

# The Jackson Russell report

SEPTEMBER 2008

## Jackson Russell's new look By Darryl King

Welcome to the first edition of the Jackson Russell Report under our new branding.

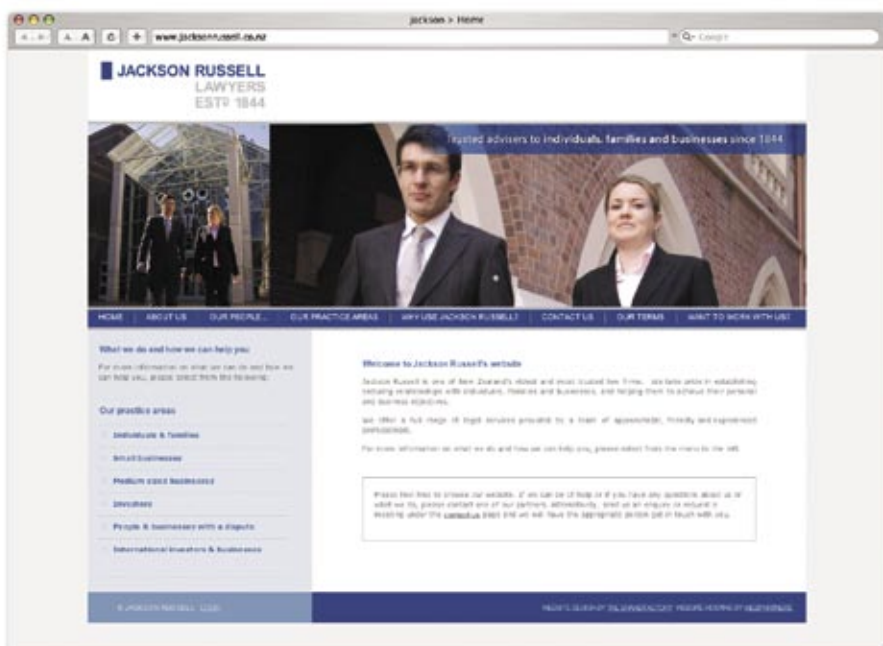
From Monday 22 September Jackson Russell is changing the way it looks on paper and in cyberspace (our website) as we introduce and start working under our new brand.

Our rebranding is essentially about refreshing our look. Our rebranding is not about changing who we are or what we stand for. Jackson Russell have been trusted advisers to individuals, families and businesses for over 160 years and this will not change.

As part of our rebrand, we have created a new website and it will be live from 4pm on Friday 19 September. The address, [www.jacksonrussell.co.nz](http://www.jacksonrussell.co.nz), has not changed.

We wanted to move away from the traditional form of website for a professional services firm and focus instead on providing information relevant to each person that accesses our website. Each of our clients is different and has different needs. We tailor our services to these individual needs and we wanted our website to do the same.

We are particularly proud of our new website and its fresh new approach. We invite you to take a look. We hope you like our new brand, newsletter and website. We welcome your questions or comments.



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## Jackson Russell Partner Retiring

After 34 years of service John Jackson has advised his fellow partners that he wishes to retire from the Jackson Russell partnership effective from the first of December 2008. John is retiring from law practice but will be available on an "as required" arrangement as a consultant.

Transition of John's clients is being dealt with and if you are seeing John between now and the end of November, it is likely he will introduce you to other professional staff in the firm. John will also be contacting his clients via mail to advise what arrangements will apply to them after his retirement.

# The Jackson Russell report

## New terms of engagement By Mark Sullivan

The Lawyers and Conveyancers Act 2006 came into effect on 1 August 2008. It creates a new statutory framework for the legal profession and affects both law practitioners and those who use legal services. The Act required the New Zealand Law Society to introduce new rules for professional conduct and client care. This includes an obligation on all lawyers to provide both existing and new clients with information on the aspects of client service.

Accordingly, from 1 August 2008, for the first new instruction that we receive from you we will send you a new letter of engagement which complies with the new rules for professional conduct and client care. For the most part, the letter of engagement merely confirms and reinforces the basis upon which we have always worked for you in the past. Our relationship with you has always been important to Jackson Russell and we will continue to maintain the same high standards of professional service and client care.

## New Limited Partnership Business Structure

By Darryl King

While company structures have long been favoured for business activities, the new limited partnership structure may offer tax and other benefits to investors and businesses.

A limited partnership is essentially a hybrid of a partnership and a company. A limited partnership provides the limited liability protection of a company and some of the flow through tax treatment and confidentiality advantages of a partnership.

A limited partnership is comprised of limited partners and general partners.

Limited partners are passive investors. Limited partners' liability is usually limited to their capital investment in the partnership – unless they participate in the management of the partnership. The identity of limited partners is confidential – which is not the case for companies.

The general partner manages the partnership and makes the investment decisions and has residual liability for the obligations of the limited partnership if the partnership cannot meet those obligations.

A limited partnership is "fiscally transparent" for tax purposes so that losses and gains are attributed to partners directly. For each partner, partnership income is taxed at the partner's tax rate. Capital gains may be distributed to partners tax free.

The attribution of losses to the partners is particularly useful if tax losses are expected in the early stages of an investment. Losses are capped at the amount of capital contributed by a partner but can be carried forward and offset against future partnership income.

**A limited partnership can be used for any type of investment or business activity, but is especially suitable for when:**

- losses are expected to be incurred early on;
- an investment is likely to experience capital gain;
- centralised management is required with other investors taking a passive investment; and
- specialised management is required and start up/running costs are high.

Limited partnerships are relatively simple to establish and operate and may offer tax and other benefits to investors and businesses over a company structure in some circumstances.

## Meet our new Staff Member

Amy Williamson has joined Jackson Russell replacing litigation lawyer Hanna Leslie who has headed off overseas.



Amy went to Diocesan School for Girls in Auckland and graduated with a law degree and Bachelor of Arts from Otago University. Amy has just finished her professional course and will be admitted in September. She works in Mark Sullivan's team with Caroline Harris. Amy's major in her arts degree was Theatre Studies and in her spare time she retains strong interests in both directing and acting in stage shows.

## Are you in a de facto relationship?

By Zandra Wackener and Tim Gray

Answering this question may not be as straight forward as you would think. Most people would say that their de facto relationship started when they moved in together. As we discuss below, it is not always this simple, and your answer to this question can have significant consequences for your property situation at the end of a relationship.

### The three year rule – equal sharing

It is important to establish when your relationship began because if you have been in a de facto relationship for more than 3 years and it ends you will be covered by the Property (Relationships) Act 1976 and your assets divided equally.

As one would expect, there are exceptions to this rule, but that could be the subject of a whole separate article. We invite you to contact us should you wish to discuss these exceptions and whether they apply to you.

However, the Act points out that this is not to be an exhaustive definition; nor is a finding in respect of any of the matters listed (or any combination of them) above to be regarded as necessary to find the existence of a de facto relationship. Accordingly, in some cases a single factor may be decisive whereas in another matter, the Court may take a cumulative approach by looking at the specific facts in the case to ascertain whether the relationship assumed a significant degree of mutual commitment and permanency as would be expected of a de facto relationship.

Accordingly it has been generally accepted that a common residence is not a necessary condition of living together as a couple and that the absence of sharing a common residence is not proof of a de facto relationship. Some have argued that this defies common sense. The issue has recently been the subject of a number of High Court appeals and there now seems to be some authority for the view that cohabiting (sharing a common residence) ought to be given some importance.

A couple's relationship may adopt a variety of forms which fall short of a de facto relationship. A couple may be friends or lovers, boyfriend and girlfriend, landlady and boarder or flatmates. What it is also apparent is that over time, a couple's relationship can change and in the ordinary course of a relationship, one moves from being boyfriend and girlfriend (a courting period) to something more serious which could then be defined as a de facto relationship. In other words, are you living together as a couple or no more than friends with benefits? Pinpointing the precise date upon which a de facto relationship began is often difficult.

Courts are commonly asked to determine this exact issue. What we do know is that the Courts are looking for a relationship where there is a significant degree of mutual commitment and permanency to a shared life. There needs to be a significant inter-twining of lives and a measure of mutual commitment by the parties to the relationship. This does not need to be a commitment intended to last for ever or indefinitely but at the very least, a commitment for the foreseeable future.

What is a problem, therefore, is that whilst the Act is a helpful guide, it is not definitive. Frequently parties in a relationship may have differing views as to the nature of their relationship. Alternatively participants in the relationship could genuinely claim to be uncertain as to whether or not their relationship comes within the statutory definition of de facto relationship.

### What is a de facto relationship?

The Act sets out that a de facto relationship is a relationship between two persons (which includes same sex couples) who

- are aged 18 years or older; and
- live together as a couple; and
- are not married to or in a civil union with one another

But what does "living together" actually mean? Again, this may not be what one would commonly assume. To assist, the Act sets out that a Court, in determining whether two persons live together as a couple, must take all the circumstances of the relationship into account.

The Act then sets out that some of the matters which the Court can take into account include:

- the duration of the relationship;
- the nature and extent of the common residence;
- whether or not a sexual relationship exists;
- the degree of financial dependence or inter-dependence, 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;
- the performance of household duties;
- the reputation and public aspects of the relationship

### What should you do to protect your assets?

If you are in a de facto relationship and do not wish for the Act to define the division of your relationship property at the end of your relationship (either upon death or separation) you should enter into a contracting out (pre-nuptial) agreement. This agreement will set out how you and your partner wish to divide your property. This is particularly important if you (or your partner) owned property prior to the relationship commencing.

Even if you do wish the Act to govern the division of your property we would encourage you to seek legal advice .

Jackson Russell's experienced Family Law team would be happy to discuss any of the issues raised above with you.

## Flexibility for working parents and other carers

By Glenn Finnigan

The Employment Relations (Flexible Working Arrangements) Amendment Act 2004 became law on 1 July 2008.

The new Act gives eligible employees who care for others the statutory right to request changes to their working arrangements and provides a framework for employees to raise requests for the flexibility they seek regarding when and how they work.

In line with sick leave entitlements, eligible employees are those who have been employed by the same employer for the last six months.

The Act does not restrict the type of relationship the person requiring care must have with the employee.

The type of working arrangements that an employee can ask an employer to vary are such things as hours of work, days of work or the place of work (for example, at home or at the employee's place of work). An employee might, for example, request flexi time, part time work, staggered start and finish times or even job sharing.

Requests for flexible working arrangements have to be in writing and must state the type of variation of the working arrangements requested and specify for how long the variation is being sought. The requests need to explain in the employee's view how the variation will enable the employee to provide better care for the person concerned and also the employee's view about the changes, if any, that the employer might need to make to the employer's arrangements if the request is approved.

Employers have to deal with a request as soon as possible but not later than three months after receiving it.

### Disclaimer

*The information contained in this newsletter is of a general nature and should be used as a guide only. Every effort has been made to ensure the accuracy of the information published, but readers are requested to seek legal advice before acting upon this information and should not rely on what is published in this newsletter.*

The Act sets out the grounds that employers can rely on to decline requests. They are:

- inability to reorganise work among existing staff
- inability to recruit additional staff
- detrimental impact on quality
- detrimental impact on performance
- insufficiency of work during the period the employee proposes to work
- planned structural changes
- burden of additional costs
- detrimental effect on ability to meet customer demand.

It has to be expected that the statutory grounds for declining requests are the type of reasons that are likely to give rise to disputes. However, there are limitations on what an employee can do if he/she disagrees with an employer's grounds for declining a request.

Assistance can be sought from a Labour Inspector. If that does not resolve the matter, the employee can refer the dispute to Mediation. Ultimately a dispute can be referred to the Employment Relations Authority if Mediation does not resolve the matter. If the Employment Relations Authority finds the employer has wrongly decided that an employee is not eligible to make a request under the Act, it can order the employer to comply with the requirements of the Act to deal with the request and make a decision on the request.

A penalty of up to \$2,000 can be imposed by the Authority where an employer has failed to deal with a request in the required time frame or to notify the employee of the decision or the grounds and reasons for it. The penalty is payable to the employee.

But the absence of an express power to require employers to agree to a request for flexible working arrangements if an employer declines the request by wrongly relying on one or more of the statutory grounds referred to above significantly reduces the effectiveness of the legislation.

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### CUSTOMER PARKING



We have free car parks available for use when visiting our offices.

Entry from Bankside St.