



A Helping Hand for First Home Buyers

Options for parents to help

It's every Kiwi's dream to own their own quarter-acre share of paradise. Unfortunately for many young people today, not only are the quarter-acre sections fast disappearing into multi-complex developments, but it's also becoming harder than ever before with an ever-rising property market.

Every time you turn on the news, we hear something about the housing unaffordability in Auckland. Those south of the Bombay Hills start to get a bit glassy-eyed when listening to this on repeat. However, since the government's introduction of the 'LVR' rules in October 2016 aimed at improving affordability in these markets, we must pay attention as all of New Zealand is affected.

The LVR explained

The loan-to-value ratio (LVR) is a measure of how much a lender will lend against a mortgaged property compared with the value of that property. Borrowers with LVRs of more than 80% (that's less than 20% deposit) are often stretching their financial resources. As well, they are more vulnerable to an economic or financial shock, such as a recession or an increase in interest rates.

The LVR rules permit lenders to make no more than 10% of their residential mortgage lending to high-LVR borrowers who are owner-occupiers.

The effect of this means that in order to buy your first home, you now must have a 20% deposit. In the Auckland and Queenstown markets where the average property price is over \$1 million, this is a big savings hurdle for the buyers who want to take their first step onto the property ladder.

Be informed

If you are financially able and willing to open your wallets to help, there are options to support your children who are struggling to meet the LVR requirements. On page 2 we outline some of the more common options available.

Most importantly, the decision to offer a helping hand needs to be informed and time needs to be taken for each party to obtain the appropriate legal advice. Depending on the option/s chosen, there may be significant paperwork to be prepared that records the complexities of the ownership and security arrangements.

This is not something that can be completed overnight. You should get the ownership structure agreed before anybody signs on the dotted line.

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Option 1 Gifting some funds

In this option, your child acquires the property in their own name and a gift of equity of the shortfall of the 20% deposit is made from you to that child. Lenders typically want confirmation that the 20% deposit is the purchaser's equity and therefore any financial assistance is generally required to be gifted. The gift would need to be documented by way of a deed of gift.

If a gift is made, there's no ability for parents to later on demand partial or full repayment. This is an important consideration from both a relationship property perspective for your child and also for your own future financial needs.

You must be careful that your generosity towards your child does not get in the way of your own retirement planning.

If you want to protect the gift made for relationship property purposes (if your child is in a relationship), your child should enter into a contracting out agreement to record the gifted amount as their separate property.

Option 2 Loan from parents

If you can persuade the lender to agree to a loan to your child rather than a gift, then the shortfall of the deposit amount can be lent to your child. The terms of the loan would need to be recorded, generally, in a deed of acknowledgement of debt. This would include naming your child as borrower, interest to be payable (if any), dates for repayment, the ability for the loan to be transferred to a second or subsequent property and, most importantly, the ability to register a mortgage as security for the loan.

Option 3 Guarantee from parents

Under this option your child would purchase the property outright and any shortfall in the 20% deposit can be guaranteed by you as parents. The guarantee should be limited to the amount of the shortfall. The lender would also generally require that the guarantee is supported by a mortgage over your own property. If you choose this option, it's important that all parties talk to the lender early on. As well, there would be a requirement for you and your child to each receive independent legal advice.

The benefit of a guarantee is that there is no money required upfront. There is, however, considerably more risk should your child default in their obligation to the lender.

Option 4 Joint purchase of property

If your child can't afford to buy their own property, you could buy a share of that property. The title to the property would

then have you and your child registered as tenants in common in the shares owned. This option provides some security and potential capital gain return for you as parents. With joint ownership, careful discussion still needs to be held with the lender regarding the required securities.

With this option, it's essential that a property sharing agreement is entered into between all of the co-owners. This records the terms of the purchase, who will pay for outgoings, repairs and maintenance, management of the property, what happens if your child fails to perform their obligations and, most importantly, an exit strategy for you as parents. Again, you and your child will need independent legal advice.

Option 5 Family trusts

A family trust could be used in many of the ways explored above, if the terms of the trust deed allow this. Family trust funds could be used to distribute or lend money to a child beneficiary to help them buy a first home. Likewise, the trust could provide a guarantee or be a joint purchaser.

A trust, of which the child is a beneficiary, could also be used as the purchasing entity. Once again, specialised legal advice needs to be sought regarding the trust and structuring of any lending.

If your child is reliant on a government grant for part of their cash contribution, the property must be owned personally for the first six months. No family trust ownership is allowed.

Although trusts have historically been used to provide relationship property protection, this is no longer the case. Trusts can also be open to claims.

Whichever of the five options above you choose, you should also review the terms of your Wills or Memorandum of Wishes for your trust. As well, it's important to ensure that any assistance, gift, loan or any potential liability under a guarantee or co-ownership arrangement is taken into account when dealing with all your children on an equal basis (if this is what you want to happen). This will help protect against claims by disgruntled siblings if similar assistance has not been provided to them.

Important to get advice

If you are financially able and willing to lend a hand to your child to help them into their first home, there are options to assist with meeting the criteria of the LVR rules. Our advice is to ensure you take control of the decision making and get expert legal advice on the options available to you before your child commits you to something that may not be the best option for you. Parents can provide valuable support but it must work for all involved. *



Up in the Air: Using your drone

The use of drones is no longer limited to government agencies, technical gurus or the super wealthy. The market has been flooded with drones that are reasonably priced and are easy to use. These high-tech pieces of equipment are, however, bound by Civil Aviation Rules. In this article, we explore what rules there are around their use.

Drone technology allows a pilot to film and photograph from the sky allowing an aerial view that was once only available through the use of planes, helicopters or satellites. More and more businesses are using drone technology to assist them. Drones have been used in the agricultural sector to aid crop and stock inspection and, in August last year, Domino's Pizza successfully delivered a pizza by drone.

CAA Rules

Following the increase in availability for personal use, the Civil Aviation Authority (CAA) has issued rules regarding the piloting of drones in an attempt to ensure procedures are followed to minimise any risk to the public.

Civil Aviation Rules (Part 101) have provisions that must be adhered to when piloting a drone that is under 25 kgs. Any drone weighing more than 25 kgs requires a certification from the CAA. Most commercial drones, however, weigh less than 25 kg.

Where can you fly a drone?

A pilot may only fly a drone during the day, no higher than 120 metres (400 feet) and must always ensure the drone is within their line of sight without the aid of any visual tools such as a virtual reality headset. The drone pilot must gain the consent of any person over whom the drone flies. Likewise, the pilot must gain the consent of the owner of any private land over which the drone flies.

The New Zealand Transport Agency doesn't allow drones to fly over any of the 11,000 km of state highways due to their potential to distract drivers and cause accidents.

Public property such as parks are often the best place to fly drones. However, each of the country's local authorities has the

discretion to set its own policies and bylaws in relation to the use of drones over council-owned land. Some councils adopt a blanket consent approach to the use of drones over their property. This, however, may be subject to more specific rules issued by the particular council. Pilots should be fully aware of any rules or regulations that they would be subject to flying in a particular area.

It should be noted that the rules for drones also apply to pilots of remotely controlled model planes.

Privacy issues

Drones fitted with recording devices do cause concern on issues surrounding privacy. Any complaints surrounding the intrusion of drones over private property without consent, or a breach of the Civil Aviation Rules, should be addressed to the Privacy Commissioner or the CAA.

Shooting down any drone that's hovering over your property would constitute any number of offences under the Summary Offences Act 1981, the Crimes Act 1961 and the Arms Act 1983.

Penalties

There have been multiple instances of the CAA issuing fines ranging between \$500 and \$1,000 for not complying with Part 101 of the Rules. The CAA has even successfully prosecuted a man in the District Court.¹ He was found guilty of causing unnecessary endangerment and flying in a controlled airspace without permission when the pilot filmed a rural fire from his drone within close proximity to a helicopter.

Pilots are also at risk of prosecution under the Privacy Act 1993 and the Crimes Act 1961 for using their drones to record information in a way that is illegal. Pilots may also face a private prosecution by the victim for an invasion of their privacy.

Drones can be an excellent way to help your business, as well as being a great deal of fun. Before becoming airborne, however, make sure you know the rules and you are mindful of privacy issues.

You can find more information on operating drones at www.airshare.co.nz or www.caa.govt.nz/rpas *

¹ CAA v Reeve [2016] NZDC 16698.



Time to Update Your Ts and Cs

New legislation in force from 1 September 2017

In February the Contract and Commercial Law Act 2017 (CCLA) was enacted which will repeal a number of commercial statutes and consolidate them in the CCLA. It comes into force on 1 September 2017.

If you operate a business that uses standard form contracts, terms of trade or other such documents which refer to the old laws, you should update those to take account of the new legislation.

The CCLA is part of the government's move to modernise legislation, including omitting redundant provisions and making changes in the language and format of legislation to make it more readable and accessible. Your contracts may refer to old legislation, and should be updated as a result of these changes.

What's changed?

Rather than having many statutes all with a small amount of relevant information, these will instead all be collected together in one place. It's a bit like a supermarket putting all the bread in one aisle instead of having it in various places around the shop. The following statutes will be repealed from 1 September 2017:

- » Carriage of Goods Act 1979
- » Contracts (Privity) Act 1982
- » Contractual Mistakes Act 1977
- » Contractual Remedies Act 1979
- » Electronic Transactions Act 2002
- » Frustrated Contracts Act 1944
- » Illegal Contracts Act 1970
- » Mercantile Law Act 1908 (except for part five of that Act, which has been retained)
- » Minors' Contracts Act 1969
- » Sale of Goods Act 1908, and
- » Sale Of Goods (United Nations Convention) Act 1994

These statutes are now 'consolidated' in the new CCLA. This consolidation process has not resulted in any changes to the law, however it does make some changes in wording to clarify the existing law and modernise the language. In addition, as is increasingly common in modern statutes, the Act includes examples to aid readability.

A few examples

Some obscure laws stand out. For example, the new legislation confirms that bacteria within fish fillets is an 'inherent vice.'

Comparable to the facts of a well-known New Zealand case which went to the Privy Council 20+ years ago,² confirms that legal title in unallocated gold coins does not pass to the purchaser until the particular gold coins have been allocated to a particular purchaser.

Other examples illustrate aspects of the law which are important but which can be easily forgotten. Do you know, for example, what your options are if you enter into a contract to buy a certain number of goods but the seller delivers too many or too few?

Let's say you ordered 1,000 widgets, but the seller delivered 800 or 1,200 by mistake. Many people would assume that you would be obliged to accept the delivery at least to the extent of your order. However, under section 164 of the CCLA, in some cases you can reject the entire order. You have other options too, but we digress ...

Timing

The new Act comes into force from 1 September 2017. There are a number of transitional provisions, however, which set out what parts of the Act apply to contracts entered into on or after various dates. In general, the Act will apply to all contracts entered into after 1 September 2017 but it will also apply to some entered into earlier.

How do the changes affect me?

Many businesses use standard form documents such as terms of trade, contracts for either buying or selling goods or services (including employment agreements), guarantees and so on. It's likely that if drafted comprehensively, most, if not all, such documents will refer to at least one of the Acts which will soon be repealed.

If your contracts aren't updated, any clauses referring to repealed legislation are likely to still be valid and interpreted as if the contract was referring to the CCLA.³ However, each case will depend on the particular wording used and the section referred to, so it is better to avoid any doubt and make the changes now.

Now is the time to check all your contracts, terms of trade, and other similar documents and have them updated if required. Please see us if you need assistance, we have experts who can help. ✨

² *Re Goldcorp Exchange Ltd (In Receivership): Kensington v Liggett* [1994] 3 NZLR 385 (PC).

³ CCLA, section 19(1).

Get Your Enduring Powers of Attorney Sorted Out

Having an Enduring Power of Attorney (EPA) is as vital as making sure you have a Will. Whether you're 18 or 80 years old, you never know when you may need to have a responsible person to make decisions on your behalf.

What is an EPA?

An EPA is a set of two legal documents, one for personal care and welfare, and the other for property. They appoint an attorney to act on your behalf to carry out your wishes at times when you may lack the mental capacity to do so yourself or, in the case of property matters, at your discretion. Lack of mental capacity can be caused by, for example, a brain injury, an accident, or a medical condition such as a stroke or Alzheimer's.

It's important that you appoint someone you trust, and who understands you, to be your attorney. It can be difficult to talk about, but you should consult with your family about your EPAs so that everyone knows what to do if you become unwell and can't manage your affairs by yourself.

Your wishes

Having an EPA allows you to appoint an attorney. You can give them some guidance as to how they should act on your behalf. For example, you can:

- » Set conditions or restrictions if you have particular things you want done or specific things you don't want to happen, such as your express wishes around life support
- » Ask your attorney to consult and keep other members of your family informed about things like your health situation or what the family thinks about selling your house. (Even if you don't specifically direct your attorney to consult your wider family, your attorney may still choose to do so.)
- » Ask them to continue to arrange Christmas and birthday gifts for your children and grandchildren, and
- » Appoint a backup person in case your first attorney cannot continue for some reason.

Why do I need an EPA?

Having an EPA ensures you get to choose who you want to act on your behalf if you can't do this yourself.

You can discuss your wishes with your attorney and your family before an EPA is ever needed, and you will have the peace of mind that your wishes will be carried out.

What if I don't have an EPA?

Unfortunately many people don't have EPAs and this can lead to a very difficult situation for your loved ones. Your family will need to apply to the Family Court for a welfare guardian and property manager to be appointed for you. This person will be chosen by the family and the court. The real issue is that you will not have the opportunity to set out any of your own wishes; you will be reliant on what other people think may be best for you.

The Family Court application can be lengthy, expensive and upsetting for your family at a time that may already be stressful as they try to make the best decisions for you without knowing what you might want.

Do it now

EPAs are something all of us need to set up now while we are in full health so that should something unforeseen occur your attorney is ready for any decision making. Please take the time to talk with us to have an EPA prepared for you. ✨

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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, information and ideas whilst maintaining client confidentiality.

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Postscript

Enforceable undertaking accepted by WorkSafe after two students hurt in St Kentigern's *Sweeney Todd* production

WorkSafe New Zealand has accepted an enforceable undertaking from the St Kentigern Trust Board following an incident in which two of their students were hurt during its production of *Sweeney Todd* in April last year.

WorkSafe's investigation found that the board breached the Health and Safety at Work Act 2015 (HSWA) by failing to ensure, so far as was reasonably practicable, that the health and safety of students was not put at risk from work carried out as part of the business or undertaking.

This is the first time WorkSafe has used an enforceable undertaking, a provision under the HSWA, which can be considered as an alternative to prosecution.

WorkSafe General Manager Operations and Specialist Services, Brett Murray, said the decision to accept an enforceable undertaking was appropriate as this was a serious but isolated incident. He added that WorkSafe had carefully considered the impact of this incident and the wishes of the victims and their families.

Under the enforceable undertaking, the St Kentigern Trust Board has:

- » Accepted full responsibility for the incident and the harm which was caused as a result
- » Committed to a restorative justice process with the victims of the offending, including the payment of reparation as an outcome, and
- » Taken steps to improve health and safety within the wider education sector, through the development of health and safety guidance and the building and delivery of training, for the benefit of schools nationwide.

We remind all businesses that you have significant responsibilities under the HSWA. If you would like some guidance on your obligations, please don't hesitate to be in touch with us. ✱

Comparing KiwiSaver providers

With the myriad of KiwiSaver funds available, it can sometimes be confusing as to which fund you should be in for your specific circumstances.

The Commission for Financial Capability has a KiwiSaver Fund finder website that can give you guidance on the KiwiSaver fund that suits your particular situation. Based on how much time you have before you start spending your KiwiSaver money, and your attitude towards risk, the website can direct you into a defensive/conservative fund, a balanced fund, or a growth/aggressive fund.

To find out more, go to www.fundfinder.sorted.org.nz ✱

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