy; the other 75% had to be owned by a registered pharmacist. Pharmacists themselves could have an interest in one pharmacy only.

All this changed on 18 September 2004. A new Medicines Amendment Act came into force and it drastically altered the pharmacy landscape. Medsafe now licenses pharmacies.

Pharmacists can now own up to five pharmacies at any one time, and they must own these with 51% in their own name. Corporates may now own shares in pharmacies with up to 49% in ownership.

Allowing corporate ownership is making fundamental changes to the manner in which pharmacies are now run; a bottom line profit is now required. However, the provision of health and pharmaceutical services are not ordinary everyday items of commerce. There is a dichotomy for all pharmacists in making strict commercial decisions, and also managing the rules and ethics of delivering a health service.

## Working with the bottom line

No one would deny a health professional's desire to make a reasonable return for the services provided to the public. But how can a corporate health commercial enterprise model run profitably, continue to satisfy ethical requirements and also supply a service to the public?

### Structure

Taking all the recent significant changes into account, the framework of a new pharmacy venture is now crucial to its success. This includes:

GST must be accounted? In this situation, the IRD's practice is also said to be inconsistent, with the department sometimes claiming a GST-taxable supply and sometimes not; and

- It is not clear at this stage what GST treatment may be mandated, but some commentators have pointed out the following potential anomaly. It is conceivable that death will trigger a GST-taxable supply of the asset, requiring the estate to account for GST on that supply, while if the beneficiary is not registered for GST at death then the beneficiary will be unable to claim a GST refund on the value of the asset. It is to be hoped the proposed legislation will deal with this anomaly.

It has been estimated the planned changes will net the government several tens of millions of dollars annually in additional taxes.

## Minimise the impact

What can the owners of assets used in taxable activities do to mitigate the impact of the proposed new taxation regime for deceased estates? There are some measures that can be taken in the meantime, including:

- The new regime will only apply to assets personally owned by the deceased at death. It will not apply to assets owned by the deceased's company or family trust. All assets with potential tax implications should be owned by a company or by a family trust;
- Depending on how the GST aspect of the legislation is worded, it may be desirable to word Wills so that assets such as farms and commercial rental properties are not bequeathed directly to the intended beneficiary, but are instead directed to be offered for sale

to the intended beneficiary coupled with a legacy of the net proceeds to that beneficiary. This arrangement will not avoid depreciation recoveries, but may allow the elimination of any GST anomalies that may arise; and

- When drawing up a new Will or making changes to an existing Will, there should be some consideration given to whether tax on depreciation recoveries should be a charge against the residue of the estate, or a charge against the asset in question if it is to be specifically bequeathed to a named beneficiary.

To conclude, while the new tax regime for deceased estates may impose unwelcome tax bills on the unwary, proper planning beforehand with us should enable significant savings to be made.



- Choose a lawyer, chartered accountant and banker with experience in pharmacies.
- If two or more pharmacies are merging, each business must be valued.
- With changes in pharmacy ownership criteria, it is crucial that due recognition is given to this issue. A detailed and comprehensive shareholders' agreement, including the method by which the shares are to be held – for example, a family trust or company – is needed. If forming a company, the constitution must include pre-emptive rights, dissolution and the transfer of shares. Deciding on the number and skill set of directors is vitally important. Provision of capital, other investors and the factors relating to control must be decided. The pharmacy may become a franchisee of one of the New Zealand pharmacy franchises (eg. Unichem, Amcal or Life). It is important to ensure your professional advisers are experienced in dealing with franchises, and also there is a clear understanding of what is involved in becoming involved in this type of business arrangement. Dispute resolution: Set a mediation and/or arbitration structure in place.
- Financial arrangements: This includes dealing with loan arrangements (new and existing), personal debt and making arrangements around personal relationship property. There are issues associated with leaving money in the

business, interest on current accounts and so on. If the new business has been formed as a result of a merger, it must be decided which of the principals is responsible for overseeing the accounting operation. The roles of the other principals and staff must be clearly defined.

- Property: The location of a pharmacy is vital to its success. High levels of foot traffic, good parking and proximity to a medical centre are desirable. If there is a merger and the operation is to be from only one site, there will be issues with the leases or the ownership of the surplus properties.
- Employment: A high standard of staff management is a key to a successful business. This includes well drafted employment contracts and staff hiring strategies. In a merger situation, there may be some redundancies; these must be dealt with correctly and sensitively.
- Personal issues: Pharmacists, as for any business owners, must organise medical, life and income protection insurance. Retirement requirements (notice period and age) must be decided. As mentioned above, personal relationship property issues must be sorted out too.

#### *Health professionals' issues and ethics*

Day-to-day management needs to be organised with care when bringing two or more independent health professionals together. This is particularly important if these people, up until the merger, have been competitors.

The merging of cultures and practices must be carefully managed. This includes HR issues, marketing, retail purchasing and dispensary management, and checks and balances over pharmacy management.

There is a Code of Ethics by which all pharmacists must comply; this can sometimes be at odds with corporate objectives.

#### **Impact for the public**

These recent changes in the retail pharmacy environment also have a major impact on the general public. The positive aspect of these changes is that merged pharmacies tend to be larger, thus offering customers a wider range of products.

But there are some negatives too:

- With some neighbourhood pharmacies closing down, people will have to travel further and longer to have prescriptions filled. This is likely to be difficult for the elderly and sick;
- The personal service from a neighbourhood pharmacist may now not be available in a larger and perhaps more impersonal environment;
- There is vulnerability in the delivery of health initiatives to rural and suburban New Zealand; and
- There is an inevitable loss of a health profession infrastructure that is dedicated to a community.

Owning and operating a pharmacy is different from running other commercial enterprises. It is a profession with a fused commercial aspect; this is necessary in order to survive. The industry has, in effect, created a subsidy for the health sector. It has some unique issues in that not only are ownership and dispensing activities governed by specialised legislation, but also it is bound by its medical ethics.

The pharmacy landscape in New Zealand has changed forever. With quality advice from professional pharmacists, the public can benefit in what is a significantly altered health environment. The worry is that many pharmacists will not survive the drastic cuts to their income and ensure delivery of the quality service they all seek to provide.

The government must be aware that in their desire to balance their books, communities may suffer the loss of a valuable service by dedicated health professionals.

# Love thy neighbour

## Trouble with trees

**Trees and bushes around our streets are a pleasing reminder of nature amongst what may otherwise be a concrete jungle. But what happens when your neighbours' trees start causing you problems?**

A neighbour's tree can potentially cause all sorts of problems such as roots blocking and damaging drains, or overhanging branches shading your prize garden. The law comes to your aid with these problems. A neighbour is responsible for their own trees. If your neighbour lets a tree grow over into your property then you are entitled to trim that growth back to the boundary line. "Growth" in this context includes roots, leaves and branches. Bear in mind though that the neighbour still owns the clippings (you cannot use this right to steal fruit!). The best idea is to tell your neighbour what you are planning to do and place the clippings in a neat pile over the fence.

give you the right to chop the tree down. If you do want the tree removed and your neighbour refuses, you must apply to the District Court for an order (under s299C of the Property Law Act 1952) to remove the tree. Such an order is also available if the tree is a danger to safety or property, an undue obstruction of a view, or any other unreasonable obstruction to the enjoyment of one's land.

These orders are not given as of right. The court uses a method known as the "balance of convenience" to determine if an order should be made. This is the process of balancing the hardship to the tree owner

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**" If you have a problem with trees, the best approach is to talk to your neighbour before taking any action."**

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It is important to remember that you do not have the right at any time to trespass on your neighbour's land. Also, you must be careful in trimming back roots not to upset the foundation soil in which the tree sits. You must not do anything above trimming back the growth – do not poison roots or branches.

You will have to bear the cost of any trimming. However, if the tree is causing problems on your property such as damage to drains, gutters or your own plants, then the tree's owner is liable to pay for that damage. It is important to take steps to minimise your loss, however. You cannot let damage continue to occur after discovery in order for your neighbour to pay more in damages.

### **Court order**

If part of a neighbouring tree trunk encroaches on your land, this does not

if the tree is removed compared with the hardship to the neighbour if the tree remains. Other factors taken into account include the maintenance of a pleasing environment, the desirability to protect public reserves containing trees, the value of the tree as a public amenity, any historical, cultural or scientific significance, and any likely effect on ground stability or run-off. The neighbour petitioning for the tree to go is generally made to pay for the costs of removal.

If you have a problem with trees, the best approach is to talk to your neighbour before taking any action. It is much better for all involved if an agreement is reached that everyone can live with rather than argue legalities. Often disputes over boundary trees can become an outlet for disgruntled neighbours and nasty, costly legal battles can follow – and all over a tree.

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NZ LAW member firms have agreed to co-operate together to develop a national working relationship. Membership enables firms to access one another's skills and information whilst maintaining client confidentiality.

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# Postscript

## Foundations for Growth: A New Zealand Guide to Business Improvement

A collaboration between NZ Trade & Enterprise, Standards New Zealand and the Ministry of Economic Development, this updated issue of the Guide looks at key business activities such as leadership and planning, improving products and services, managing your information and developing community relationships.

The *Guide* can be downloaded free from [www.nzte.govt.nz/section/13673/11718.aspx](http://www.nzte.govt.nz/section/13673/11718.aspx)

## Charities legislation

As reported in the Winter 2004 issue of *Fineprint*, new legislation regulating charities was expected to be passed by the end of last year.

The government is redrafting the Charities Bill due to 'unintended consequences' in proposed compliance. It is not known when the new law will be passed; we will keep you informed.

## Beware direct selling

How many times over the past 12 months has someone tried to sell you life insurance through the post? You know those letters from banks, finance companies, credit card companies and so on that offer you life insurance as an added extra – a bit like McDonalds offering fries on the side. And how many times has your bank teller tried to sell you life insurance recently?

It sometimes seems the whole world woke up one morning and decided that the direct selling of life insurance was a sure-fire way to make money.

But what about you? How does this direct approach benefit you? With the direct selling approach, the profit driver for the company is to keep the cost of the sale as low as possible. Therefore, the resources required to complete a full analysis of your needs, to fully research your current policies and to give informed advice to you do not feature in the direct sales model. Neither do the resources to continually review your changing needs over your lifetime and to restructure your policies to meet these changing needs.

This potentially means that:

- You are only offered a very limited choice of product;
- You are not given any advice on how the product fits your individual circumstances;
- You are left to understand and accept the consequences of any changes, or cancellations made to your existing policies as a result of purchasing the new one. In other words, you could end up cancelling a policy that actually provides more extensive benefits just so you can afford to purchase the new direct product – all without receiving any expert advice.

Surely this approach spells potential disaster for you. When you realise that the prices of these direct products are very similar to, and sometimes more expensive than, the products offered through independent advisers, it makes the scenario even more disturbing.

Contact us for a referral to a financial planner who meets industry best practice standards for a review of your insurance requirements.

Source: TPG