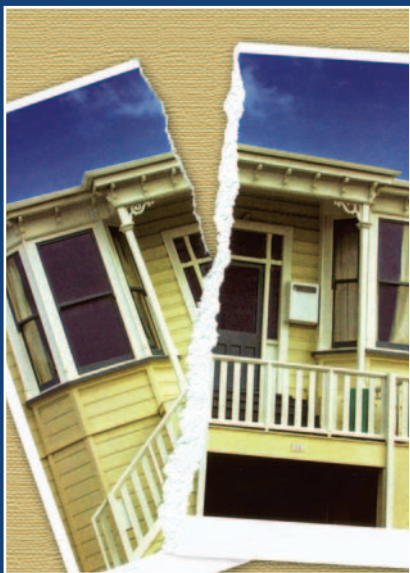

DIVIDING UP RELATIONSHIP PROPERTY

The Property (Relationships) Act

Do the right thing –
see your lawyer first



NEW ZEALAND
LAW SOCIETY

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1. | The Property (Relationships) Act

If you are married, in a civil union partnership or in a de facto relationship, even if you are a same-sex couple, and your relationship ends by separation or because one of you dies, you will be affected by the **Property (Relationships) Act** (the PRA). This act came into force on 1 February 2002. It replaces the Matrimonial Property Act 1976, which applied only to married couples.

The PRA presumes that each partner contributes equally to their relationship, even though that may be in different ways, and it aims to provide a just division (almost always equal) of the relationship property when the relationship ends, taking into account the interests of any children involved.

In this pamphlet, the term “partner” is used to describe a person in a relationship whether married, civil union or de facto. Where a rule applies only to a married or civil union person, the term “spouse” is used and where a rule applies only to a de facto person, the term “de facto partner” is used. Similarly, the word “relationship” is used to denote a marriage, civil union or a de facto relationship.

This pamphlet explains some of the key points in the legislation.

As it can be complex, people needing advice on this area of law should consult a lawyer. The information in this pamphlet is not intended to take the place of legal advice in individual cases.

2. | Who does the PRA apply to?

The PRA applies **automatically** to all married and civil union couples and those who have been living together in a de facto situation for a minimum of three years, whether they are of the same or opposite sex.

It applies to relationships that **end after 1 February 2002** even if they began before that date.

It applies whether a relationship ends through separation or death – and it can override the provisions of a deceased partner's will.

Discussing at the start of a relationship how you should divide property if you break up may seem pessimistic, grasping and untrusting, but anyone who is in a relationship now or who enters a new relationship should give the PRA careful thought.

It is especially important that people who have deliberately chosen not to marry or enter a civil union check with their lawyers to see how this law affects those arrangements. Those who put agreements in place to protect their property (perhaps to preserve it for children from an earlier relationship) or who have set up family trusts should also consider how the PRA might affect those arrangements.

3. | What constitutes a de facto relationship?

For the purposes of the PRA, a de facto relationship exists only when both parties are aged at least 18 and they are living together as a couple but are not married to each other or in a civil union. These are the essential but not the only factors that go to determining whether a relationship is or has been de facto.

The issue of whether there is a de facto relationship in terms of the PRA and the date that it began will be questions of fact for a court to decide if necessary. In deciding, the court will consider all the relevant circumstances, which may include:

- the length of the relationship;

- the extent to which you shared a home;
- the degree to which your finances were merged;
- how your property was owned and used;
- whether you had a sexual relationship;
- how you cared for and supported any children either of you had;
- who performed household duties;
- your mutual commitment to a shared life;
- whether others saw you as a couple; and
- any other matters as seem appropriate.

It is often difficult to determine when a relationship ceases being of the girlfriend/boyfriend type and becomes de facto – yet the date at which two people become “a couple” is significant in terms of when the PRA applies. It could, therefore, be useful to agree in writing the date your de facto relationship began.

If you think your relationship could be classified as de facto and you do not want this law to apply to you, then you will need to contract out of it.

4. | What about people who are flatting together?

As the above factors indicate, people can flat together without their relationship being deemed de facto in terms of this legislation. However, if people who live together and share costs develop a sexual relationship, they may be classified as de facto. Both their assets and their debts (possibly including student loans) would be shared equally if their relationship lasts three years or more. The only way to avoid that is for them to make a contracting-out agreement. This could be quite simple, merely providing that they will each keep their own existing assets and be responsible for their own current debts, but if it is intended to cover all eventualities it will necessarily be more complex (and more expensive).

Parents may lend property to their children when they go flatting. It is a good idea to record any such arrangements in writing to avoid them being caught up in any future PRA claim.

5. | When does the PRA apply?

Usually a relationship will need to have lasted at least three years for the PRA's equal-sharing regime to apply. However, sometimes shorter relationships (where there are children or a partner has made a substantial contribution) will also qualify if that would be just.

A relationship that has not lasted for three years is classified as a "relationship of short duration" and different principles are applied in dividing the property.

Where a couple has been in a de facto relationship and then married or entered a civil union, the total length (de facto and married/civil union) of the relationship is taken into account.

The PRA can also apply if one or both partners have been declared bankrupt or one is mismanaging the relationship property, or if one or both partners need a declaration from the court concerning the status or ownership of any particular asset (eg, for tax purposes).

If you do not want the PRA to apply to you and your relationship property, you will need to make a legal agreement contracting out of it (see clause 19). If you entered into a property-sharing agreement before the PRA came into force on 1 February 2002, check that the agreement will still achieve what you want.

6. | What are the rules for relationships of short duration?

The rules for dividing property when a relationship is of short duration (usually less than three years) are different for married and civil union couples from those for de facto couples.

When a **marriage or civil union of short duration** ends through **separation**, property is generally divided on the basis of contributions to the marriage or civil union rather than shared equally where one spouse's contribution has been clearly greater than the other's.

If a **marriage or civil union of short duration** (even if very brief) is ended by **death**, it will be treated as a marriage or civil union of long duration. The surviving partner will have the same rights to an equal share of the relationship property, unless the court considers that would be unjust.

An order dividing property under the PRA cannot usually be made if a **de facto relationship was of short duration**.

However, the relationship may be treated as one of three years or more and covered by the PRA where there is a child of the relationship **or** the applicant has made a substantial contribution to the relationship **and** the court is satisfied that failure to make the order would result in serious injustice. In that case, the share would be determined according to the contribution each party had made to the relationship rather than equally.

For other de facto relationships of short duration – whether ended through separation or death – property is usually shared according to the equitable principles applying before the PRA came into force rather than 50/50. These principles take into account who has legal title to the property, each partner's contributions to the property and the couple's expectations as to how they should share their property.

7. | What is property?

The definition of property under the PRA includes tangible and intangible property. Tangible property includes items such as houses, cars, furniture, jewellery, money, household equipment, etc. Intangible items are such things as an interest in a business partnership, fishing quota, a future benefit in a superannuation scheme, etc.

The effect of this definition is that all property that both partners own, no matter when it was acquired (before, during or after the end of a relationship), has to be considered and classified, and must be disclosed to the other partner.

Valuing some property – especially intangible items – can be complex and may require the services of a specialist.

8. | What is relationship property?

Relationship property includes:

- the family home, even if it was acquired by one partner before the relationship began or by inheritance, gift or via a trust. The only exception is if it is on Maori land;
- the family chattels (furniture, fittings, household equipment and appliances, vehicles, boats, etc) even if they are in one person's name only (but see "separate property" below);
- any common or jointly-owned property;
- in certain circumstances, separate property that has been intermingled with relationship property (see clause 10);
- property acquired **before** the relationship began **if** it was intended for the couple's common use or benefit;
- all income earned and property bought after the relationship began;
- the value added during the relationship to superannuation and life insurance policies.

9. | What is separate property?

Separate property includes:

- inheritances and gifts;
- heirlooms and taonga;
- chattels used wholly or principally for a business;
- property acquired under a trust;
- property that the partners declare is separate under an agreement contracting out of the PRA;
- property acquired before the relationship began;
- property acquired with the proceeds of separate property and not intended for the use or benefit of both partners.

10. | When does separate property become relationship property?

Where the application of relationship property, or the direct or indirect actions of the other partner, contribute to an increase in the value of separate property, that increased value may be classified as relationship property. Indirect actions could include, for instance, caring for children while a partner works to increase the value of his or her separate property. The increase in value will not necessarily be shared equally – it will be apportioned according to the contribution each partner made to the increase.

Where separate property (being a gift, trust money or inheritance) is used for the benefit of both partners or becomes intermingled with other relationship property, it may be classified as relationship property.

The family home and family chattels are always relationship property no matter whose name they are in or how they were acquired, unless they are designated separate property by an agreement. Where both parties owned homes before the relationship began and one became relationship property by being used as the family home, an adjustment in the division of property may be made to take account of the other home or its proceeds.

11. | What about overseas property?

Overseas assets are classified as either “movable” or “immovable”. Items such as furniture, chattels, cars, bank accounts, shares, etc are movables. Land (with or without a building) is immovable. Provided one partner resides predominantly in this country, New Zealand courts can make orders about movable assets overseas but not about immovable ones – unless the couple agree in writing that New Zealand law should apply to those assets.

A couple can contract out of the PRA and agree that the law of another country should apply to their property. Such agreements must comply with the formalities of that other country’s laws.

12. | What about debts?

Just as assets may be either relationship property or separate property, debts may be classified as relationship debts or personal debts. The responsibility for relationship debts is shared but personal debts remain the responsibility of the person who incurred them.

Relationship debts are:

- those incurred jointly (eg, a joint hire purchase agreement);
- those incurred in the course of a common enterprise (such as a business that benefits both parties);
- debts incurred to acquire, improve or maintain relationship property (eg, a bank loan to renovate a house);
- those incurred to manage the affairs of the household (eg, purchases of household items, holidays, car, etc);
- those incurred for the purpose of bringing up a child of the relationship.

Personal debts are those incurred to acquire or improve separate property or those incurred before the relationship began or after it ended.

Even though a debt may be in one partner's name only (say on one partner's credit card), that does not mean it is a personal debt – it will depend on the purpose for which it was incurred. In some circumstances, a student loan may be classified as a relationship debt depending on what it was used for (eg, joint living costs).

Some debts (eg, a bank overdraft) may be partly a relationship debt and partly a personal debt.

Compensation may be awarded where relationship property has been used to pay a personal debt in the past.

13. | How will property be divided when a relationship ends?

All relationship property will be divided equally following the end of a relationship that has lasted more than three years, unless extraordinary circumstances make equal sharing repugnant to justice. In that case, property would be divided according to the contribution each partner had made to the relationship.

One partner may be awarded a greater share if the ending of the relationship would leave them at a serious economic disadvantage because of the division of roles during the relationship (see clause 16).

An adjustment in equal sharing might also be made where a partner's gross misconduct has affected the amount or value of relationship property. And compensation may be awarded where a partner has either increased or has deliberately diminished the value of relationship property after separation.

Usually each partner retains their separate property.

14. | What if property is put into a trust or company?

Property transferred to a trust **during** the relationship can be taken into account if it is considered that the transfer has the **effect of defeating** the sharing of relationship property (even if it was not intended to have that effect). The property cannot be transferred back out of the trust but the court can order compensation by adjusting the share of relationship property, by payment from the other partner's separate property or, if neither of those is sufficient, from trust income, if any.

Where a trust owes a debt to a partner, that is an asset that may be classified as relationship property. So may any beneficial interest a partner has in a trust.

Compensation from relationship or separate property may also be ordered where relationship property was transferred during the relationship to a **company** in which one partner has a controlling interest and that transfer has the effect of defeating the other partner's property rights.

15. | What does “contribution” mean?

If property is divided according to contribution, both financial and non-financial contributions are taken into account.

Non-financial contributions can include such things as caring for children or other relatives, managing the household, performing services in respect of property, giving up a higher standard of living, helping a partner in their occupation or business, or enabling a partner to gain qualifications.

As well as providing money and financial support, **financial contributions** can include increasing the value of relationship property or the other partner’s separate property.

16. | What if one partner will be left worse off than the other?

Where there will be **significant economic disparity** between the partners after separation **and** that disparity is caused by the division of functions during the relationship, the court may decide that the partner left at an economic disadvantage should get more than half the relationship property. This bigger share comes out of property accumulated during the relationship, not out of the other partner’s future earnings.

The court can consider the likely earning capacity of each partner and their responsibilities for the daily care of dependent children plus other relevant circumstances in deciding whether there will be economic disparity that merits compensation. However, just the fact that one partner earns much more than the other is not enough to claim economic disparity – it depends on whether the reason for the lower income and living standards is because of the way functions were divided during the relationship.

The court can postpone property sharing to avoid undue hardship to children, such as allowing the parent with day-to-day care of the children to retain use of the family home until the youngest child has reached a certain age.

Also, under the Family Proceedings Act, an ex-spouse or civil union partner (no matter how long married or in the civil union), or an ex-de facto partner of a relationship that is not of short duration, can seek maintenance from the other – but only if that person cannot support him/herself because of the effect of division of functions during the relationship. In deciding whether to order maintenance, the court can consider the differences between the partners' future living standards and earning capacity, and can take the family's previous living standards into account in assessing a partner's reasonable needs.

17. | What does “division of functions” mean?

This refers to the way people organise their lives. For example, one person may have stayed home to look after children while the other worked, or have given up their own job when their partner was transferred elsewhere. Or one partner may have supported the other during a course of study, enabling that partner to advance their career. If this sort of division of functions has left one partner either economically disadvantaged or not able to maintain him/herself, then the normal 50/50 property split may be adjusted to compensate or an order for maintenance made.

18. | Who is a “child of the relationship”?

Several provisions take into account the needs of any children of the relationship and relationships of short duration may be treated as longer if there is a “child of the relationship”. This term has a wide-ranging definition – it includes not only any child the couple have together but also any child of either partner and any other child who is a member of the family when the couple ceased to live together or at the date of death of a partner. This can include stepchildren, adopted children, even foster or other children if they are living as members of the family.

19. | Contracting out

The only way to prevent the PRA from applying to your property is for you and your partner to enter into a contracting-out agreement. This allows you to make your own rules about the ownership of your property (including future property) and how it is to be divided when your relationship ends. Your partner cannot be forced to enter into a contracting-out agreement.

You can make a property-sharing/contracting-out agreement whether you are married, in a civil union or de facto and at any time – before you begin the relationship, during it, when you are splitting up and even when a partner dies (in which case you would contract with the deceased's personal representatives).

You can contract out of all or part of the provisions of the PRA. An agreement can be made to apply during the partners' lifetimes; for a fixed period and then expire; only after the death of one or both of them; or both during their lifetimes and after death.

You can specify the property you want excluded from the relationship pool (that is, identify the separate property of each party) and how relationship property is to be divided. You can provide for different results according to the number of years the relationship lasts and whether you have children. You could state quite simply that there will be no sharing of any property and that you will each retain your separate property. However, if an agreement is too one-sided, it may be subject to review by the court. A couple might want to make an agreement to split assets for estate planning and tax purposes.

To be valid, an agreement to contract out:

- must be in writing and signed by both parties;
- each party must have been **properly advised independently by a lawyer** before signing the agreement (this will involve time and cost);
- each signature must be witnessed by a lawyer who must certify that they have explained to that party the effect and implications of the agreement.

Although model forms of contracting-out agreements are provided in the PRA regulations and in some books, these will often be inadequate for everyone's needs. The issues may seem straightforward but complexities often arise. Obtaining early legal advice will often save time and money and may reduce conflict. Even if you use a model form agreement, you will still need to have a lawyer witness your signature and certify that you understand it to make it valid.

If consulting a lawyer about a contracting-out agreement, you can reduce the time required with the lawyer by preparing well beforehand. Take any relevant documents and prepare a list of all property and assets (including superannuation and life insurance policies), and debts, when they were acquired, by whom and a note of how the property and debts have been used.

The court can set aside or alter an agreement if it would cause serious injustice. In deciding this, the court would look at:

- the agreement's provisions;
- how long since it was made;
- whether it was unfair or unreasonable when it was made or has become so because of changed circumstances;
- the fact that the parties were trying to achieve certainty by making the agreement; and
- any other relevant matters.

Where an agreement provides for sharing property created during the relationship but allows each partner to retain property owned before the relationship began or property they inherit, it is unlikely to be disturbed.

A court can also overturn an agreement made under duress or because of a mistake. If you believe there may be reasons why an agreement might be able to be set aside, you should seek legal advice promptly. Delayed action may be fatal to a claim.

Agreements are submitted to Inland Revenue to check that they do not create an unequal division that attracts gift duty.

20. | What if we already have a property agreement?

De facto property-sharing agreements made **before 1 August 2001** have effect as if the PRA had not been passed but may be challenged on conventional contract law principles such as mistake, duress, misrepresentation, etc.

An agreement made by a married couple under section 21 of the Matrimonial Property Act (often a pre-nuptial agreement) **before 1 August 2001** can be challenged under the PRA so they should be checked to see that they will still achieve what was intended.

Any agreements (married, civil union or de facto) made **since 1 August 2001** should have been made in light of the PRA and may be challenged under the PRA rules as to validity and whether they might result in serious injustice.

It is advisable to review any contracting-out agreement from time to time to see that it still meets the needs of both partners, particularly where a relationship lasts for a long time and circumstances change (eg, children come along or the property increases significantly or legislation changes).

21. | What if there is more than one partner?

If a partner enters a new relationship and starts pooling property before property division for the former relationship has been finalised, then property from the earlier relationship is sorted out first.

If a person is in more than one qualifying relationship at the same time, property is divided according to the property belonging to each relationship; where that is not clear, the contribution of each relationship to the acquisition of the property is taken into account.

22. | What happens if a partner dies?

Previously, if a spouse died, the surviving spouse would inherit property under the deceased's will or under the Administration Act rules if there was no will (see our pamphlet *Making a will and estate administration*). They could not make a claim under the Matrimonial Property Act 1976 but they could bring a claim under the old Matrimonial Property Act 1963 (based on contribution to relationship property) and under the Family Protection Act. There was no such protection for de facto couples.

Under the PRA, the situation is different. Now a surviving partner (married, civil union or de facto) can choose **either** to claim a half share of relationship property under the PRA (Option A) **or** to accept what they have been left in their partner's will or, if there is no will, the set share that the Administration Act would provide (Option B). If no choice is made, any surviving partner is assumed to have chosen Option B.

Even where a marriage or civil union is of short duration, the equal sharing regime can apply on death unless the court considers that would be unjust.

De facto partners in a relationship of short duration can make a claim on death only if there is a child of the relationship or the surviving partner has made a significant contribution to the relationship **and** it would cause serious injustice not to allow them to claim. In these cases, the property would be divided according to contribution to the relationship, not on the basis of equal sharing.

The choice of whether to make a PRA claim or accept the terms of the will or intestacy rules must be made within six months of the grant of administration of the deceased partner's estate, though this limit may be extended in certain circumstances unless the estate has already been distributed. The surviving partner has priority over beneficiaries of the will and other claimants under inheritance law. Once a claim under the PRA is lodged, the estate cannot be distributed until the claim is settled.

The choice must be made in writing in a set form. It must be signed and a lawyer must certify that they have explained the effect of the choice to the surviving partner.

Once made, the choice cannot be revoked except by order of the court on specified grounds (for example, where the choice was not made freely or additional relevant information comes to light).

If you make a PRA claim, you lose the right to inherit under the will or the Administration Act even if your claim proves unsuccessful – unless the will states specifically that you should inherit even if you make a claim or the court allows it to avoid injustice.

Today, people's living arrangements can be complex and it is possible that there could be more than one surviving partner – if so, each would have the right to make a claim under the PRA.

You cannot override in your will your partner's right to claim (except to state specifically that the surviving partner can take what you leave them under the will even if they make a PRA claim). The only way you can avoid this provision is by making a contracting-out agreement that these rules will not apply and stating how relationship property should be shared on your death.

After death, a surviving partner and the deceased partner's personal representative can make an agreement sorting out how the property should be divided and to settle any claim.

A deceased partner's personal representatives, however, cannot claim against a surviving spouse under the PRA without leave of the court, which will not grant leave unless this would cause serious injustice.

A deceased partner's estate is bound by any property-sharing agreement that the partners have made, though that agreement could be set aside if it would result in serious injustice.

The rules about dividing property when a partner dies also apply when a partner dies after separation but before proceedings to divide property have commenced.

A surviving partner can also still claim under the Family Protection Act and the Law Reform (Testamentary Promises) Act. Under the Family Protection Act, a court can order proper maintenance and support for close family members, including spouses and de facto partners, out of a person's estate, if that is not provided for in the will. Under the Law Reform (Testamentary Promises) Act, the court can enforce

a promise to leave property to someone in return for work or services performed during the deceased's lifetime. See our pamphlet *Making a will and estate administration* for further information.

The PRA applies to **all wills, including those made before 1 February 2002**, so if you feel it could affect how you have left things, you should check with your lawyer.

23. | Which court handles PRA matters?

All proceedings under the PRA will start in the Family Court though complex cases may be transferred to the High Court. Cases in the Family Court are closed to the public and cannot be reported in the media but those in the High Court are open and may be reported.

You do not have to use a court to determine how your property should be divided. You can come to your own agreement, but to be a valid legal agreement, it will need to be made in the manner prescribed in the PRA (see clause 19). If you have trouble agreeing, a lawyer can help you negotiate or you can ask a mediator for assistance. Your lawyer or a Family Court (which are part of District Courts) can help you find a mediator. If you cannot reach agreement, then you may need to ask a Family Court to make a ruling.

The court can issue interim orders in urgent situations. A final order cannot be reviewed or varied unless new evidence suggests a substantial miscarriage of justice has occurred but a Family Court's decisions can be appealed through the normal appeal processes.

Legal aid may be available to assist with a claim but it will almost certainly be in the form of a loan rather than a grant, secured by a charge over your assets.

For spouses, court proceedings must be instigated within 12 months of a marriage or civil union being dissolved (that is, within 12 months of the divorce date, which would normally follow a separation of at least two years). For de facto couples, the time limit is three years after they stopped living together. These limits may be extended in special cases.

This pamphlet has not attempted to cover all the finer points of this complex area of law. Therefore, anyone who has particular questions about how the PRA might apply to their situation is advised to consult a lawyer.

24. | Do the right thing – see your lawyer first

Lawyers deal with many personal, family, business and property matters and transactions. No one else has the training and experience to advise you on matters relating to the law. If your lawyer can't help you with a particular matter, he or she will refer you to another specialist. Seeing a lawyer before a problem gets too big can save you anxiety and money.

Like other professional people, your lawyer charges for time, experience and skill in looking after your affairs. Ask at the beginning about the likely cost or tell your lawyer that you don't want to spend more than a certain sum without the lawyer checking with you. If you are on a low income and there is the possibility of court proceedings, ask whether you might qualify for legal aid. Our pamphlet *Seeing a lawyer – fees, charges and value* will provide you with more information.

Choose your own lawyer for independent advice. You do not have to use the same lawyer as your partner or anyone else involved in the same legal matter. In fact, sometimes you must each get independent legal advice. Your lawyer should act for **you**.

Your lawyer will:

- treat your business as completely confidential;
- give you independent advice;
- use his or her skills for your benefit; and
- give value for what you have to pay.

If you don't have a lawyer:

- ask friends or relatives to recommend one to you;
- look in the Yellow Pages under “lawyers” or “barristers and solicitors”;
- inquire at a Citizens Advice Bureau or Community Law Centre;
- check these websites:
 - www.familylaw.org.nz
 - www.propertylawyers.org.nz
 - www.adls.org.nz
 - www.wellaw.co.nz
 - www.odls.org.nz

- contact your local district law society:

Auckland (including Northland, South Auckland, Coromandel)	(09) 303 5270
Waikato Bay of Plenty (including Taupo)	(07) 838 0264
Gisborne	(06) 867 7874
Hawke's Bay	(06) 835 1254
Taranaki	(06) 758 3238
Wanganui	(06) 345 7092
Manawatu	(06) 356 2214
Wellington (including Wairarapa)	(04) 472 8978
Nelson	(03) 545 2613
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Law Awareness Programme

The New Zealand Law Society (NZLS) publishes this pamphlet as part of its Law Awareness Programme to inform you of your legal rights, the law and how lawyers can help you. The current list of titles in the series is:

1. How your lawyer can help you
2. Seeing a lawyer – fees, charges and value
3. Your lawyer and confidentiality
4. Buying or selling a property
5. Over the fence ... are your neighbours
6. Domestic violence
7. What happens to your children when you part?
8. Dividing up relationship property
9. What happens when your relationship breaks up?
10. Living together
11. The family trust
12. Making a will and estate administration
13. Powers of attorney
14. Motor vehicles, accidents and alcohol
15. You and the police
16. Giving evidence
17. Going into business

Copies of these pamphlets may be obtained from the New Zealand Law Society, PO Box 5041, Lambton Quay, Wellington 6145, tel (04) 472 7837, fax (04) 473 7909, email pamphlets@lawyers.org.nz or from most district law societies or legal offices. They will be supplied free to individuals and non-profit community service organisations and at a small charge to others. The full text of all the pamphlets available in the Law Awareness series can be accessed through the NZLS website – www.lawyers.org.nz/pubaboutlaw.asp

Notes

All information in this pamphlet is, to the best of the knowledge of the NZLS, true and accurate as at the date below. However, no liability is assumed by the NZLS for any losses suffered by any person relying directly or indirectly on information in this pamphlet. It is recommended that readers consult a lawyer before acting on this information.

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