S J SCANNELL & CO

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INSIDE THIS EDITION

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Lawyer opportunity

Unique opportunity to become an intrinsic part of a small well-established firm. Significant learning and career development on offer with option to acquire equity. Work across a range of legal matters using sound judgement and high levels of integrity.

S J Scannell & Co, a sole practice, is a trusted and well-known law firm based in Hastings. The firm has a very strong and large client base which comprises of commercial, farming, horticultural and family clients. The main areas of expertise cover commercial law, conveyancing (rural, commercial and residential), estates, trusts and matrimonial property matters coupled with providing general legal services to clients including civil litigation, employment law and certain areas of family law

Currently an opportunity exists for an experienced and driven lawyer to become an intrinsic part of this small well-established firm. This is a unique opportunity for somebody seeking learning and career development, to acquire an equity share in the practice over time and ultimately full ownership. You will have the chance to build your own client base in addition to the firms existing client base and grow and develop the firm for your future benefit and ownership. There are also opportunities to expand the areas of the law the firm practices in.

The firm has a reputation for high quality, efficient and friendly service and these values will need to be maintained. To be successful these values will resonate with you and you will need to be able to demonstrate strong initiative and drive towards developing and growing the business as well as assisting the current principal with the succession plan.

If this sounds like the opportunity you have been looking for, please apply with a CV and covering letter.

For confidential discussion please contact Martin on 021 959 303 or martin@engagers.co.nz

Commercial contracts and climate change: Time to think differently

There are many ways to get involved in fighting climate change, but it can feel overwhelming not knowing where to start, as climate issues can touch every aspect of our lives. For evolving businesses and individuals, the variety of options available are expanding.

The legal framework for fighting climate change started with the 2015 Paris Agreement, a legally binding international treaty. The goal was to limit global warming to well below two degrees compared to pre-industrial levels. To date, 192 parties have joined, with each country setting their own emission reduction targets, which are reviewed every five years with the aim of continually raising ambition.

In New Zealand, the Climate Change Response (Zero Carbon) Amendment Act 2019 outlines our framework to align with the Paris Agreement; setting a target to reduce our net emission of greenhouses gases (except biogenic methane) to zero by 2050. The Climate Change Commission was then established to provide expert advice to government; their goal being to keep them on track to meet the new targets.

Most recently, New Zealand made an announcement at COP26 of a new more ambitious target, to reduce net emissions by 50% below 2005 levels by 2030. The plan outlining how New Zealand will achieve this target is set to be released in May 2022. New Zealand did, however, receive the Fossil Award during COP26 from the Climate Action Network due to the fact that the Government refused to update the National Determined Contribution to constraining global temperatures. This may have an adverse effect on New Zealand's touted 'green' reputation as the award is given to countries who are "doing the most to achieve the least", and "doing their best to be the worst" in terms of climate change progress/action.

Also recently, the Financial Sector (Climate-related Disclosures and Other Matters) Amendment Bill is currently in its third reading. New Zealand will be the first in the world to require mandatory reporting of, predominantly, large listed companies, banks, insurers and investment managers; to ensure climate change is routinely considered.

Of the many layers to fighting climate change, one that may not commonly be considered, is that your lawyer can help by taking action via your legal drafting.

The Chancery Lane Project is a collective of lawyers from around the globe that have focused their efforts on developing contractual clauses to help fight climate change – enter the Climate Contract Playbook (3rd Edition); delivering climate action via legal drafting. The Playbook provides model clauses for climate solutions by incorporating climate change thinking into legal drafting. Draft clauses for a variety of documents are publicly available online for anybody to download. The clauses are drafted in the context of English law, however, a lawyer with expertise in the area of law specific to your needs would be able to assist you with the conversion process to fit within New Zealand's jurisdiction.

Areas where these draft clauses can potentially be used are commercial, corporate, construction, finance and capital markets, insurance, planning, real estate, employment, energy and transport, litigation and arbitration. There are over 70 drafted climate change clauses (which have been rigorously peer reviewed) with a user manual that provides context to the clause.

Overview of the End of Life Choice Act 2019

The End of Live Choice Act 2019 came into effect in November 2021 ("the Act"). It establishes the framework for the process, the eligibility and safeguards for the service of assisted dying in New Zealand. It is overseen by the Ministry of Health Manatu Hauroa.

Section 5 of the Act sets out the essential criteria to be eligible to receive assisted dying. The patient seeking assisted dying must:

- be at least 18 years of age,
- be a NZ citizen or a permanent resident,
- suffer from a terminal illness that is likely to end their life within six months,
- be in an advanced state of irreversible decline in physical capability,
- be experiencing unbearable suffering that cannot be relieved in a manner that the person considers tolerable, and
- be competent to make an informed decision about assisted dying.

While the first two criteria are easily verified, the other eligibility criteria are less than straight forward and may require expert evaluation. This is because the lawfulness of implementing assisted dying will depend on whether ALL the eligibility criteria have been met. If not, the person assisting could potentially be exposed to the consequences normally

dictated by the Crimes Act, such as liability for murder or manslaughter.

The criteria of "experiencing unbearable suffering" could vary from one patient to the next, therefore it is an implicit requirement for the doctor to obtain as much information as possible from the patient. If it turns out that suffering can be relieved in a way that is tolerable to the patient the "unbearable suffering" criteria will not be met and the patient will not be eligible for assisted dying.

Section 5(2) of the act provides a degree of clarification of eligibility by providing that a person is not a person who is eligible for assisted dying or an eligible person by reason only that the person:

- is suffering from any form of mental disorder or mental illness,
- has a disability of any kind; or
- is of advanced age.

Section 6 lays out the meaning of competent to make an informed decision about assisted dying. Ascertaining the required level of competence in any patient may be difficult but the Act provides a process for obtaining expert psychiatric advice when the patient's competence is in doubt.

Under section 11 of the Act, only a patient can initiate a request of assisted dying via their attending medical practitioner. Section 10 of the Act is very clear that a health practitioner cannot initiate this process on behalf of their patient. Section 33 and s.34 provides that advanced directives and welfare guardians have no weight under this Act. Section 11 provides the process that the attending medical practitioner must follow on the patient exercising this option. The steps provided for in s.11 are required to be taken before any assessment has been made of the patient's eligibility to receive assisted dying, as per s.5 mentioned above.

Section 14 applies if the medical practitioner has reached the opinion that either: the person requesting the option of receiving assisted dying is eligible, or the person requesting the option of receiving assisted dying would be a person who is eligible for assisted dying if it were established under s.15 that the person was competent to make an informed decision about assisted dying. Section 15 provides for a third opinion to be given by a psychiatrist if competence is not established to satisfaction of one or both medical practitioners under s.13 or s.14.
Section 24 allows for no further action to be taken if coercion or pressure from another person is suspected by the attending medical practitioner or attending nurse practitioner. It is important to know that a person/patient can change their mind at any time during the process.

What is a testamentary guardian and what they can/can't do

Generally, a mother and father are referred to as the natural guardians of their child. Section 26 of the Care of Children Act 2004 provides that a testamentary guardian is a guardian appointed by deed or by will by a parent of a child. This article discusses further what a testamentary guardian is and what their role allows them to do together with what they are prohibited from doing.

A testamentary guardian's role commences on the death of the parent who makes the appointment. They essentially assume part of the role as a parent for the child and must be at least 20 years old when the appointing parent dies. If the deceased parent was a sole guardian, the testamentary guardian will be the child's sole guardian. If there is a surviving parent/guardian, the testamentary guardian will be joint guardian with that surviving parent. This can ensure that the deceased parent's family stays involved with the child.

A testamentary guardian does not need to consent to their appointment, however, if they do not wish to be a testamentary guardian they would have to apply for a court order to be removed. Accordingly, it is important to discuss your wishes with the person you intend to appoint.

A testamentary guardian assists with making significant decisions for a child's wellbeing and upbringing such as:

- when the child should go to school,
- religious teachings,
- where they should live,
- permission for marriage under 18,
- medical treatment for the child, and
- any changes to the child's name.

Where there is more than one guardian, all guardians must make unanimous decisions about the child. Where there is a conflict, the Family Court can make orders to resolve a dispute.

What can't a testamentary guardian do? A testamentary guardian does not automatically gain the right to provide day-to-day care (or have custody) for the child by virtue of their appointment. They must seek a parenting order giving them the right to day-to-day care. A testamentary guardian's rights and responsibilities end when the subject child turns 18 years old, marries, enters a civil union or is in a de facto relationship.

It is important to prepare a will and include provision for the appointment of a testamentary guardian for young children, particularly in the event that both parents die, otherwise the court appoints a guardian

instead. Prior to an appointment, the appointed testamentary guardian should be consulted with first and a review undertaken each year to ensure they are still suitable for the role.

It is suggested that you contact your lawyer to discuss your options in ensuring the best outcome for your children's wellbeing.

Review of new drug testing at festivals law

Event organisers now have new legislation that allows for drug testing at concerts and festivals. Previously in New Zealand, drug testing organisations such as KnowYourStuffNZ have conducted tests at festivals with the risk of being prosecuted under section 12 of The Misuse of Drugs Act 1975.

On 23 November 2021, Parliament passed the Drug and Substance Checking Legislation bill ahead of the summer period where the Misuse of Drugs Act 1975 was amended to temporarily allow the Director-General of Health to appoint drug checking service providers under section 35DA of the Act by way of notice in the New Zealand Gazette, thus allowing for drug testing at festivals whilst a licensing scheme was developed.

On 7 December 2021, the appointment provisions were automatically repealed. Providers who were appointed before that date could continue to operate legally, even if their appointment notice expires. The Drug and Substance Checking Legislation Act 2021 now enables a licensing scheme for drug checking providers. Former Prime Minister Helen Clarke tweeted, "Testing of pills/drugs at music festivals in #NZ is to become permanent after positive evaluation of experience last summer. 68% of surveyed festival-goes who used drug-testing services changed their behaviour. This service is saving lives."

Over the 2020/2021 New Year's festivals, over 50% of what was meant to be MDMA tested as more dangerous stimulants, the most common being eutylone.

The bill received some criticism by the likes of National's Justice spokesperson Simon Bridges regarding the research behind the evidence relied on, and others have criticised the new legislation stating that the drug-testing service rather encourages illicit drug use.

An organiser of KnowYourStuffNZ has said that the testing sets up an awkward situation in people's minds, where you have police and security at the gates checking for illegal substances, then inside the event you have the organisation encouraging people to have their drugs tested.

Criminologist Dr Fiona Hutton has heavily researched the behavioural impacts of drug-checking and tells us that the drug-checking services have reduced drug-related harms, have stopped people from being hospitalised and that the evidence is very clear that drug-checking services do not increase drug use.

Although the initiative for drug-checking was brought about by the services being provided at festivals, the new legislation allows for drug-checking services to operate at sites, except for residential premises as defined in section 2(1) of the Residential Tenancies Act 1986. With the Government contributing $800,000 towards the cost of the service, critics views are that although the law provides for drug-checking services, more funds and technology would be required to ensure that there is widespread access to drug-checking .

New guidance on discretionary payments under the Holidays Act 2003

The Holidays Act 2003 (HA) sets out that employers must take into account 'gross earnings' when calculating payments for holidays. Gross earnings are defined under Section 14(a) of the Act as "all payments that the employer is required to pay to the employee under the employee's employment agreement." The legislation expressly states that these payments include productivity or incentive-based payments, but excludes any discretionary payments.

In Metropolitan Glass & Glazing Ltd v Labour Inspector, there was a dispute over the employer's Short-Term Incentive Bonus Scheme. This scheme meant that if employees met all three performance targets, they would be eligible for a bonus. The employer indicated in their policy that the payments were discretionary, "any payments are totally at the discretion of Metropolitan and there is no guarantee of any payment in any year." Based on this policy, the employer did not include any bonuses in the calculation of an employee's gross earnings. The Employment Court ruled that because the parties intended that the scheme had contractual force, the bonus payments were not discretionary and should be included in calculations for gross earnings.

This decision was recently considered in the Court of Appeal where they held a different view on the bonus payment scheme that Metropolitan offered. It was held that when drawing the line between whether a

payment is discretionary or not, you must consider whether the employer is bound by a contract to make the payment.

The Court held that where there are conditional payments that an employer must make if certain conditions are met, these payments are not discretionary and are to be included in the gross earnings calculation. However, the Court found that Metropolitan's payments under their bonus scheme were entirely discretionary. The policy around the payments labelled them as discretionary and also stated that there was no guarantee as to whether they would be paid out if the employee met their targets. It was clear that Metropolitan retained the discretion to not pay the bonus even if the targets had been met. Therefore, the Court overturned the decision of the Employment Court and concluded that the employer was correct in excluding the bonus payments from calculations of gross earnings.

This decision will help provide some certainty to employers. However, it must be noted that there is more to it than simply labelling payments as discretionary. To meet the criteria of a discretionary payment, the employer will need to ensure that they retain the discretion as to whether they make the payment or not despite any conditions being met by the employee. If employers make any productivity or incentive payments, they must firstly label them as discretionary, as well as ensuring it is clear that they are not bound in any way to make the payments under a contract and that the payments are being made entirely at their discretion.

Snippets

The future of smoking in New Zealand

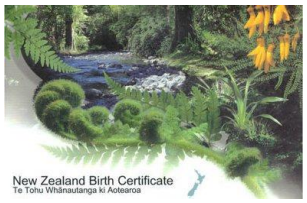
Smoking cigarettes has always been permitted in New Zealand. In more recent times the health hazards that smoking poses have been well researched, documented and publicised.

Many policies have been put in place to lower the number of people who take up, or continue to, smoke. This includes education around how it affects health, including causing cancer and other respiratory complications. Packets of cigarettes advertise these dangers on each packet, and are not allowed to be sold to those under 18. There are smokefree spaces and events. All of which being very good deterrents.

The numbers smoking have been coming down markedly; which has been encouraging. Then comes the announcement at the end of last year by Dr Ayesha Verrall, the associate Minister of Health, that legislation shall be introduced around the question of smoking cigarettes in the future. Ramping up the elimination drive. Vaping is still allowed.

The plan is to have the country smoke free in four years. There are many measures to surround this legislation, which will regulate who can buy cigarettes, who can sell them, how much nicotine is allowed to be used in each cigarette and where you can obtain support if you are addicted. The process will commence in 2022 and roll out in the following years.

Changes for birth certificates



Every child born in New Zealand receives a birth certificate including the details surrounding the time and place, who the parents are and the sex of the child. It has always been the base document for New Zealand citizens, a confirmation of their place in the world and in the system which subsequently relies on this initial information for many legal and statistical purposes. So it must be correct.

Enter the Births, Deaths, Marriages and Relationships Registration Act 2021. The Act allows for a New Zealand Citizen to self-identify. Rights are upheld for transgender, LGBT and intersex, and non-binary New Zealanders. By way of clarification, while self-identification on birth certificates has been allowed since 2018, it is now a simpler process and less intrusive to the applicant. No evidence of a medical procedure needs to be produced.

An applicant may apply to the Family Court stating that the information on the birth certificate is incorrect. It must be stated that the applicant now has a different gender identity from the one specified on the birth certificate. Some ancillary information is required also; a lawyer will be able to assist with completing the compliance paperwork.

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

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