

# *Overlap between Criminal Law and Employment Law*

*Presented by:*

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THE EMPLOYMENT LAW FIRM



## 2 Parts

- Part A – Peter Cullen – focus on employment law
- Part B – Greg King – focus on criminal law

# Part A: Peter Cullen

- Partner at Cullen – The Employment Law Firm
- Barrister and Solicitor
- Specialising in employment law
- Over 30 years of experience
- Columnist for the *Dominion Post*

# PART A: Topics

1. Simultaneous investigations
2. Standards of proof
3. Obligations on employer
4. Obligations on employee
5. Disrepute
6. Minimum standards of criminal procedure
7. Conflict
8. Test of justification
9. Considerations
10. Police investigation
11. Suspension
12. Cases of interest

# 1. Simultaneous investigations

- I Simultaneous employment and criminal investigations can cause many difficulties for an employer because of:
  - Employer's instinctive desire to dismiss employee
  - Employment law obligations and duties
  - Criminal law protections

## 2. Standards of proof

- Reasonable belief vs beyond reasonable doubt.
- Criminal law – beyond reasonable doubt.
- Employment law – strong suspicion reasonably founded on established facts maybe sufficient to justify a dismissal.

### 3. Obligations on employer

- Good faith, including being responsive and communicative.
- Fair and reasonable.
- Trust and confidence.

## 4. Obligations on employee

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- Good faith, including being responsive and communicative.
- Obligation not to bring the employer into disrepute.
- Trust and confidence.



## 5. Disrepute

- I Conduct outside the workplace which brings the workplace into disrepute may warrant dismissal.
- I Because:
  - (a) it impacts on the employer's obligation to other employees; or
  - (b) it undermines the relationship of trust and confidence necessary between employer and employee.

## 6. Minimum standards of criminal procedure

- | Right to Silence - the right not to be compelled to be a witness or to confess guilt.
- | Presumption of innocence - the right to be presumed innocent until proved guilty according to law.
- | Right to a fair trial - the right to a fair and public hearing by an independent and impartial court.
- | (Section 25 Bill of Rights Act 1990).

## 7. Conflict

- Obligation to be responsive and communicative vs. right to silence.
- Employment law - good faith, responsive and communicative (section 4 Employment Relations Act 2000).
- Criminal law – right to silence (section 25 Human Rights Act 1990).

## 8. Test of justification (s 103A)

"The question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test..."

"...whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all these circumstances, at the time the dismissal or action occurred."

## 9. Considerations

- Public service – higher standard of conduct may be expected of public servants.
- Criminal law protections – an employer's investigation could obviously result in the employee incriminating him/herself or prejudicing an upcoming trial.
- Suspension clauses – suspension without pay may suggest guilt rather than innocence.
- Employment agreement and Codes of Conduct.

# 10. Suspension

- Express provision in employment agreement required.
- No provision in employment agreement - if employee is at all relevant times ready and willing to work the employer will be in breach of contract if employee is suspended on full pay employer will not be liable in respect of salary or wages lost.
- But may still incur liability if decision is in breach of procedural fairness or if employer is obliged to provide work.
- Procedural fairness applies to the imposition of a suspension – compliance with rules of natural justice.

# 11. Police investigation

- Where police are involved, the employer is not entitled to substitute the opinion of a police investigator for its own enquiries and assessment.
- The employer's duty to enquire into the circumstances cannot effectively be delegated "to the police".
- When dishonesty is suspected but not proven and a police investigation has led to charges being laid – the safest course is to suspend the employee on pay pending a police prosecution.
- Employees are not entitled "as a right" to have the employer's disciplinary process stayed because of a pending, or possible, criminal proceeding.

## 12. Cases of interest

- A. *Airlines Stewards and Hostesses of NZ IOUW v Air New Zealand Ltd* (1987) 1 NZELC 95.
- B. *Russell v Wanganui City College* [1998] 3 ERNZ 1076.
- C. *Smith v Christchurch Press Company Ltd* [2000] ERNZ 624.
- D. *Wackrow v Fonterra Co-op Group* [2004] 1 ERNZ 350.
- E. *Singh v CEO of Dept of Labour* (2005) 7 NZELC 98.
- F. *Shone v Gisborne Intermediate School BoT* [2007] NZERA Auckland 294.
- G. *A v Chief Executive of CYF* [2010] NZERA Wellington 125.



## ***A. Airline Stewards and Hostesses of New Zealand IUOW v Air New Zealand Limited***

- Air hostess charged with drug offences.
- Arrest reported in newspaper giving her occupation.
- Employer dismissed employee because publicity would have damaged its reputation and her United States visa was under threat of removal.
- Charge dismissed - acquittal.
- Employee sought reinstatement.
- Even though Air New Zealand's name not mentioned as her employer, the public would draw an inference that she was employed by Air New Zealand.
- Only action airline could have taken.
- Court could not think of a matter more damaging to the reputation of an international airline than the employment in an aircraft of a person who has been, if only on one occasion involved with cocaine.
- Dismissal justified even though acquitted.

## *B. Russell v Wanganui City College*

- | Employee one of two deputy principals.
- | School required to make an annual return to the MoE indicating the size of the roll for the year.
- | Employee was charged with altering the school roll, to the detriment of the employer, by including students who had either never attended the school or had attended part-time, but were shown as full-time.
- | Employer commenced a disciplinary inquiry.
- | Employee sought interim relief – reinstatement and stay of disciplinary proceedings.
- | Court said it was not proper for the employer to proceed with the inquiry.
- | Employee had established an arguable case for maintaining the status quo until such time as his rights could be determined substantively.
- | Application granted in part; reinstatement.

# CJ Goddard's Observations

1. Employer is entitled to conduct an investigation into the conduct and performance of an employee that is of concern to it and, indeed, bound to do so in the ordinary course of its business of being an employer.
2. Grave matter for the Court to interfere with this entitlement by some form of prior restraint - to take such a course requires justification on proper grounds.
3. Burden on the employee to show that it is just and convenient that the employer's ordinary rights should be interfered with or modified.
4. Employee cannot be entitled as of right to have an employer's disciplinary process "stayed" because of a pending or possible criminal proceeding.
5. Court's task is one of balancing justice between the parties, taking account of all relevant factors.
6. Each case must be judged on its own merits.
7. Two relevant factors where there are pending or possible criminal proceedings are the right of silence and the undesirability of exposing a person to double jeopardy.
8. Issue is whether there is a real and not merely a theoretical danger of injustice in the criminal proceedings having regard to a range of relevant factors.

# Relevant factors:

- | Possibility of publicity of the civil proceedings that might reach and influence jurors in the criminal case.
- | Proximity of the criminal hearing.
- | Possibility of a miscarriage of justice by the disclosure of a defence enabling the fabrication of evidence, or interference with witnesses.
- | Burden of preparing for effectively two sets of proceedings.
- | Effect on the employer against the background of the nature of the employee's obligations to the employer.
- | Whether proceedings may be allowed to proceed to a certain stage before being stayed.

## *C. Smith v Christchurch Press Company Ltd*

- | Two employees went to one of the employee's house during lunchtime to have lunch together.
- | The male employee offered to massage the female employee's neck, but she refused and told him she was in a happy relationship.
- | Male employee began to massage the female employee's neck and under her top. He commented on her breasts. Female employee resisted and moved towards the door but the male employee removed his shirt and was unbuckling his belt. He kissed her, placed his hand inside her skirt and masturbated.
- | Female employee was scared and decided to acquiesce to prevent further trouble. Eventually she asked him to take her back to work.
- | Female employee made a complaint to the Deputy General Manager.
- | Employer initiated an investigation and male employee was eventually dismissed.
- | Male employer brought proceedings in Employment Court, failed, and appealed to the Court of Appeal.

# Court of Appeal

- | Not so much where the conduct occurred, but rather the impact or potential impact on the employer's business in some way:
  - Conduct incompatible with proper discharge of employees' duties
  - Impact on the employer's obligations to other employees
  - Undermines the necessary trust and confidence
- | Not necessary for there to be a demonstrated actual adverse affect on the employment situation before the employer is entitled to conclude that the conduct warrants dismissal.
- | Employer does not have to wait for a negative impact on the working environment before dismissing an employee when such impact is inevitable.
- | Appeal dismissed.

## *D. Wackrow v Fonterra Co-op Group*

- | Employee was Trading Manager for “Kiwi” dairy group, later amalgamated with Fonterra.
- | Employee was involved in two investigations into allegations milk powder was sold through a company associated with Kiwi and exported without an export licence.
- | Employee appointed Sales Manager for Fonterra.
- | 9 months later, a Serious Fraud Office investigation commenced.
- | 1.5 years later employee charged with indictable offence of conspiring by deceit, false, or other fraudulent means to defraud NZ Dairy Board, NZ Customs, MAF and Kiwi by exporting incorrectly identified dairy produce without proper documentation and authority, and outside the statutory monopoly of NZ Dairy Board.
- | Employee suspended.
- | Employee sought an injunction restraining the employer from requiring the employee to attend a meeting of a disciplinary nature.

# Employment Court

- | Where right to silence in the face of potential or actual criminal proceedings came into conflict with employer's interest in investigating the employee's conduct raised by allegations of criminal behaviour – question of balancing justice between the parties.
- | Case by case basis.
- | Applied *Russell* observations.
- | Some of the proposed questions dealt with matters directly at issue in the criminal proceedings.
- | Powers of the SFO were such that it could require disclosure of the answers to the questions.
- | Conflicted with his right to silence.
- | Relevant that employer had already conducted an investigation into employee prior to employing him.
- | Restrained employer from asking the employee any of questions which bore on or related to the substance of the criminal charge until after the final disposition of the charge.
- | Declined to restrain employer from dismissing or suspending the employee until criminal proceedings determined.
- | Provided the disciplinary proceedings were conducted appropriately and did not stray into areas covered by the criminal charges, the employer was entitled to conduct its investigation and disciplinary procedures.



## *E. Singh v Chief Executive Officer of Department of Labour*

- | Employee was an immigration officer at the Department of Labour.
- | Department made two allegations of corruption by the employee to the police.
- | Police arrested charged employee with four counts of theft of two motor vehicles and two sums of money.
- | Employee suspended.
- | Department commenced an investigation into the employee's conduct.
- | Employee sought an interim injunction restraining the department from continuing the investigation and implementing any disciplinary proceedings into the alleged serious misconduct until the criminal proceedings were concluded.
- | Overall justice of the case → impossible to see how the employee could have the benefit of a fair employment investigation into his behaviour in the light of the conclusions already reached about him by the investigators.
- | Until the criminal trial is over, he is unable fully to answer the questions which go to the heart of the investigation.
- | There is a real and present danger that his failure to answer would be construed negatively against him.
- | It would be unjust to allow the investigation to proceed in the meantime.
- | Interim injunction was ordered.

## ***F. Shone v Gisborne Intermediate School BoT***

- | Employee was school teacher.
- | Primary Teachers' Collective Employment Agreement.
- | Criminal charges involving allegations of assault and sexual violation on teenage girls – related to events outside his official duties as a teacher at the school.
- | Employee suspended on full pay.
- | Sought an injunction to prevent employer from stopping his pay while he awaited trial on criminal charges.
- | Powers and obligations of the employer under the Employment Relations Act, State Sector Act and the Education Act, are to be interpreted consistently with the Bill of Rights Act provided such meanings do not render the provisions of those statutes invalid or ineffective.
- | Employer's decision to suspend employee without pay, in the circumstances of an impending trial on criminal charges → inevitable taint of presumption of guilt rather than innocence.
- | Employee must be presumed innocent until the decision in his trial on criminal charges.
- | If employee is presumed innocent → no basis for suspending his pay while he awaits trial.
- | Employer not wrong to determine the basis of the suspension on an initial basis, or to reserve the option of reviewing the position as time went by but it did err on the basis that it subsequently sought to make changes.

## ***G. A v Chief Executive of Child Youth and Family***

- Employee was Team Leader, Approvals at Child Youth and Family (CYF).
- CYF received a complaint that employee had assaulted his son outside a squash club.
- CYF Code of Conduct *“you should not bring your employer into disrepute through your activities, whether inside or outside CYF. Youth and family activities whether inside or outside the Department are not likely to be acceptable if they.....damage the standard or reputation of CYF because of the position you hold in it.”*

# Authority

- Government policy considerations relevant factor (highest possible standards and utmost integrity).
- Zero tolerance police (to physical abuse of children) relevant factor.
- Employee suspended on full pay from July 2010 until dismissal in February 2011 – 6 months.
- Conduct brought employer into disrepute.
- CYF no longer had the requisite trust and confidence.
- CYF acted as a fair and reasonable employer and employee was not unjustifiably disadvantaged or unjustifiably dismissed from his employment with CYF.

# Has good faith changed things?

- | Good faith requires the parties to be active and constructive which includes being responsive and communicative.
- | This put an obligation on employees to communicate during employment investigations and obviously conflicts with one's right to silence.
- | *Russell* (1998) and *Wackrow* (2004) may have been decided differently.

## PART B: Greg King

- | Barrister
- | Specialising in criminal defence
- | Trial and appellate advocacy
- | Works nationwide
- | Host and an Executive Producer of 'The Court Report'

# PART B: Topics

1. 'Goodwill' extortion or blackmail
2. CV fraud
3. Theft by person in a special relationship
4. Dishonestly taking or using documents
5. Forgery
6. Using forged documents
7. Practical tips
8. Further information





# 1. Blackmail

- | threatens, expressly or by implication
- | to make any accusation against any person (whether living or dead)
- | to disclose something about any person (whether living or dead) or to cause serious damage to property or endanger the safety of any person with intent:
- | to cause the person to whom the threat is made to act in accordance with the will of the person making the threat and to obtain any benefit or to cause loss to any other person
- | → guilty of blackmail, even though that person believes that he or she is entitled to the benefit or to cause the loss, unless the making of the threat is, in the circumstances, a reasonable and proper means for effecting his or her purpose
- | benefit means any benefit, pecuniary advantage, privilege, property, service, or valuable consideration
- | (Section 237 Crimes Act 1961)

# Interpretation

- | Statutory language is not always as straight forward as it should be.
- | Employer maybe unaware that their conduct is in breach of the law.
- | **"Threatens'"** - "make clear an intention to..."
- | **"Disclosure"** - not limited to specific allegations or accusations, and includes revelation of information that may lead others to begin an investigation from which charges may ensue.
- | Threat need not be of disclosure of particular offence. Disclosure to any other person is all that is needed.
- | **"Benefit"** - defined in wide terms, not necessarily in monetary terms (such as withdrawal of assault charge will be a benefit.
- | **"Pecuniary Advantage"** - enhancement of a person's financial position. Extends to the evasion or deferral of payment of debt.
- | However not all of the advantages listed in the statute need to be financial.

# Summary

- I In an employment context, blackmail is where an employer makes it clear that s/he will reveal any information to any person that may cause benefit or loss to an employee with an intention that the employee does what the employer wants.

# Relevance

- 1 Employer may be attempting to act on 'goodwill' in order to avoid alerting authorities and negotiate with employee suspected of fraud.
- 1 Employer may be searching for reason to avoid paying redundancy/compensation/holiday payments upon detection of CV fraud.

# Examples

- I “As you are aware we act for Mr X, if you settle this dispute by paying \$Y we will not be forced to inform the authorities about Z (CV fraud)”.
- I If you waive your right to compensation of \$Y we will not take matter Z any further”.

## 2. CV fraud

- | Making clear an intention to disclose an employee's CV fraud to any other person that would lead to their loss of employment and would appear to be caught by section 237.
- | Recruitment agencies do not carry out effective background enquiries.
- | Conflict of interest - when attempting to secure commission for successful placement of an employee who has a negative (or fabricated) history.

# Example 1 - Stephen Wilce

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- | Chief Scientist for the NZ Defence Force resigned from his position.
- | Momentum Consulting did not disclose his previous dismissal for poor performance or that he had frequently exaggerated his responsibilities and accomplishments.

## Example 2 - Mary-Anne Thompson

- | Head of the New Zealand Immigration Service.
- | Pleaded guilty to CV fraud.
- | Fined \$10,000 and ordered to perform 100 hours community work.
- | Used a false CV to secure senior Government positions by claiming to have a PhD from the London School of Economics.



## Example 3 - Shadrach Darren Mitchell

- | Wellington employment lawyer.
- | Struck-off as a barrister and solicitor by the Court of Appeal after failing to declare an extensive criminal history and three terms of imprisonment.
- | Declared he had no criminal convictions and made a similar claim to his employer.
- | Offending included drug possession, burglary, theft, assault, intentional damage (13 charges), disorderly behaviour, breaching bail, obstructing Police, failure to attend Periodic Detention, four drink-driving convictions, driving whilst disqualified and giving false details to the Police.

# Conclusion

- | Carryout checks on criminal history, employment history and qualifications.
- | Care must be taken to ensure necessary procedures are followed to end the employment.
- | Negotiating on 'goodwill' with the employee could quickly realise the risk of declaring an intention to expose the fraud if the employee doesn't comply with what is proposed by the employer.

### 3. Theft by a person in a special relationship

- | Any person who has received or is in possession of, or has control over, any property on terms or in circumstances that the person knows require the person
- | To account to any other person for the property, or for any proceeds arising from the property; or
- | To deal with the property, or any proceeds arising from the property, in accordance with the requirements of any other person.
- | → commits theft who intentionally fails to account to the other person as so required or intentionally deals with the property, or any proceeds of the property, otherwise than in accordance with those requirements.
- | Whether or not the person was required to deliver over the identical property received or in the person's possession or control.
- | Question of law whether the circumstances required any person to account or to act in accordance with any requirements.
- | (Section 220 Crimes Act 1961)

# Summary

- I Requires receiving of property on terms or in circumstances which, to the accused's knowledge, affect what the accused may do with the property or its proceeds or require the accused to act in accordance with the requirements of another person; and that the accused intentionally departed from the relevant obligation.

# Interpretation

- | **“Received”** - employee who does not have legal access to funds received by his company is unlikely to be regarded as having ‘received’ funds paid to the company, even if in practice the employee can gain access to those funds by deceiving superiors who control legal access.
- | **“Terms or Circumstances”** – critical to establish.
- | **“Deal with”** - not restricted to physical handling of the proceeds but any acts that may affect the legal rights or obligations.
- | **“To any other person”** – other than the accused.

# No requirement for dishonestly

- I There is no requirement for dishonesty or without claim of right, the mere fact of intentionally failing to perform one's obligations is sufficient for liability.

## 4. Dishonestly taking or using a document

- | With intent to obtain any property, service, pecuniary advantage, or valuable consideration
- | dishonestly and without claim of right, takes or obtains any document; or
- | dishonestly and without claim of right, uses or attempts to use any document
- | → Liable to imprisonment for a term not exceeding 7 years
- | (Section 228 Crimes Act 1961)

# Interpretation

- | **"Takes"** - not defined for the purposes of this offence, but can be obtained from s 219(3) or s 217.
- | **"Document"** – very wide definition - means a document in any form and includes like paper, photograph, disc, tape, wire, sound track etc.
- | **"Any property, service, pecuniary advantage or valuable consideration"** - Service is limited to activity having an element of financial or economic value.
- | Pecuniary advantage means anything that enhances the accused's financial position.
- | **"Uses"** - wide meaning - covers unsuccessful attempts to gain advantage.
- | **Claim of right** - must relate to belief in entitlement to take or use the relevant document, rather than belief in entitlement to the proceeds or advantage.



## 5. Forgery

- I (1) Making a false document with the intention of using it to obtain any property, privilege, service, pecuniary advantage, benefit, or valuable consideration → liable to imprisonment for a term not exceeding 10 years
- I (2) Making a false document, knowing it to be false, with the intent that it in any way be used or acted upon, whether in New Zealand or elsewhere, as genuine → liable to imprisonment for a term not exceeding 3 years.
- I Forgery is complete:
  - as soon as the document is made with the intent described in (1) or with the knowledge and intent described in (2)
  - even though the false document may be incomplete, or may not purport to be such a document as would be binding or sufficient in law, if it is so made and is such as to indicate that it was intended to be acted upon as genuine.
- I (Section 256 Crimes Act 1961)

## 6. Using forged documents

- | Knowing a document to be forged,—
- | uses the document to obtain any property, privilege, service, pecuniary advantage, benefit, or valuable consideration; or
- | uses, deals with, or acts upon the document as if it were genuine; or
- | causes any other person to use, deal with, or act upon it as if it were genuine.
- | → liable to imprisonment for a term not exceeding 10 years
- | Document made or altered outside New Zealand in a manner that would have amounted to forgery if the making or alteration had been done in New Zealand is to be regarded as a forged document.
- | (Section 257 Crimes Act 1961)

# Comments

- | Forgery - use is not required, but intention that the forged document will be used is required.
- | The offence occurs at the time the accused makes the false document.
- | Using forged documents - must prove in addition to 'use' there was obtaining or retaining of property/benefit.

# Think it won't happen to you?

- | 9,612 people from 131 countries spent more than NZ\$10 million buying 10,815 fake degrees and certificates from a US "degree mill" in Washington.
- | 10 people from New Zealand spent more than \$20,400 buying qualifications from the company
- | 2 of the New Zealand purchasers are a Director and Shareholder respectively of an employment recruitment company in Auckland.
- | Used the names of 77 legitimate academic faculties (including one NZ institution) and used the names of 121 unrecognised or non-existent institutions.
- | 1/3 of the "degrees" were issued in fields such as Healthcare, Engineering, and Public Safety.

# School Principal

- | Maria Gladys Josephine Haronga Lewis.
- | Hawkes Bay School Principal.
- | 30+ years teaching experience.
- | Guilty of fabricating a job reference when she applied for the position of Principal at Riverslea School, a position she had previously been acting in for a short time.
- | Immediately dismissed and the matter referred to the Police.
- | Pleaded guilty to using a document to obtain a pecuniary advantage - was convicted and discharged.
- | Could be deregistered when she appears before the Teachers Council.

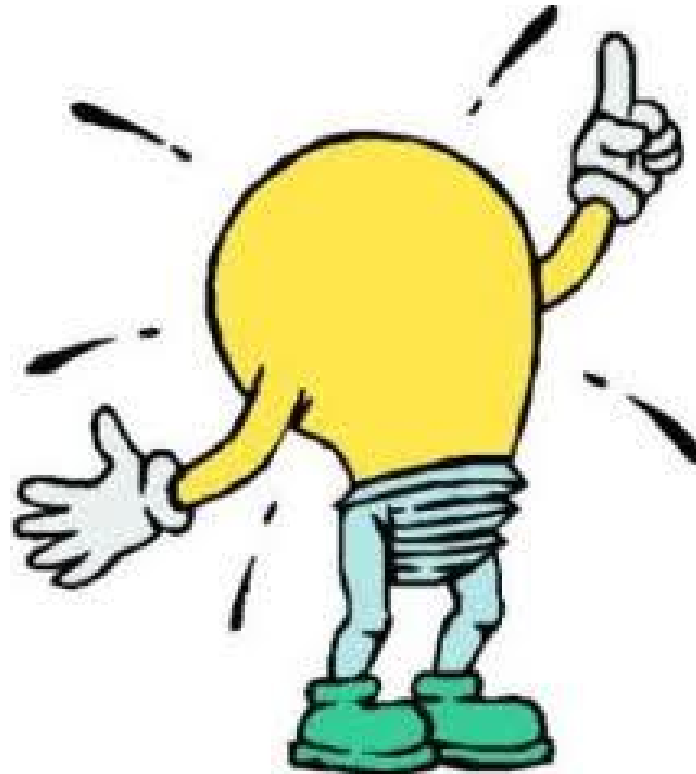
# Practical tips!

- | Don't cross the line between acceptable negotiation procedures and blackmail.
- | Be wary when negotiating with an employee suspected of wrong-doing, be it CV fraud, forgery or use of a fake degree.
- | CV fraud occurs throughout NZ.
- | Not correct to assume that someone's CV is unimpeachable just because they already have experience or are in a professional role.
- | Forgery and use of forged documents occurs in NZ.
- | Be aware and make sure you have appropriate protocols in place to deal with suspected cases of fraud.

# Further information

- [www.verify.co.nz/news-cvfraudnz.php#cvfraudnz20100326](http://www.verify.co.nz/news-cvfraudnz.php#cvfraudnz20100326)
- [www.oag.govt.nz/2009/immigration-volume-2/](http://www.oag.govt.nz/2009/immigration-volume-2/)  
[www.stuff.co.nz/blogs/opinion/448938](http://www.stuff.co.nz/blogs/opinion/448938)
- [www.nzherald.co.nz/business/news/article.cfm?c\\_id=3&objectid=10624665](http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=10624665)
- [www.verify.co.nz/refs/20090611\\_the\\_independent.pdf](http://www.verify.co.nz/refs/20090611_the_independent.pdf)
- [www.lawcom.govt.nz/sites/default/files/publications/2000/09/Publication\\_77\\_164\\_PP42.pdf](http://www.lawcom.govt.nz/sites/default/files/publications/2000/09/Publication_77_164_PP42.pdf)

# Questions and Discussion





**Disclaimer:** The information in this seminar is not intended to take the place of or be a substitute for specific legal advice.



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