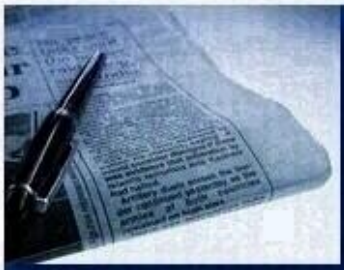

# S J SCANNELL & CO

## NEWSLETTER- DECEMBER / FEBRUARY

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## Covid-19 vaccine/regulations - employer and employee rights

Employers and employees both have responsibilities under the Health and Safety at Work Act 2015. Employers are required to take steps to eliminate or otherwise minimise risks, and employees are expected to follow policies and procedures put in place in their workplace.

The World Health Organisation deemed Covid-19 a worldwide pandemic in March of 2020. All countries are expected to take as many precautions possible to eliminate or minimise its spread. One way New Zealand is doing this is to offer the Pfizer vaccine free to all.

While an employer cannot require any individual to be vaccinated, they can require that certain roles must only by undertaken by vaccinated workers where there is a high risk of contracting and transmitting Covid-19 to others, or if their work is covered by the Covid-19 Public Health Response (Vaccinations) Order 2021.

To decide if a role/position is high risk and therefore needs vaccination for Health and Safety reasons, an employer must first assess their Covid-19 exposure risk. Typical situations to consider are:

- How many people does the employee come into contact with whilst conducting their duties?
- How easy will it be to identify the people who the employee comes into contact with?
- How close is the employee in proximity to other people whilst conducting their duties, and how long does the work require the employee to be in that proximity to other people?
- Does the work involve regular interaction with people at high risk of severe illness from Covid-19?
- What is the risk of Covid-19 infection and transmission in the work environment compared to the risk outside of work?
- Will the work environment continue to involve regular interaction with unknown people if the region is at a higher alert level?

Employers must include their employees in the risk assessment process. During this process it may be determined that work arrangements or duties can be changed such that a role/position is no longer high risk. Employers and employees should work together to reach a mutually agreed outcome.

If, as a result of the Health and Safety Exposure Risk Assessment process ("the assessment"), it is deemed that a role/position can only be undertaken by vaccinated staff, employers should set a reasonable timeframe for employees to decide if they will be vaccinated. If during this time an employee cannot work, special paid leave should be considered; especially in the short term while employers and employees discuss what happens next.

An employee does not need to disclose or prove their vaccination status to an employer; and they cannot be redeployed or disadvantaged for refusing to disclose their vaccination status, unless it is determined under the assessment that their role cannot be completed by unvaccinated employees.

If a role is determined under the assessment to be high risk that requires an employee to be vaccinated, an employer can ask an employee if they are vaccinated. If the employee does not disclose or provide evidence of their vaccination status, the employer has the right to assume they have not been vaccinated. However, employers will need to ensure they have previously informed their staff of this assumption and what will happen if an employee is not vaccinated or does not disclose their vaccination status.

Collecting, storing and sharing information about employees' vaccination status must be done in accordance with the Privacy Act 2020.

On 26th of October 2021, the Government announced new legislation around what type of roles vaccination will be mandated. This is to align with the recently announced Covid-19 Protection Framework. The Government is currently in the process of working with businesses and unions on when this mandate will come into effect and further guidance will be available.

## Taxes on utes rules

The Government is taking action in line with the advice of the Climate Change Commission to increase uptake of low emission vehicles by introducing a range of measures that will help meet New Zealand's 2050 carbon neutral target.

The Land Transport (Clean Vehicles) Amendment Bill 2021 is one such measure, which is intended to achieve a rapid reduction in carbon dioxide emissions from light vehicles imported into New Zealand. Clause 4 of the bill introduces a new definition into the Land Transport Act 1998 (LTA), defining a Light Vehicle as a motor vehicle that has a gross vehicle mass of not more than 3,500kg.

Clause 5 of the bill inserts new sections 167A to 167C into the LTA. The proposed new section 167A provides regulations imposing fees and charges for the purposes of a Clean Vehicle Discount. The Clean Vehicle Discount is proposed to make electric and low emission light vehicles more affordable by offering a discount, in the form of a rebate, for eligible imported electric and low emission vehicles first registered in New Zealand from 1 July 2021 through to 31 March 2022. Petrol hybrids (hybrids whose motive power is not derived, wholly or partly, from electricity) do not currently qualify for a rebate.

Subject to legislation being passed, it is proposed that from 1 April 2022, fees and rebates will be applied according to the emission level of vehicles. Vehicles with a purchase price of $80,000 or more (including GST and on-road costs) and those with less than a 3-star safety rating (as published on the Rightcar website) will not be eligible for the rebate.

The fees for high emission vehicles were meant to come into effect from 1 January 2022, however this has been delayed until 1 April 2022 due to the current Delta outbreak. Buyers purchasing high carbon emission vehicles will pay a higher price in recognition of the increased environmental and economic costs they are imposing. The fee on new imported high emission vehicles could be up to $5,175, and $2,875 on used imports. This fee would then be used to subsidise discounts of up to $8,625 for people buying new electric or low emission vehicles, and up to $3,450 for people buying used electric or low emission vehicles.

The Bill has received some criticism from industries such as farming and building regarding a lack of suitable vehicles to replace current high emission vehicles such as utes. It was confirmed by Prime Minister Jacinda Ardern that the Government had considered an exemption due to the lag in technology for electric or low emission vehicles in those industries, however, this exemption was no longer in the pipeline due to the difficulties filtering out those who did not require a ute for work purposes.

The Bill was introduced in September and has passed its first reading. The Select Committee will report back in early February 2022 when the remaining stages of the Bill will be progressed.

## Overview of the Wills Act

The Wills Act 2007 ("Act") governs how wills should be prepared, executed, amended and administered. The Act was introduced to make the law around wills easier to understand, with a single reference point rather than spread over different statutes. An overview of the Act is outlined below.

- The Act applies to the wills of people who die on or after 1 November 2007 regardless of when the will was executed. However, s 40 of the Act provides guidance on which sections of the Act are modified to apply to wills made before November 2007. For example, some provisions of the Act for wills made before 26 April 2005 (the date civil union was made legal in NZ), must be read as if the words 'civil union' are not included.
- Section 8 of the Act defines a will as a document that is made by a natural person which disposes of property and/or appoints a testamentary guardian.
- Section 9 of the Act states that anyone 18 years or over may make a will, however, minors below the age of 18 may make a will if they are married, in a civil union, de facto relationship or are a military, seagoing person or with the approval from the Family Court. Section 10 of the Act goes further and allows those under 18 to make a will who have agreed to marry or enter a civil union, which will only be effective if the marriage or civil union occurs. The will does not have effect if the will-maker dies before marrying or entering the civil union.
- Section 11 states, for a will to be valid, it must be in writing, signed by the will-maker (or another at their direction), witnessed by two people together and signed by the witnesses in the will-maker's presence. Contrary to previous legislation, the Act does not stipulate where the will-maker's signature must be on the document, however, it is advised to sign at the bottom of the will. Given the Covid-19 lockdowns, the Epidemic Preparedness (Wills Act 2007—Signing and Witnessing of Wills) Immediate Modification Order 2020 is in force which modifies the attestation requirements and allows signing of wills via audio visual link. Section 14 allows the High Court to declare a will as valid notwithstanding compliance with s 11 or if the document was made overseas.
- Section 12 provides that appointed executors may witness the will, however, if they are also a beneficiary, their benefit may be forfeited under s 13 of the Act. Accordingly, it is suggested that witnesses are independent. Witnesses do not need to know that the document they sign is a will.
- Sections 15-17 of the Act provides how will-makers may change, revoke or revive their wills. A will is also revoked if the will-maker subsequently marries or enters into a civil union, unless the will was made in contemplation of marriage. An annulment of a marriage or civil union, or a separation order invalidates provision made in a will to a former spouse/partner; and the will must be read as if the former spouse/partner died immediately before the deceased.

A will only comes into effect once you die and is arguably the most important document you will ever sign. Accordingly, it's strongly recommended to seek legal advice when creating a will in accordance with the Act.

## Trusts: when is a loan really a distribution?

Loans to beneficiaries are often made without proper consideration as to whether the powers being exercised will affect the preservation of trust assets or how these will affect any benefits to beneficiaries.

Recording a payment to a beneficiary as a loan does not conclusively make it so, and such a misrepresentation could put the trustees in breach of their duties as a trustee.

Under the Trusts Act 2019, trustees have a mandatory duty to act honestly and in good faith (s 25). They also have the following default duties that apply unless the Trust Deed in question modifies or excludes:

1. a general duty of care (s 29);
2. a duty to avoid a conflict between the interests of the trustee and the interests of the beneficiaries (s 34); and
3. a duty not to make a profit from the trusteeship of a trust (s 36).

The above duties mentioned are not the complete list of mandatory and default duties under the Act but are the ones that could be considered relevant to this situation. If a trustee does not exercise their powers properly or they breach the above mentioned duties, a trustee is not entitled to be indemnified out of the trust's assets. A trustee could also find themselves liable to beneficiaries. Factors to consider include:

- Is the loan of a significant sum in terms of the trust's overall assets?
- Is the beneficiary in a financial position to pay this loan back?
- Will there be a provision for security?
- Will interest be charged?
- Is there a clear and expected repayment date?
- Could this loan be considered contrary to the interests of other beneficiaries?

If a loan is made where the prospects of it being repaid is low, there is no security, no interest being charged and no clear repayment date, the loan could easily be characterised as a distribution instead. At the very least trustees should consider the insertion of a Marshall Clause into the terms of the loan to offer some form of asset protection. The trustees should also ensure that detailed Trust Minutes/Resolutions be completed contemporaneously with any such loan document outlining the considerations the trustees have taken before entering into the loan.

A comprehensive paper trail will significantly improve the trustees' position in the face of potential future allegations of dishonesty and/or breach of trustee duties.

## Trial vs. probationary periods - what is the difference?

Trial and probationary periods look very similar and are used for similar reasons but they are fundamentally different. The main differences are set out in this article.

**Probationary periods** - Section 67 of the Employment Relations Act 2000 ("the Act") provides that a probationary period must be specified in writing in the employment agreement and that the application of the law of unjustified dismissal applies in the situation where an employee is dismissed under the probationary period. In other words, the effect of a probationary period clause is limited and an employee under probation generally has the same legal rights and protections as a permanent employee.

The probationary clause does, however, provide employers with some degree of flexibility when hiring a new employee and can also be useful to assess someone's performance, for example, if you would like to offer an existing employee a new role but you are not sure whether they have the skills to succeed in that role.
The employer is obligated to put an employee on notice, if for example, they have concerns about their performance. The employee should be given the opportunity to respond and to improve their performance over a period of time. The employer is further obligated to supervise and review the performance of the employee accordingly.

The employer also needs to follow a fair process and act in good faith before making a decision to dismiss an employee under a probationary period. Probationary periods do not prevent an employee from raising a personal grievance for unjustified dismissal, which is one of the key differences compared to a trial period clause.

There's no maximum length for probation periods. This will depend on what is reasonable in your particular situation. A probationary period can be extended (by agreement).

**Trial periods** - Section 67(A) of the Act provides that an employment agreement containing a trial period may be entered into by a small-to-medium sized employer, with a person who has not previously been employed by the employer. A small-to-medium sized employer is defined as an employer who employees fewer than 20 employees.

A trial period clause needs to be agreed on before the employee starts work, be in writing in the employment agreement and can only be used for new employees. It is further important to note that trial periods can only be used for up to 90 days, and if there is a collective agreement that covers the work to be done by the employee, that the collective agreement would prevail. Trial periods can't be extended beyond 90 days.

A probationary period could also be added on to a trial period so that when the trial period has expired there will be a further probationary period. But it would have to be fair and reasonable to do so.

A trial period clause effect is far greater and places restrictions on the employee's rights. This clause, if applied correctly can prevent an employee bringing a personal grievance for unjustified dismissal at the end of a trial period. Notice of termination under a trial period must also be in accordance with the terms of the employment agreement.

If the above requirements are not met, the trial period will not be effective, meaning the dismissed employee will have grounds for a valid personal grievance.

# Snippets

## Tenants in common: when one wants to sell

Property sharing agreements are becoming more prevalent as individuals seek certainty of outcomes, where unforeseen circumstances intervene after property purchases. The form of property ownership known as 'tenancy in common' is becoming more popular due to this. This form of ownership enables an individual to have control over the share of the property they are a part owner of, to the extent that they can decide who they wish to take over their share in the event they die or for any other reason they choose.

If the owners of a property are tenants in common that wish to go their separate ways, the party wishing to remain as the property owner, on the face of it does not have to agree to sell, thereby thwarting the wish of the other owner(s) to sell. This is where a Property Sharing Agreement ("PSA") is useful. Signed and agreed before the purchase of the property, the PSA provides paths and processes to allow an exit strategy to exist for any of the owners, in the event they wish to exit the property as owner.

The PSA includes details such as what each of the parties contributed, agree what each of them contributed to the purchase price, how much lending was obtained and if the undivided shares are unequal. It also includes who may give notice of wanting to sell, how a price value may be determined, what timeframes are deemed reasonable and what constitutes a net share of the profit to be paid out in the proportions agreed upon.

Your lawyer can talk you through a PSA and have one drawn up to ensure your future planning is safeguarded in the event that property owners decide to go their separate ways.

## Family Protection Act - claims and dates

The Family Protection Act 1955 ("FPA") becomes relevant under either a will or intestacy (where a deceased dies without a will in place) in circumstances where a claimant does not consider that they have been appropriately provided for under the deceased's estate. Proper maintenance and support is the test, which is a wide and general phrase.

So, who can make a claim under the FPA? A spouse or civil union partner of the deceased is at the top of the list. Children (includes stepchildren), grandchildren and parents in certain circumstances are also on the list. Your lawyer will be able to access your status should you wish to check that issue initially.

Where a claimant wishes to ask the court to enforce the moral duty of the deceased, notice must be given to the executors of the relevant will via the estate's lawyer within a twelve-month period from the date the probate is granted by the court in respect of that will. The required period may be longer should the applicant either be a minor or not have full mental capacity.

The court has the power to extend the timeline at their discretion based on the circumstances. It is prudent, however, to give written notice of your claim within six months from the grant of probate. Executors will have been told by the estate's lawyer that if they move to distribute the estate to the beneficiaries inside the six-month period, then an executor may be personally liable should a subsequent claim surface.

## 124 Queen Street, Hastings


124 Queen Street, Hastings the top floor has been converted to a self-contained apartment which is now available on Airbnb for inner city accommodation [Airbnb link to 124 Queen Street]

## 126 Queen Street, Hastings



Massive Music School's tutors are the best in Hawke's Bay. Providing a great service at a great location with an incredibly easy to use booking system [Link to .massivemusic.school]

**S J Scannell & Co**
**Would like to wish you and your family a Merry Christmas and prosperous New Year**
**We advise our offices will be closing on Wednesday, 22nd December 2021 at 5pm**
**and re-opening on Thursday, 13th January 2022**