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Welcome to the Spring/Summer issue of *Property Speaking*. We hope you find the articles of interest. If you would like to talk further about any of the items covered in this newsletter, then please don't hesitate to contact us.

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Loss Attributing Qualifying Companies

Can have tax advantages

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The Great Outdoors

Balancing private and public interests

New Zealanders have a passion for our rugged mountain ranges, the beautiful national parks and the splendour of our coastline. We have built up a belief that every individual has an entitlement to roam freely along the coastline and climb the highest peaks to capture the best views of Aotearoa. However this has created some conflict with high country leaseholders; we reflect on a recent court decision that upholds the rights of pastoral leaseholders.... CONTINUE READING

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The next issue of Property Speaking will be published in April 2010.*

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Loss Attributing Qualifying Companies

Can have tax advantages

If you have an investment making losses and you want to pay less income tax, an LAQC may be a useful investment vehicle for you. Despite some recent scrutiny by the Inland Revenue Department, LAQCs are still considered to be a robust and straightforward method to legally reduce your tax liability.

An LAQC is a regular New Zealand registered company that has made an election through the Inland Revenue Department to be a loss attributing qualifying company. To qualify to be an LAQC a company must not have more than five shareholders, the company must not receive more than \$10,000 of income from foreign sources, and all the shares in the company must have the same rights attached to them.

The advantages and downsides of an LAQC

Advantages: The main benefit of an LAQC is that losses made by the company can be allocated to the individual shareholders and offset against that individual's personal income resulting in a decreased liability for income tax. With a company that is not an LAQC losses can only be offset against future profits.

Dividends from non-taxable reserves, eg: capital gains, are tax-free to LAQC shareholders.

Providing the shareholder is not an employee of the company, non-cash dividends distributed to LAQC shareholders are not subject to fringe benefit tax.

Disadvantages: The shareholders must agree to become personally liable for a share of the company's tax liability. This should not be an issue as an LAQC election is only appropriate for a company that is making losses, not profits. Furthermore, the company can exit the LAQC regime at any time within the tax year.

Qualifying Company Election Tax may be payable on entry into the LAQC regime on taxable reserves, this is currently set at 30%. The taxable reserves are all the retained income of the company. A newly formed company will not have any taxable reserves so the best time to elect to join the LAQC regime is at the time of incorporation. Understandably payment of qualifying company election tax is a strong deterrent to entry into the LAQC regime.

Any company losses from previous years which have been carried forward are forfeited on entry into the LAQC regime. Again, this will not be an issue for a newly formed company.

The LAQC regime is slightly more complex, for example, if you change the shareholding of the company you must file another LAQC election within 63 days of the change. There are also some increased compliance costs, for example, the costs of your annual accounts may increase.

Case study example

Mr & Mrs Jones are both employed, each earning annual salaries of \$60,000 on which they each pay income tax of \$13,809.67 pa. Mr & Mrs Jones own a rental property which is making annual rental losses of \$20,000. If Mr & Mrs Jones transfer their rental property to an LAQC in which they each own 50% of the shares the losses can be attributed to Mr & Mrs Jones personally. The resulting tax benefits to Mr & Mrs Jones are that they should have paid income tax only on their salary less the losses which is \$50,000 pa each. The tax refund they would each receive would be about \$3,300. (Please note this calculation is based on some assumptions which may not apply to your particular circumstances.)

Summary

Using an LAQC to attribute losses earned in your company to you personally in order to reduce your income tax liability can be a useful tool. If you think you could benefit from an LAQC talk with us first to ascertain if an LAQC is the best method to use.

PS: Just as we went to press the Inland Revenue Department reported its success in a test case in relation to an individual who set up an LAQC for her private home in which she resided with a lease-back arrangement. This case confirms that LAQCs cannot be used to claim tax losses against the cost of living in your own home.

The Great Outdoors

Balancing private and public interests

New Zealanders have a passion for our rugged mountain ranges, the beautiful national parks and the splendour of our coastline. We have built up a belief that every individual has an entitlement to roam freely along the coastline and climb the highest peaks to capture the best views of Aotearoa. However this has created some conflict with high country leaseholders; we reflect on a recent court decision that upholds the rights of pastoral leaseholders.

The conflict between public and private interests has been brought to the fore in the recent High Court decision of *The New Zealand Fish & Game Council v Attorney General and others*¹. In that decision Justice France upheld the exclusive possession rights of pastoral lessees over public access rights.

The Fish & Game Council sought a declaratory judgment that pastoral leases granted under the Land Act 1948 did not allow exclusive possession or occupation on land contained in such leases. The Council was unsuccessful. The action primarily challenged the construction of the pastoral leases themselves and it is suggested by respected property lawyer and legal commentator, John Greenwood, that the High Court's decision was 'unsurprising'. The construction of pastoral leases clearly established exclusive possessory rights not just pastoral rights as submitted by the Council.

The case upheld that a lease could still claim to give exclusive possessory rights, even if it provided reservations or exceptions enabling public access to our high country stations to satisfy an individual's love of the great outdoors.

Crown Pastoral Land Act

The passing of the Crown Pastoral Land Act 1998 has prevented any new pastoral leases being created. If a lease is terminated it reverts to the Crown. There is currently pressure on the Commissioner of Crown Lands to take notice of public opinion when considering an application from a current pastoral lessee to freehold existing leasehold land.

There are 6 million hectares of pastoral leasehold land; of this 300,000 hectares has transferred to freehold title and 800,000 hectares has reverted to public conservation land.

At about the same time as the Fish & Game case above, the Parliamentary Commissioner for the Environment released a report entitled *Change in the High Country: Environmental Stewardship and Tenure Review*. The report recommended that:

- » Reviews of individual tenure pastoral leases proceed through the Commissioner of Crown Lands, provided that proposals and settlements are demonstrably in the wider public interest
- » The government establishes a High Country Commission for a fixed period to advise on all significant aspects of the public interest in tenure review and in the high country more generally
- » Cabinet directs the officials responsible for preparing the next South Island High Country Objectives report to include both environment gains and environmental losses, and the
- » The Minister for Land Information directs the Commissioner of Crown Lands to encourage and adopt a wider range of land ownership and management models within tenure review proposals (such as sustainable management covenants which include an annual rent charge that is waived if there is no significant breach of conditions or otherwise reduced rentals where a farmer can demonstrate superior stewardship).

One may assume that similar thought processes will be adopted when John Key, Chris Finlayson, Tariana Turia and Pita Sharples set about repealing The Foreshore and Seabed Act. As journalist Matthew Hooton observes, "There will be pressure on them to enshrine [the] myth" that "there is an inherent right to every New Zealander to access every centimetre of [the] foreshore and seabed".

Whether such land ownership issues are embedded in statute or determined by our courts the balancing of public and private interests will remain at the forefront of environmental law.

¹ HC WN CIV 2008-485-2020 (2009) NZHC (12 May 2009)

Property Briefs

Overseas Investment Office update

On 3 September 2009, the Overseas Investment Office (OIO) increased its fees for processing overseas investment applications. The increased fees that now apply to applications for one off acquisitions of 'sensitive land' under the Overseas Investment Act 2005 are:

- | | |
|----------------------------------------------|----------|
| » Applications requiring Ministerial consent | \$22,000 |
| » Applications requiring OIO consent | \$19,100 |

The application fees have been increased to reflect the additional staff hiring costs. This is a response to the Minister of Finance delegating the power to make decisions under the Act in relation to a number of land types that had previously required approval from the Minister of Finance.

With the additional staff OIO processing times have decreased by as much as two weeks. The faster processing times are consistent with the government's Overseas Investment policy.

The government is still working towards announcing a number of amendments to the Act itself that will simplify the criteria for obtaining consent under the Act. The amendments are intended to make overseas investment in New Zealand more attractive while ensuring that New Zealand's most sensitive assets are safeguarded.

Public Works Act 1981 – Public Works Amendment Bill

In June 2009, the Public Works (Offer Back of and Compensation for Acquired Land) Amendment Bill had its first reading in Parliament.

The purpose of the Bill is to ensure that former owners of Maori land or general land previously taken or acquired by the Crown for public work purposes, such as roads, are given the first right to buy the land back from the Crown in the event that the Crown no longer needs the land for public work purposes.

At the moment, the Act provides exceptions to the requirement to give former owners of the land the first right to buy back the land no longer needed by the Crown. The exceptions are:

- » The land may be needed for another public work
- » It is impracticable, unreasonable or unfair to offer the land back to the former owner, and
- » Significant changes in the character of the land have taken place in relation to the public work for which it was to be used.

If successful, the Bill will remove the exceptions set out above. Submissions on the Bill closed in mid-August and the select committee's report is expected in mid-June 2010.

Real Estate Agents Act 2008 and related Regulations

The Real Estate Agents Act 2008 came into effect on 17 November 2009, replacing the 1976 Act. The purpose of the new legislation is to promote and protect the interests of consumers, and also to boost public confidence in the performance of real estate agency work.

An independent Real Estate Agents Authority has been established that is responsible for licensing, complaints, disciplinary action for unsatisfactory conduct, industry standards and providing information for consumers.

All real estate agents, branch managers and salespeople must now be licensed individually; and consumers will have better access to information about those working in the industry. A register of licensees will be publically available and will record whether a licensee has been subject to any disciplinary action within the last three years. Consumers will also benefit from enhanced disclosure obligations, as well as the Professional Conduct and Client Care Rules 2009 which set out the standard of professional conduct and client care required of agents, branch managers and salespeople.