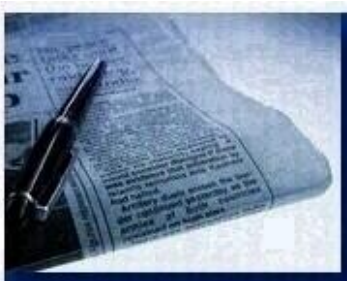

S J SCANNELL & CO

NEWSLETTER - SEPTEMBER / NOVEMBER 2020

INSIDE THIS EDITION

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Overview of COVID-19 Public Health Response Act

The rapid spread of the COVID-19 pandemic was an unprecedented global disaster. Entire nations were forced to go into lockdown, requiring its residents to stay at home for an undefined amount of time. The New Zealand Government responded promptly to the pandemic with the first confirmed case in New Zealand being 28 February 2020 and the implementation of the Level 4 Alert Lockdown by 25 March 2020.

The enforced lockdown raised legal questions around human rights including freedom of movement, right to refuse to undergo medical treatment and the right to be free from unreasonable search and seizure. The Government's response to this was the urgent passing of the COVID-19 Public Health Response Act 2020 ("the Act"), with a purpose to create a bespoke legal framework for managing the public health risks posed by COVID-19. The backdrop to the Act is an unprecedented public health emergency that required a number of exceptional powers that would be unlikely to be justified in ordinary circumstances. Therefore, the Act is a temporary measure and is repealed on the earlier date of either two years after the date of commencement, or on the expiry of a period of 90 days if no resolution is passed to continue the Act by the House of Representatives. This demonstrates the extraordinary circumstances of COVID-19 and justification of the exception powers that are extended in the Act.

The Act is broadly based on the powers set out in the Health Act 1956 and allows the Minister of Health, and the Director-General of Health in some circumstances, to make enforceable orders relating to people, business and activities. It enables the Government to take a precautionary approach in an effort to prevent and limit the risks of potential

outbreaks of COVID-19 in New Zealand. The Act further recognises the highly contagious nature of COVID-19 and allows for continued applicability of necessary public health measures.

Section 11 is arguably the most important section of the Act as it details the orders which can be made by the Minister or Director-General of Health. Some of these orders include: requiring persons to stay in a specified place or refrain from going to any specified place; refrain persons from travelling to or from any area; be isolated or quarantined in any specified place and to report for medical examination or testing. Further, s20 allows for the enforcement of any s11 order by granting an enforcement officer the power to enter, without a warrant, any land, building, craft, vehicle, place or thing if they have reasonable grounds to believe that a person is failing to comply with any aspect of a s11 order. Any person who commits a serious offence relating to non-compliance of s11 orders is liable on conviction for a fine of up to $4,000 or imprisonment of up to six months. Minor offences of non-compliance can cost an individual a fine of $300 or a business can be ordered to close for up to 24 hours.

As the COVID-19 situation continues to develop and we attempt to adapt to the unprecedented times ahead, questions remain unanswered and the COVID-19 Public Response Act is likely to be in the firing line with additions and amendments required.

Difference between Contracting Out & Relationship Property Agreements

The primary and distinctive difference between contracting out and relationship property agreements relates to the timing and status of a relationship between two parties. The definition and status of a relationship as a marriage, de-facto relationship or civil union, under the Property (Relationships) Act 1976 (“the Act”) is important in assessing a contracting out agreement (“COA”) or relationship property agreement’s (“RPA”) influence.

Essentially, a COA commonly known as a ”pre-nup”, is often (but not always) entered into at the start of a relationship, prior to the relationship being defined under the Act as marriage, de-facto relationship or civil union and before the couple is subject to greater legal requirements around relationship property division. Couples enter into the COA to define each party’s separate property, defining what would happen to that property if the relationship were to end.

On the other hand, an RPA, commonly known as a settlement agreement or separation agreement, is entered into once a relationship has ended, whereby the parties wish to distribute the relationship property assets.

Contracting Out Agreement

A COA is used to contract out of the general relationship property division principles under the Act; with those principles providing for an equal 50/50 split of the relationship property between the parties. It provides couples with the autonomy to decide how to split their assets if the relationship ends. Even if in the eyes of the law such a split may not be deemed as ‘equal’, the couples can subsequently waive those rights under a COA.

A COA is often seen in the case where one party enters the relationship holding significantly greater assets/wealth earned as their separate property or by an inheritance, which they wish to protect and keep separate in the event of separation. The COA is essentially a type of ‘insurance policy’ for either party to protect their assets or inheritance, despite every intention for the relationship to progress.

COA’s can be binding and important documents to review with your solicitor, hence Part 6 of the Act requires that your signature be witnessed by a solicitor who has certified that they have explained the contents and implications of the COA to you before signing. The court can declare a COA void if they view the COA lacks the fundamental principles of independent legal advice, disclosure or there is evidence of some kind of undue influence from one party to the other.

Relationship Property Agreement

In the case of a relationship separation, the Act establishes principles which govern the split of those assets, as mentioned above. When couples separate from each other they may wish to have some autonomy and choice in how the relationship property is split. An RPA (also known as a separation agreement) allows the parties to do this. Similar to a COA, the couple is able to contract out of the Act’s general principles of equal division and negotiate the distribution of assets.

Commonly, parties wish to enter into an RPA to define specific separate property, i.e. businesses, trusts, houses and/or shares/investments. Sometimes the parties wish to customise distribution as the process of equally dividing an asset/liability can be labour-some and disruptive or may cause unnecessary burdens for one party, for example, trying to sell an established business to split the equity.

Similar to the COA, the requirements on both parties to receive full disclosure of all assets and legal advice as to the implications of the RPA is vital. It is recommended that you contact a legal professional to discuss either agreement in detail.

Paper roads explained

An unformed legal road, more commonly known as a paper road, is a parcel of land that is legally recognised as a road but has never been formed into a road. Many paper roads cannot be identified by physically looking at the land, as it could just be a paddock, but paper roads will be evident on survey plans. Although paper roads have never been formed, the Court has found that paper roads have the same legal status as a formed road.

As paper roads hold the same status as formed roads, this means that the public has the right to drive their vehicles, walk on foot, etc. without having to ask for permission from a landowner as the paper road is owned by the local council. Council owns the paper road, but has no responsibility to form, maintain or repair paper roads.

It is very important to remember that even though these roads are not formed at the moment, they can be developed in the future. With that said, it is very important to consider the use of the land to which a paper road flows through.

Paper roads were initially created in the late 19th century to make sure that in the future, blocks of land, especially land alongside waterways, would remain accessible for public use. However, many paper roads were created over landscape which make it impossible to drive or even walk where the paper road is. This is because people did not have the surveying equipment and knowledge of the terrain like we do today.

If you own property where a paper road runs through it, you must remember that the public has a right to use that paper road. As it is difficult to find the exact location of many paper roads, landowners can fence or mark where the paper road is, in an attempt to minimalise the impact to the surrounding land. Landowners are permitted to install an unlocked gate and anyone using the road must not damage the gate and must leave the gate as they have found it; as not following these simple rules could be considered an offense under the Trespass Act 1980. Livestock must not prevent the use of a paper road and Landowners must not obstruct a paper road with vegetation, trees, scrubs, buildings etc.

Landowners can apply to Council for exemptions, which could ban access to the paper road. It is also possible to ask Council to close the paper road, this means that the road will no longer have the status of a road, and will not be public land. The closure and exemptions are at Council's sole discretion.

The Walking Access Act 2008 ("Act") at section 3 describes the purpose of the Act, which summarized, is to provide the public with free, practical walking access to the outdoors so that the public can enjoy the outdoors and to establish the New Zealand Walking Access Commission ("Commission"). The Commission has created the Walking Access Mapping System, which informs the public of the location of public places including paper roads.

Further information and Access Maps can be found at http://maps.walkingaccess.govt.nz/ourmaps.

Residential Tenancies Amendment Bill and terminating a tenancy

With over 34 percent of people in New Zealand renting the property they live in, the passing of the Residential Tenancies Amendment Bill ("the Bill") has the potential to significantly impact the tenant and landlord relationship; particularly with regard to ending a tenancy.

One of the reforms to the Residential Tenancies Act 1986 ("RTA") relates to the tenancy agreement and how it may be ended. There are two different types of tenancy agreements a tenant can enter into, fixed term or periodic. A fixed term tenancy agreement is where the landlord and tenant agree on a period of time with an end date, where the tenant will occupy the landlord's property. A periodic tenancy agreement is on-going, until either the landlord or tenants decide to end the agreement.

Prior to the reforms, to end a periodic tenancy tenants had to give landlords 21 days' notice, as to when they will be ending the tenancy. Landlords had to give 90 days' notice to the tenants, without having to give any reason or explain why they were ending the tenancy.

Under the Bill, and effective from 11 February 2021, a landlord can no longer end a tenancy without giving a valid reason. The specified reasons by which a periodic tenancy can be ended by the landlord are given in the RTA and include:

- The landlord issued a tenant three notices for separate anti-social acts in a 90-day period.
- The landlord gave notice that a tenant was at least five working days late with their rent payment on three separate occasions within a 90-day period.
- The landlord intends to carry out extensive renovations at the property and it would be impractical for the tenant to live there during that process.

The Bill also changes what happens when a fixed-

term tenancy agreement comes to an end. Under the new rules, a fixed-term agreement will convert into a periodic tenancy unless:

- A landlord gives notice using the reasons listed in the RTA for periodic tenancies
- A tenant gives notice for any reason at least 28 days before the end of the tenancy
- The parties agree otherwise e.g. to renew the fixed term or to end the tenancy

Some of the drivers behind the changes, according to Associate Housing Minister Kris Faafoi, are "More Kiwis than ever are renting now, including families with young children, as well as older people, and it's important that there are appropriate protections in place for them. Renters should be able to put down roots in their community and not face the stress of continually having to find a new home."

Evicting a tenant on a periodic contract

Given that the requirements for ending a periodic tenancy under the Bill are met and upheld, it is an unlawful act if the tenant stays in the tenancy without the permission of the landlord. If a tenant stays at the property without the permission of the landlord, the landlord can apply to the Tenancy Tribunal ("Tribunal") for rectification.

If the tenant refuses to leave, a landlord should try self-mediation first and try to come to an agreement with the tenant. If an agreement cannot be made the landlord should then follow the steps of applying to the Tribunal. These steps are:

- register to apply,
- log in to the Tenancy Tribunal Application online tool and fill in the application form, and
- pay the application fee ($20.44) online and submit the application.

The Tribunal hearing will usually be within 20 working days of the application. If you are successful the Tribunal may order the other party to reimburse the application fee along with the other remunerations.

Consumer Guarantees Act 1993 – key points

The purpose of the Consumer Guarantees Act 1993 (the "Act"), is to protect the interests of consumers while balancing the rights of businesses and consumers. The Act provides consumers with certain guarantees when buying goods and services from a supplier together with the right to claim some form of compensation from suppliers and manufacturers if the goods and services fail to comply with guarantees within the Act. The purpose of the Act (as stated at s1A of the Act) was introduced as a result of the consumer law reform in 2013. This article outlines the key areas of the Act with specific reference to suppliers and consumers.

The Act outlines certain guarantees that suppliers must provide to consumers when exchanging domestic goods (second-hand or new) and services. These guarantees include that (but are not limited to):

- Where goods are to be delivered to a consumer by the supplier, the supplier guarantees that the goods will be received by the consumer within a reasonable time or at the time agreed between the parties.
- The goods are of an acceptable quality.
    - Acceptable quality" provides that the goods:
        - Are safe and durable.
        - Are fit for all purposes for which they are commonly used.
        - Match their advertised description.
        - Are reasonably priced.
        - Are free from minor defects.
        - Are acceptable in appearance and finish.
- With regards to services, suppliers guarantee that the services provided are:
    - Completed within a reasonable time.
    - Reasonably priced (if the price is not already agreed).
    - Carried out with reasonable skill and care.
    - Fit for the particular purpose.

The Act allows consumers to seek repairs, refunds or replacements where the above guarantees are not followed by a supplier. However, the supplier or business has the right to decide which of the above remedies it will provide a consumer, which will largely depend on the circumstances of the claim.

It is important to note that the Act does not apply to goods normally bought for commercial business use; i.e. to trade, re-supply or use in the ordinary course of business. The Act covers goods and services generally used for domestic and personal purposes. Where businesses are purchasing domestic goods for use at the business premises, such as desks or telephones for example, they can agree that the Act does not apply. However, to contract out of the Act for this purpose, the businesses must record this in writing. Businesses that sell consumer goods and services cannot contract out of the Act unless the above exemption applies.

The Act also does not apply to private transactions, so where you are involved in a private deal, it is important that thorough due diligence investigations are conducted before engaging the services or purchasing goods from a private seller.

The following government website https://www.consumerprotection.govt.nz/general-help/consumer-laws/consumer-guarantees-act/

is a great tool to gain further information about your rights and obligations under the Act as either a consumer, supplier or manufacturer. If you do own a business, it may be worthwhile to review the terms and conditions of trade with your lawyer. If you have any other concerns or queries about how the Act applies to you, we suggest getting in touch with your lawyer for further guidance.

Snippets

Importance of a Pre-Settlement Inspection

The excited purchasers have found the property and the deed is done – the agreement is signed. They know they are signing up for the property as it is on that date. Not everything is able to be seen or known at that date. However, they know what they have seen, and what has been represented to them.

Their initial questions can be clarified through conditions in the agreement. The Agreement says what chattels are to remain and those chattels must be (where relevant) in working order, fair wear and tear excepted. A settlement date looms. The last opportunity presents itself to check that what you signed up for is consistent with what you shall pay for. It is called the pre-settlement inspection.

You cannot revisit matters that you had not covered prior to signing the agreement, but you can check everything is the same and in order. Either the vendor or their agent arrives with a key and stays with the purchasers during the inspection. It happens in the last few days before settlement date. Any queries must be with the vendor's solicitors prior to the actual settlement date.

Aspects that have changed, or not been rectified as agreed, or are now not in working order, may be queried. Settlement is not able to be held up, but compensation or the retention of funds on the day to cover rectification is possible.

The pre-settlement inspection is very important, so continue to keep your lawyer in the picture at that time of the transaction.

Can an activated EPA vote for the Donor?

You hold an activated Enduring Power of Attorney ("EPA") for property on behalf of a much loved one (known under the document as the Donor). Can you (the Attorney) vote on election day for and on behalf of the Donor?

Attorneys do have an obligation as part of their decision making process to think about what the Donor would have wanted to be done. Sometimes though you would not know their thoughts or where their thinking would be. However, if you wish to you can vote on their behalf (except in certain circumstances if the Donor is in a mental health facility under a Court order).

There is an enrolment form that can be obtained from the Electoral Commission. If the Donor is enrolled to vote, and you are enrolled to vote, and the Donor has an activated EPA in your favour (or the Court has appointed you as the Donor's welfare guardian) you can complete that enrolment form. Then you must complete another form enabling the Electoral Commission to contact you as the accepted representative and attorney of the Donor.

It is best to give yourself plenty of time to complete the process with the Commission. A good idea would be to discuss the issues with your lawyer as you progress here.