

# New Zealand Law Society

## SUBMISSION ON STATUTES AMENDMENT BILL (NO 2)

- 1 The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Statutes Amendment Bill (No 2) (the Bill). The submission focuses on Part 20, which amends the Wills Act 2007, and Part 18 of the Bill, which amends the Trade Marks Act 2002.

### **PART 20 – WILLS ACT 2007**

#### **Clause 94 – Wills made before 1 November 2007**

- 2 The Law Society supports the proposal in clause 94 to repeal the transitional provisions in relation to the validation power in sections 40(2)(k), (l) and (n). Under the old Wills Act 1837 the Courts insisted on strict compliance with the formalities for execution of wills. One minor technical defect, such as two witnesses not being present at the same time, meant the will was invalid. The overall aim of the Wills Act 2007 is to give better effect to testamentary intentions and prevent those intentions from being defeated on mere technicalities. The validation power in s14 is pivotal to that aim. Given that purpose, the Law Commission's Draft Act, on which the Wills Act 2007 is based, did not include transitional provisions, allowing the changes in the Act to apply to wills of persons dying after the Act came into force, regardless of the date that the will was made. This made good sense because wills have no legal effect until the will-maker dies. Beneficiaries nominated in the will have no rights whatsoever prior to the will-maker's death. Applying the validation power to wills made before the Act came into force did not change or affect acquired rights of beneficiaries. They had none.
- 3 The Law Society proposes that the validation power apply to persons who die after 1 November 2007, when the principal Act came into force, rather than the date that the Amendment Act comes into force. This would avoid confusion and complexity arising from different dates. The Law Society is of the view that the transitional provision in clause 95 provides sufficient protection to beneficiaries who may have acquired rights under a prior validly executed will or under the intestacy rules. Clause 95 precludes determinations as to validity made before commencement of the Act from being affected and it protects grants of probate and administration. The only beneficiaries who potentially lose out are those where no determination as to validity has been sought and where no probate or administration has been granted. Those beneficiaries have some rights, but until administration of the estate has been completed they do not have beneficial ownership of the assets in the estate. The estate is held for purposes of administration, to pay creditors and the like. Such rights as beneficiaries have

are therefore very limited. The Law Society is of the view that such rights as these beneficiaries may lose are minor, and such benefits as they would get if the prior will or intestacy rules were not replaced by a validated non-compliant will are undeserved.

- 4 There are two safeguards in s 14. The first is that the later document will only be validated as the deceased's will if the Court is satisfied that it appears to be a will and expresses the testator's testamentary intentions. To make this determination the Court requires cogent evidence, because of the nature of the power. It requires all parties affected by the determination to be given an opportunity to be heard. In most of the cases so far, the affected parties have all consented to the document being validated, including those who would have benefited if the document had not been validated. There are cases in the pipeline where one or more parties are opposing the exercise of the power. In such cases, the Court is likely to be more cautious. The second safeguard is that the Court has discretion to validate a non-compliant will. It is not under a duty to do so. It could find that the later document expressed the will-maker's testamentary intentions, but decline to validate the will on the grounds that it would unjustly defeat existing rights of beneficiaries.
- 5 If the Law Society's recommendation is followed, any draft wills, wills instructions, or informal wills of the victims of the Canterbury earthquake could then be validated under s14.

### ***Recommendation***

- 6 That sections 40(2)(k), (l) and (n) be repealed.

### **Further comments**

- 7 The Law Society notes that there is no proposal to amend the transitional provision in relation to the position of the signature on wills executed before 1 November 2007. That provision takes the law back to before the Wills Amendment Act 1852 was adopted. In *Taylor v Taylor & Anor*<sup>1</sup> the Court commented on this problem and the possibility of unintended consequences. Section 40(2)(i) should be repealed, to avoid invalidating wills on the technicality of the position of the testator's signature. For persons who die after the proposed amendments come into force the validation power can be used to validate the will, but that is a costly process which will also inevitably delay administration of the estate.

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<sup>1</sup> HC HAM CIV 2009-419-725 24 September 2009

- 8 Prior to the adoption of the Wills Act 2007, the Court was able to rely on s1 of the Wills Amendment Act 1852 to give the position requirement a greatly expanded meaning. The Court would uphold the will regardless of where the signature was placed, provided the Court was satisfied that the testator intended to give effect to the will as a whole by signing it. The transitional provision as currently worded makes such a liberal approach very difficult. The repeal of s40(2)(i) retrospectively will cause no disadvantage to anyone other than the person who is able to benefit from a minor technical defect in the position of the testator's signature.
- 9 The Law Commission proposed that the entire Act be retrospective, obviously because it could see no harm in doing so, as beneficiaries nominated in a will had no rights before the will-maker's death. The transitional provisions are complex and inconsistent. Some substantive changes are retrospective, such as the amendment made to the effect of marriage or a civil union on a will, while others are not, such as the position of the signature or the capacity of minors to make wills with appropriate authorisation. As the amendments in the Act were intended to give better effect to testamentary wishes and do not affect acquired rights of beneficiaries, the Law Society would support a repeal of s40 in its entirety. That would give effect to the aims of the Act, and avoid unnecessary litigation and confusion about which provisions apply retrospectively and which do not.

### ***Recommendation***

10. That s40 be repealed.

### **PART 18 – TRADE MARKS ACT 2002**

11. Part 18 of the Bill proposes an amendment to section 44(1) of the Trade Marks Act 2002 (the Act). As that section now stands the Commissioner of Trade Marks must treat a trade mark application as abandoned if an applicant has not responded to a notification from the Commissioner that the application does not comply with the requirements of the Act. As a result of the proposed change the Commissioner must treat such an application as abandoned if he or she does not receive a response from the applicant. In each case the response is to be filed within a time specified in the notification.
12. The reason for making the amendment is, according to the explanatory note to the Bill on page 12:
- “... to create more certainty about when the Commissioner will treat as abandoned an application to register a trade mark.”

13. The explanatory note does not state what is uncertain about the existing wording. On the face of it, the words “if an applicant has not responded” are clear. The explanatory note does not refer to any decision of an Assistant Commissioner or Court suggesting any uncertainty. If Parliament is being asked to amend an Act it should be given a better explanation as to why there is uncertainty.
14. It is instructive to look at the Patents Bill as reported to Parliament by the Commerce Committee. Clause 63 of that bill reads:

“Application treated as abandoned if applicant fails to act within set deadline  
A patent application must be treated as having been abandoned **if the applicant has failed to comply** with section 62.” *(emphasis added)*
15. The “section 62” that is referred to in that clause is the equivalent to section 41 of the Act. Under section 62 the Commissioner of Patents issues a report to an applicant setting out why the application being examined does not meet the requirements of the Patents Act and sets a deadline for making a substantive response. In other words, to comply with section 62 the applicant has to have responded by the date set.
16. If Parliament is to make the amendment proposed here, the explanatory note should explain why the wording “if an applicant has not responded” in the Act is unclear, but the wording “if an applicant has failed to comply” in the Patents Bill is clear.
17. In addition, the Trade Mark Regulations 2003 set a series of events in relation to various proceedings, such as revocation, opposition, or declaration of invalidity proceedings. In each case the opposition or the proceedings are treated as abandoned if the applicant or opponent (as the case may be) does not file evidence or notify the Commissioner of a certain step within the applicable deadline (see for example, regulations 83, 91 and 103(3)). All of these are based on the person in issue not having filed something or notified the Commissioner, not on the Commissioner having received the notification.
18. If it is fine for this to be the case with proceedings – that is, all based on whether someone has responded by filing something – there does not seem a lot of point in having receipt as the triggering point for termination of the applications themselves. It could be confusing to have an application terminated if the Commissioner does not receive something by a due date, but a proceeding terminated if a party does not file something by a due date.

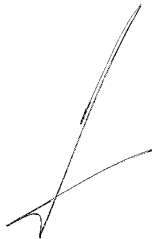
19. Although the differences in wording may seem on the face of them to be pedantic, the consequences for an applicant are potentially the loss of rights in a trade mark application. If an applicant had prepared and posted a response and it had been delayed or lost in the post, or if an applicant had sent a response electronically and for some reason the electronic version has been lost or delayed in transmission, under the current law the applicant would have an opportunity to prove that it had responded in time. But if the Part 18 change proceeds, an applicant who had responded but whose response had not been received would be faced with the task of proving that the Commissioner had received it, when through no fault of the applicant, the Commissioner had not.

***Recommendation***

20. For the reasons outlined above, the Law Society submits that there is no sound reason for making the change and a good reason to not make the change. Part 18 of the Bill should be deleted.

***Conclusion***

21. The Law Society does not wish to appear in support of this submission. However, we are willing to meet with the Committee or officials advising it if the Committee considers that would be of assistance.



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