

Property Law Conference 2002

1. WILLS AND ESTATE ADMINISTRATION – PUBLIC TRUST DOES THE FULL MONTY!	1
A. Wills advice	1
Will instructions	1
Relationship vs separate property	1
Advice re relationship property	2
Prior relationships	3
Likely inheritances	3
Life interest/rights of personal residence	5
Life interests – early vs late vesting of remainder interests	6
Testamentary capacity	6
Contrary intention/gift in favour of a separated spouse	7
Domicile/overseas assets	7
The electronic questionnaire (the computer nerd section)	8
B. The trustee	11
Issues facing the executor – the Public Trust experience	11
<i>Introduction</i>	11
<i>The mandatory wording of section 71</i>	11
<i>Another barrier to distribution</i>	12
<i>Reporting the estate</i>	12
<i>Early distributions</i>	12
<i>Advising on the choice of Option A/B</i>	13
<i>Choosing Option B</i>	13
<i>Choosing Option A</i>	14
<i>Friends/companions/de facto partners</i>	14
<i>Disclosure to the survivor's lawyer</i>	14
<i>Claims against the surviving spouse/partner</i>	15
<i>Role of the trustee where Option A is chosen</i>	15
C. Advising the survivors	17
Conflicts of interest	17
Summary of statutory provisions	17
PRA	17
Intestacy	18
Information gathering	18
Debts back	19
Rights to information	19
Discovery	20
What are trust documents?	20
Can a settlor limit the rights of beneficiaries to information by express provisions in the empowering documents?	21

Summary of disclosure obligations	22
Trust-busting	23
Economic disparity	23
Maori land	24
Notices of claim	25
Multiple partners	25
Survivorship	25
Distribution	26
Section 71 of the PRA	27
Section 74 of the PRA	27
Section 74(2)(b)	28
Family protection claim	29
Conclusion	30
APPENDIX 1A - Information required to make a will and for asset planning	31
APPENDIX 1B - Medical practitioner's certification for will	39
APPENDIX 1C - Electronic will questionnaire	40
APPENDIX 1D - Barriers to distribution – inquiries checklist	41
APPENDIX 1E - Plan of administration	42
APPENDIX 1F - Consent to early distribution and indemnity - partner	47
APPENDIX 1G - Consent to early distribution and indemnity - children	49
2. BUSINESS TRANSACTIONS – A CHECKLIST	51
1. Who should the purchaser be?	51
(a) <i>Matters to consider</i>	51
(b) <i>Tax rates</i>	52
(c) <i>Miscellaneous issues</i>	57
2. A corporate vendor or purchaser	61
(a) <i>The Companies Act 1993</i>	61
(b) <i>Formation of the contract</i>	62
3. How is the purchase price made up?	63
(a) <i>Allocation of the purchase price</i>	63
(b) <i>Fixed assets</i>	64
(c) <i>Trading stock</i>	64
(d) <i>Goodwill</i>	65
4. Restraints of trade	66
5. Warranties in the ADLS form	70
6. Matters not covered in the ADLS form	73
(a) <i>Employment</i>	73
(b) <i>Debtors</i>	74
(c) <i>Insurance</i>	75
(d) <i>Intellectual and industrial property</i>	75
7. Drafting considerations	75

<i>Plant fittings and fixtures</i>	76
<i>Lease</i>	76
<i>Stock</i>	77
<i>Intellectual property</i>	77
<i>Goodwill</i>	77
<i>Financial</i>	78
<i>Corporate vendor</i>	78
<i>Time of supply – going concern</i>	78
8. Due diligence checklists	79
<i>Plant, fixtures and fittings</i>	79
<i>Lease</i>	79
<i>Stock</i>	80
<i>Companies</i>	81
3. PROPERTY-SHARING IN DOMESTIC RELATIONSHIPS – A VITAL UPDATE	83
Introduction	83
Ambit of this paper	83
Separate property: the main concern for property lawyers	84
Trusts	86
Section 21 agreements	87
Conflicts	90
APPENDIX - Sections 8 – 10 Property (Relationships) Act 1976	93
4. A VIBRANT AND PROFITABLE LAW PRACTICE	97
A. Strategic value pricing of legal services	97
Strategic value pricing of legal services	97
Introduction	97
The role of fees in practice development	97
Professional practice is not a business	98
B. Fitting into the marketplace – myths about pricing	100
Myth One - price is the issue	100
Myth Two - the market sets the price	100
Myth Three – you must match your competitor’s price	101
Myth Four – you have to lower your prices to attract business	101
Professional fees and the marketing mix	102
What your clients really value	102
C. Managing clients’ expectations	104
Understanding your clients	105
<i>Needs, expectations and aspirations</i>	106
<i>Summary</i>	108
<i>Cost estimate dos and don’ts</i>	109
D. Promoting your firm, your service and its value – how to sell your firm	112
Be visible	113

Be proactive	114
<i>Micro-environment</i>	114
<i>Macro-environment</i>	115
Communication	116
In summary	117
E. Working smarter...not harder	118
Being organised in yourself	118
Assess where you are now	119
Set some routines	119
<i>Weekly</i>	119
<i>Daily</i>	120
Being organised in your firm	121
To conclude	122
APPENDIX 4A - Engagement – purchase template	123
APPENDIX 4B - "To Do" list	126
APPENDIX 4C - Reporting letter – sale/purchase	127
APPENDIX 4D - Checklist	130
5. RURAL LAND TRANSACTIONS	131
Index	131
6. TAX ISSUES – A POT POURRI FOR PROPERTY LAWYERS	213
A. Income tax	214
B. Gst	233
7. MULTI-UNIT DEVELOPMENTS	239
A. Agreements for the sale and purchase of units in multi-unit developments - the purchaser's perspective	239
Introduction	239
Illegality of agreements where there is no resource consent	239
Section 225 Resource Management Act 1991	240
<i>Section 225(2)(a)</i>	241
<i>Section 225(2)(b)</i>	241
<i>Does it matter whether s 225 imposes contingent conditions?</i>	243
<i>Contracting out of s 225</i>	243
<i>Section 225(1)</i>	244
<i>Section 225(2)(a)</i>	244
<i>Section 225(2)(b)</i>	244
<i>Summary</i>	245
<i>Illegal Contracts</i>	245
Advising the purchaser on the contract	245
<i>Certainty</i>	245
<i>Resource Consents</i>	246
Access lots	247
Building covenants	248

Powers of attorney	249
B. Unit titles/body corporates – questions our clients keep asking	251
APPENDIX 7A - Unit Plan	260
APPENDIX 7B - Unit Titles Act 1972 – 3/33 Recovery of money expended for repairs and other work	261
APPENDIX 7C - Survey Regulations 1998 – excerpt from Schedule 2	262
APPENDIX 7D - Unit Plan	263
APPENDIX 7E - Unit Plan	264
APPENDIX 7F - Unit Plan	265
APPENDIX 7G - Letter from Land Information New Zealand	266
8. TRUSTS – A SELECTION OF PRACTICAL ISSUES	267
A. Trustee duties – to beneficiaries, to disclose; power of appointment	267
Trustees’ duties generally	267
Trustees duties when exercising powers or discretions	268
<i>Fraud on the power</i>	268
<i>Reasonableness?</i>	269
<i>Duties to discretionary beneficiaries when exercising powers of appointment</i>	271
<i>What are trustees duties to potential beneficiaries in a discretionary trust?</i>	272
<i>Law Commission’s review</i>	272
Trustee’s duty to disclose	273
<i>The rule that trustees are not obliged to disclose reasons for their decisions</i>	273
<i>Other limits on trustees’ duty to disclose</i>	274
<i>Trustee’s duty to disclose to discretionary beneficiaries</i>	274
<i>Can the trust deed modify the duty to provide information to beneficiaries?</i>	275
<i>Is there a duty to inform beneficiaries that they are beneficiaries and of their rights as beneficiaries?</i>	275
<i>Law Commission’s review</i>	275
B. Formation of Trusts	276
The need for a nominal settlor	276
Appointment of trustees	277
<i>Number of trustees</i>	277
<i>Independent trustees</i>	277
<i>Considerations relating to the possible re-introduction of estate duty</i>	277
<i>Considerations relating to exercise of discretionary powers</i>	277
<i>Trust deed design - prohibited periods</i>	278
Sham considerations	278
Considerations of impartiality	278
Technical expertise	278
Proposed reform : trustees’ powers of delegation	278
Proposed reform : advisory trustees and protectors	279
Corporate trustees/trading trusts	280
<i>The trustees’ right of indemnity</i>	280

<i>Creditor's right of subrogation</i>	281
<i>Suggested reforms relating to trading trusts</i>	281
<i>Other types of trustee protection</i>	282
"Trust busting" and the Property (Relationships) Act 1976 (the PRA)	283
<i>Section 44</i>	283
<i>Section 44A</i>	283
<i>Section 44B</i>	283
<i>Section 44C</i>	283
C. Contents of trust deeds – how wide should your variation clause be?	286
Indemnity clauses	286
<i>Law Commission's review</i>	287
APPENDIX: AGREEMENT FOR SALE AND PURCHASE	288