

WILLIAMS & CO

incorporating BRASSINGTON & CO

BARRISTERS & SOLICITORS

77 PETERBOROUGH STREET; P O BOX 4599 CHRISTCHURCH 8140 NEW ZEALAND; TEL (03)379-7444; FAX (03)366-0562

NEWSLETTER

Issue 2

May 2016 – July 2016

INSIDE THIS

EDITION

Flat mate or de facto partner	1
Buildings and warrants of fitness	2
The ins and outs of a restraint of trade clause	3
Citizen's arrest: An overview	3
Snippets	4
Property purchase – Meth testing	4
Reform – Health and Safety at Work Act 2015	4

Flat mate or de facto partner?

The Property (Relationships) Act 1976 ("The Act") provides an equal sharing presumption to relationship property for qualifying relationships. Qualifying relationships are marriages, civil unions or de facto relationships that are a minimum of three years in duration.



Section 2D of the Act defines a de facto relationship as a relationship between two persons who are both aged over 18 years, who "live together as a couple" (either heterosexual or same sex relationships) and are not married or in a civil union to one another.

If the parties are under the age of 18 years, the de facto relationship starts from the time the younger partner turns 18 years old.

In determining whether two persons are "living together as a couple", all circumstances of the de facto relationship are to be taken into account including the matters recorded at section 2(D)(2), which are:

- The duration of the relationship.
- The nature and extent of the common residence of the relationship.
- Whether or not a sexual relationship exists.
- The degree of financial dependence or interdependence and any arrangements for financial support, between the parties.
- The ownership, use, and acquisition of property.
- The degree of mutual commitment to a shared life.
- The care and support of children (either from that relationship or from previous relationships).
- The performance of household duties.

All information in this newsletter is to the best of the authors' knowledge true and accurate. No liability is assumed by the authors, or publishers, for any losses suffered by any person relying directly or indirectly upon this newsletter. It is recommended that clients should consult a senior representative of the firm before acting upon this information.

- The reputation and public aspects of the relationship.

None of the above factors are essential to determine whether the parties are living together as a couple and the Court is entitled to attach such weight to any matter as is appropriate in the circumstances of that relationship.

Marriages and Civil Unions are legal processes, which require the parties to opt in from an agreed commencement date. However, there is no formal process that records the commencement date of de facto relationships. This usually leads to the parties unknowingly entering into a legally defined relationship well before they chose to declare their relationship (agree that their relationship is serious enough to commit to one another or tell friends and or family they are in a relationship) leading to the Act applying retrospectively, rather than from an agreed date.

This can be financially crippling to parties that may have amassed assets and property prior to the commencement of the de facto relationship as the

partner may be entitled to half the value of those asset and property.

The ending of a de facto relationship is a question of fact and occurs either when one partner regards the relationship as over and has communicated that intent to the other partner or one partner dies.

Parties are also able to enter into contemporaneous relationships (marriage and de facto at the same time).

A remedy available to parties is that they are able to contract out of the terms of the Act by way of s21A of the Act. This type of agreement is called a Contracting Out Agreement or otherwise known as “pre-nup”.

If you find yourself in the above situation, gaining legal advice from a lawyer that deals with relationship property law could save you a lot of money in the future.

Buildings and warrants of fitness

Many commercial and multi-residential buildings require an annual building warrant of fitness (BWOFF) to prove that the building’s safety systems have been maintained and inspected. The BWOFF is obtained by the building owner and provided to the Council, and must be displayed in the building in a visible place at all times.

Building Warrant of Fitness

The name “Building Warrant of Fitness” can be misleading, because there is no obligation to inspect the building as a whole, and the document makes no statement as to the fitness of the building itself. Rather, it refers only to procedures listed in the compliance schedule that relate to specified systems in the building.



Compliance Schedule

The Building Act 2004 (“the Act”) provides that a building other than a single household unit requires a compliance schedule if it has one or more specified systems. This means most homes will be exempt, but any building that has more than one household (such as an apartment or townhouse) or any building that includes other non-residential uses must have a compliance schedule and annual BWOFF, if it contains a specified system. The compliance schedule will state and describe each of the specified systems, state the performance standards, and describe the inspection,

maintenance and reporting procedures to be followed in respect of each of those specified systems.

Specified System

A specified system is a system or feature contained in or attached to the building which contributes to the proper functioning of the building, and has been declared by the Governor General to be a specified system for the purposes of the Act. Specified systems include (amongst other things): fire suppression systems (sprinklers); automatic or manual emergency warning systems for fire or other dangers (alarms); electromagnetic automatic doors or windows; emergency lights; riser mains for use by fire services; lifts, escalators and travellers; air conditioning systems; smoke control systems; cable cars; and in some circumstances that typically relate to fire escape, they include smoke separations; fire separations; final exits and communication signs.

Independently Qualified Person

To complete the BWOFF an owner will need to obtain certificates of compliance from an independently qualified person who can certify that the inspection, maintenance, and reporting procedures stated in the compliance schedule have been fully complied with during the previous 12 months. Typically this will include certification that any remedial action that may have been needed has been completed. Larger buildings may require several certificates for different specified systems. In addition to these annual inspections, some owners may still be required to carry out minor

inspections that are specified to occur daily, weekly or monthly.

Penalties

For newer buildings, compliance schedules are typically issued as part of the building consent process, however all buildings must still comply. If a building requires a compliance schedule and does not have one, the owner could be liable for a fine up

to \$20,000, and further fines of \$2,000 per day while that offence continues. If a building owner fails to obtain a required BWOFF they could be liable for a fine of up to \$20,000.

Finally, it is the building owner's continuing obligation to ensure that each of the specified systems is performing and will continue to perform.

The ins and outs of a restraint of trade clause

Restraint of trade

The world of business is increasingly competitive. Business owners as employers have become more focused on securing and safeguarding information that sustains their business, such as trade secrets and profit margins. Those employers may consider the inclusion of a restraint of trade clause in their employment agreements as a safeguard against employees leaving their employment and using this sensitive information to the former employer's detriment.

What is a restraint of trade clause?

A restraint of trade clause is designed to protect a business's sensitive information to which its employees may have access. The most common conditions in restraint of trade clauses tend to prohibit or limit an employee from working in a certain field of expertise, and/or in a designated geographical location, and/or for a specified period of time.

Consideration

An employer considering the inclusion of a restraint of trade clause within an individual employment agreement is advised to consider offering the employee consideration such as an increase in wages or salary, given the imposition the employee may face if a restraint of trade clause is sustained.

Practicalities to consider

A restraint of trade clause does not automatically protect an employer. The Courts take a careful approach when making determinations about restraint of trade clauses, and often deem restraint of trade clauses unenforceable from the outset.

Where a dispute arises, the Courts examine all aspects of the restraint of trade clause, paying particular attention to whether the conditions are reasonable in order to protect the employer's

interests, relative consideration or compensation, as well as the reasonableness and practicality of the conditions imposed upon the employee.

The Courts may consider the following factors when considering the enforceability of a restraint of trade clause:

- Whether the former employer has a proprietary interest that is capable of being protected; (for example, did the employee have access to confidential information or having built up a strong customer/client/supplier relationships);
- Whether it is reasonable to restrict the employee's employment options/activities;
- Whether period of the restraint is reasonable;
- Whether the geographical limits of the restraint are reasonable.



Before considering inclusion of a restraint of trade clause it is vital to understand what is the interest or the purpose of the restraint of trade clause; what reasonable parameters may be imposed in order to achieve that purpose; and in return whether fair consideration or compensation been offered to the employee.

Restraint of trade clauses can be very beneficial for employers, especially if a business is reliant on securing and safeguarding its interests critical to the successful running of the business. It is essential to understand all aspects of a restraint of trade clause before relying on one to protect your business, as finding the right balance in a restraint of trade clause is vital to ensure that it is enforceable. We are available to help draft and discuss such terms.

Citizen's arrest: An overview?

Ordinary citizens have a limited ability to make an arrest; however, their powers are not as wide as you may think.

This article will interest security contractors, business owners and anyone else who might find themselves in the position where they might need to react to a crime.

Technically you only have the actual right to make an arrest if you have been asked to assist someone else who is performing a legal arrest (such as a Police Constable or Fisheries Officer) (s 316 Crimes Act 1961). As an ordinary citizen, you are however given limited protection in some circumstances if you do make an arrest (s 35-38

Crimes Act 1961). This means that although you do not usually have a right to arrest, you might be protected from criminal responsibility if you do so.

- Section 35 gives protection where you arrest a person who you actually find engaged in a criminal offence at night. If you find them by day you are protected only if the offence carries a maximum punishment of three or more years imprisonment. For these purposes 'Night' means between 9 p.m. and 6 a.m.
- Section 36 does not require you to actually find an offender in the act. Protection is given if you arrest a person that you honestly and reasonably believe to be committing a criminal offence at night.
- Section 37 overlaps, but is somewhat limited. Protection is given where you arrest a person that you honestly and reasonably believe already has committed a criminal offence (by day or by night), so long as the offence actually occurred, even if it was not the person who you arrested that committed the offence.
- Finally, section 38 provides protection during flight, if you arrest somebody that you honestly and reasonably believe committed a criminal offence and is escaping from and being pursued by someone else whom you reasonably believe has an authority to arrest the offender.



In all cases you must have an intention to make prompt contact with the Police in order to set in motion the processes of prosecution.

It is important to note that protection is only granted for an arrest relating to a criminal offence, meaning an offence under the Crimes Act 1961 (such as murder, burglary, assault or home invasion). Protection is *not* granted for other offences, such as those which may be covered by the Summary Offences Act 1981 (such as disorderly behaviour, graffiti and tagging or indecent exposure) or traffic offences, which are covered by the Land Transport Act 1998 (such as dangerous or careless driving).

To actually arrest someone, you need only make it clear of your intention to apprehend. Physical contact or restraint is not a legal requirement to make an arrest, but may become necessary in some circumstances. If so, the Crimes Act provides you with some protection against the use of reasonable force if, and only if, your arrest is justified.

If you get it wrong there is the potential to face criminal charges for assault or kidnapping or civil action for false imprisonment.

Snippets

Property Purchase – Meth testing

Methamphetamine contamination has been described as being so prevalent that it could be worse than the leaky home crisis that affected New Zealand in the late 1990s and early 2000s.

Ministry of Health guidelines do not identify any safe level of methamphetamine contamination, and guidelines around the world vary. In New Zealand, decontamination is recommended if 0.5 micrograms (0.0005g) are detected in one 10cm by 10cm area. If detected, your local Council has powers under the Health Act 1956 to order cleansing of the property and could place a permanent requisition on your property file.



The chemicals used to cook Methamphetamine and the residue from its use can be highly toxic and can linger for a long time after being absorbed into housing materials. Health risks include burns, respiratory and neurological damage. Decontamination can require complete redecoration to the affected area, including replacement of carpets, curtains, and wall linings.

Reform – Health & Safety at Work Act 2015

The Health and Safety at Work Act 2015 ("the Act") came into force on 4 April 2016. This Act has significant implications for workers and business owners alike, reforming New Zealand's health and safety system.

The Act introduces the concept of a "person conducting a business or undertaking" ("PCBU") and sets out a wide range of PCBU obligations – it is important to note that the PCBU concept also applies to entities running businesses, such as companies. The Act also imposes a positive duty on officers of a PCBU (for example a director of a company or partner in a partnership) to exercise due diligence in ensuring compliance with health and safety regulations, failing which, officers can be personally liable.

For workers, there is an increased emphasis on worker participation and consultation with PCBUs, as well as an obligation on workers to take reasonable care for their own health and safety and not to affect the health and safety of others.

If you have any questions about the newsletter items, please contact me, I am here to help.