

# NEWSLETTER

Issue 2  
May 2016 – July 2016

## Inside this edition

### Contents

#### Page 1:

- In the Office
- Staff
- Facebook

#### Page 2:

- Flatmate or de facto partner?
- The Ins and Outs of a Restraint of Trade Clause

#### Page 3:

- Snippets

#### Page 4:

- Buying goods subject to security – the “ordinary course of business” exemption
- The Taxation Act 2016



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.

If you have any questions about the newsletter items, please contact the office on (07) 827 6140.

# vosper

L A W

## In the Office

Vosper Law Staff gave **Junk Free June** a go this year in support of The Cancer Society of New Zealand. The staff all chose their 'junk' to give up and it was very interesting to see how we all got on. We had a 'cheats' envelope in the staff room which has definitely had some use!



Our cheat proceeds have also been donated. Thank you so much to those who supported us. We raised \$800 for the Cancer Society.

## Staff

Many of you will know Liane who is my longest standing staff member. She had a fabulous wedding in March and I am sure you will all agree from the photo she looked fabulous.

Our newest staff member, Rhianon McQuoid, who is Vernon's PA has settled in well and we are enjoying having her on the team. She is a very experienced secretary and has nearly completed her Legal Executive Diploma.

Lynne Revell is now working remotely on Mondays and Tuesdays so will not be in the office for appointments on those days. However, she is still managing the trust account and estate administration and can be contacted by phone every day.

## Facebook

Keep an eye on our Facebook page for interesting snippets about legal and other matters of interest.

[www.facebook.com/vosperlaw](http://www.facebook.com/vosperlaw)



## Flatmate 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.
- 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.

## 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.

**Snippets**

**Reform – Health and 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.

**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.

We recommend that any purchaser of property should strongly consider having a meth test completed before it goes unconditional. We are sadly seeing some houses affected so it is important to check.

## Buying goods subject to security – the “ordinary course of business” exemption

When buying or leasing valuable goods it is important to check that they are not subject to a security interest. Otherwise, the secured party is able to use its security interest to call in the goods you purchased or leased, to repay the debt they are owed.

However, the Personal Property Securities Act 1999 (“the Act”) provides some protection. One situation where a purchaser is protected is if you are dealing with a seller or lessor in the ordinary course of their business. For the purposes of this article, seller means both a seller and a lessor.

Section 53 of the Act provides that when you buy or lease goods that have been sold or leased in the ordinary course of business of the seller, you take those goods free of any security interest.

This exception does not apply if you know that the transaction will be in breach of an existing security agreement, or where the security interest was granted by a person other than the current seller.

By way of example, this exemption can apply when purchasing a vehicle from a dealer. The vehicles for sale will often be subject to a security interest in favour of a third party (perhaps the vehicle’s former owner or the dealer’s bank), and the dealer clearly sells vehicles in the ordinary course of their business. If you were to buy a vehicle from the dealer you would therefore usually receive the vehicle free of the third party’s security interest, even if that interest had not been discharged as part of the sale. In contrast to this, if you buy the vehicle from a private seller via Trademe without first ensuring that all security interests have been discharged, the security holder could recover that vehicle from you to repay any debt still owed by the private seller – even if you paid for the vehicle in full.

Whether a sale or lease is ‘in the ordinary course of the seller’s business’ depends on the facts of each situation. Some common factors the Courts consider include whether the transaction took place at the seller’s business premises, and the quantity and price of the goods sold or leased. This means for example that if you are buying from a car dealer, but the vehicle you buy is bought at a remote place unrelated to the dealership, and for less than market value, the transaction might not be considered as part of the seller’s ordinary course of business and this exemption may not apply.

We recommend you search the Personal Property Securities Register to determine whether there are any registered security interests that relate to the property you are buying. If there is an interest

registered, you should carefully consider whether you are protected by the “ordinary course of business” exemption, and if not, you should take steps to ensure that the security interest is discharged before you part with your cash.

## The Taxation Act 2016

The Taxation (Residential Land Withholding Tax, GST on Online Services, and Student Loans) Act 2016 takes effect from 1 July 2016. The effect of this act is that if an offshore person sells a house in New Zealand within two years of purchasing it the vendor’s solicitor must deduct Residential Land Withholding Tax to be paid to the IRD. An offshore person for the purpose of this Act is:

- a) A New Zealand citizen who is outside New Zealand and they have not been in New Zealand within the last 3 years; or
- b) A person holding a New Zealand Resident Class Visa who is outside of New Zealand and who has not been in New Zealand within the last 12 months; or
- c) A person who is not a New Zealand citizen and does not hold a New Zealand Resident Class Visa.

If you are the Trustee of a Trust you must be aware that a Trust may also be an offshore person for the purpose of this Act if:

- More than 25% of the Trustees of the Trust are offshore persons; or
- More than 25% of the people who hold the power to appoint/remove Trustees or amend the Trust Deed are offshore persons; or
- All natural person beneficiaries and discretionary beneficiaries are offshore persons; or
- A beneficiary (including discretionary beneficiary) that is an offshore RLWT person has received a distribution in one of the last 4 years before the relevant disposal greater than \$5000; or
- The trust has disposed of residential land within the last 4 years before the relevant disposal and the trust has a beneficiary (including discretionary beneficiary) that is an offshore RLWT person).

A company can also be an offshore person if more than 25% of the directors or shareholders of the company are offshore persons.