S J SCANNELL & CO

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INSIDE THIS EDITION

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Changes to First Home products

On 19 May 2022 the Minister of Finance, Hon. Grant Robertson delivered New Zealand's 2022 Budget that included changes to the following First Home products: the First Home Grant, First Home Loan and the Kāinga Whenua Loan scheme.

The changes to the First Home Grant took effect from 19 May 2022 and the changes to the First Home Loan and Kāinga Whenua Loan took effect from 1 June 2022. Housing Minister Dr Megan Woods ("Dr Woods") stated that: "We are increasing the house price caps for the First Home Grant to align with lower quartile market values for new and existing properties. This recognises the changes in house prices over the past year,".

The Government has also removed house price caps from the First Home Loan, this provides eligible applicants with a greater choice of properties, however income caps and lender requirements will still apply to ensure that the First Home Loan is being used by buyers who need support for a first home. House price and income caps are to be reviewed every six months to ensure that they continue to stay up to date. Changes to First Home Grant in summary:

- House price caps increased, to align with lower quartile estimated values for new and existing properties.
- KiwiSaver contribution requirements adjusted, to reduce the threshold amount of regular savings to access the grant.
- New income cap category introduced for 'individual buyers with dependents', with an income cap of $150,000.
- Relocatable homes that have received a Code Compliance Certificate in the last 12 months can qualify as new properties.

- Members of eligible Progressive Home Ownership rent-to-buy schemes can access the grant amount for new builds.

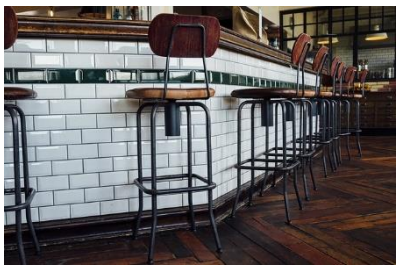
The changes to the eligibility criteria include the introduction of a new income cap category for individual buyers with dependents, and adjusting the KiwiSaver contribution requirements for the First Home Grant. Dr Woods stated that "We estimate that these changes, along with other changes to the eligibility criteria, will help thousands more first home buyers, with funding available for approximately 7,000 extra First Home Grants and 2,500 extra First Home Loans available every year." Changes to First Home Loan in summary:

- House price caps removed altogether (income caps and lender requirements still apply), to provide applicants with a greater choice of properties.
- New income cap category introduced for 'individual buyers with dependents', with an income cap of $150,000.

The Government also announced a change to the Kāinga Whenua Loan scheme, increasing the loan cap. Associate Housing Minister (Māori Housing) Peeni Henare said this change will make a real difference for whanau; "Unlocking funding support to help people into homes will reconnect them with their whenua." Further that "We made a promise as a government to change the status quo when it comes to Māori housing, and providing more funding options for whānau looking to utilise whenua Māori as effectively as possible is a vital part of that work,". Kāinga Ora's Jason Lovell, Manager of Home Ownership Products, says the announcement supports Kāinga Ora to continue helping more whānau into their first home. The change to the Kāinga Whenua Loan scheme in summary:

- Loan cap has increased from $200,000 to $500,000, to provide more choice and opportunities for people building, relocating, or purchasing a home on whenua Māori. A deposit of 15% of every dollar borrowed over $200,000 is required.

Epidemic Preparedness Notice for commercial leases and mortgages



In May 2020 temporary law changes were made to the Property Law Act 2007 ("the Act") as part of the COVID-19 Response (Further Management Measures) Legislation Act 2020. These changes related to leases of commercial properties and all residential and commercial mortgages; including mortgages related to goods (e.g., Business assets other than land and buildings). These temporary law changes are outlined below.

Commercial Leases: the period in s.245(1)(a) and s.245(3)(c) of the Act, which was 10 working days, was extended to 30 working days. This means that a landlord cannot exercise their right to cancel a lease due to unpaid rent of the tenant which has been in arrears for no less than 30 working days - and if a landlord does give notice to exercise their rights, the tenant has 30 working days after the date of service to remedy their breach. The best approach is for all parties affected to work together productively to find a solution that is feasible and will meet all parties needs and interests.

Mortgages: the notice period under s.120(1)(c) of the Act, which was 20 working days, was extended to 40 working days. This means that if a lender intends to give notice under s.119 of the Act, which is giving notice to the borrower that they are in default and outlining the action required to remedy the default, the period that the borrower has to remedy the default is currently not shorter than 40 working days after the date of service of the notice.

To give a brief background to these temporary changes: the Prime Minister, with the agreement of the Ministry of Health, utilised the special powers provided under section 5 of the Epidemic Preparedness Act 2006 to declare that the effects of the COVID-19 outbreak were likely to disrupt or continue to disrupt essential governmental and business activity in New Zealand. The result of this was The Epidemic Preparedness (COVID-19) Notice 2020. An Epidemic Preparedness Notice is something governmental agencies can use to assist them to respond swiftly, and in this instance, to the continually evolving COVID-19 pandemic.

Since the Epidemic Preparedness (COVID-19) Notice 2020 was first issued, it has been reviewed every 3 months by government resulting in it being renewed each time. It was last reviewed on 12th June 2022 and is effective from 16th June 2022 through to 16th September 2022, when it will be reviewed again. The next renewal review is due mid-September and will be notified to the public by way of an official notice on www.gazette.govt.nz.

Therefore, any temporary law changes made under the Epidemic Preparedness Notice, whilst temporary, are still in effect. If you are a landlord, you do need to comply with the current 30 working day period until such time as the Epidemic Preparedness Notice is not renewed and comes to an end. The same goes for lenders having to comply with the current 40 working day period.

A brief summary of the Fair Pay Agreements Bill

The Fair Pay Agreements Bill has been drafted with the intention of providing a framework for collective bargaining for fair pay agreements across all industries and occupations, rather than just between unions and particular employers. Introduced on 29 March 2022, it is currently at the Select Committee stage.

The Fair Pay Agreements Bill allows for unions and employer associations to set standards for all other employees in an industry. The standards that can be negotiated are base pay rates, working hours and rates for work completed outside of working hours. Once a minimum standard has been set, employers and employees will be able to negotiate above this standard, but employees cannot legally be paid less that what the Fair Pay Agreement has set as the standard rate. The current layout of the Bill allows for the terms of the agreement to be valid for three years with renegotiation possible after this period.

Fair Pay Agreement negotiations are triggered by either a union beginning to bargain if they have the agreement of either 10% of a workforce or 1000 employees, or unions can meet a "public interest test". Unions can agree to either an occupational Fair Pay Agreement or an industry one. Fair Pay Agreement bargaining will receive a government provided bargaining support person, as well as training. The government also will contribute up to $50,000 per bargaining side, which has been calculated based on four Fair Pay Agreements a year. Unions will directly update employees, while employers must allow employees to attend two 2-hour paid meetings for Fair Pay Agreement bargaining.

The Employment Relations Authority will review a Fair Pay Agreement to ensure everything is lawful before it is taken to a vote. In order for a proposed Fair Pay Agreement to be ratified, it will need the support from the majority of both employees and employers. Employers will be given one vote per employee; however, a higher vote weight will be given to those employers with fewer than 20 employees. Once the vote has been carried out, MBIE will create secondary legislation to enact the Fair Pay Agreement so that it can cover all employees in an industry or occupation.

As the Bill is currently at the Select Committee stage, amendments to the Bill will be considered with the Select Committee due to report to Parliament early October 2022. Once the Bill has passed, it is anticipated that the Fair Pay Agreement process will commence at the end of 2022.

By way of introducing Fair Pay Agreements, the wages of those on low to medium incomes will be lifted, working conditions will be set at a better standard, and those working overtime, overnight and on public holidays will be able to negotiate fairer terms for doing so.

Family Protection Act claims

The Family Protection Act ("the Act") is utilised by certain classes of family members who have an issue with the extent of their inheritance; either due to being left out entirely or where they perceive the share received is less than what is reasonable and fair because the deceased has breached their moral duty to that person to adequately provide for their maintenance and support.

An application is made to either the Family Court or the High Court. That said, there are only a limited class of people that can make a claim under the Act; being:

1. a spouse or civil union partner;
2. a de facto partner who was living with the deceased at the time of death;
3. children of the deceased;
4. grandchildren of the deceased;
5. stepchildren; and
6. parents of the deceased.

There are of course some parameters to each of these classes of people who may wish to bring a claim against an estate. Claims can be settled informally with the help of lawyers via negotiation, however, some claims will end up in the Family Court.

The courts will consider whether there has been a breach by the deceased of their moral duty towards the class of person/persons making the claim and then what, if any, monetary award will be made from the estate to repair such breach. Of course, each case will vary greatly and any awards will be based on the facts of the case; and the courts have a fairly wide discretion given the variety of case law in this area.

Focusing only on the category of persons 1 to 3 above: there is a requirement for the applicant to establish that there has been a failure to provide for their maintenance and support under the

deceased's will. It will then be assessed whether the claim is for both maintenance and support or just support.

If you wish to make a claim, it must be filed in the courts within 12 months of the grant of probate. There are a number of forms to be completed, namely a notice of proceeding, statement of claim, affidavit of the applicant in support of the claim and 'ex parte application' for directions as to service and for representation. A lawyer will assist you drafting these in accordance with the specific High Court rules.

Whilst we can never fully protect an estate from having a claim made against it; we can try to limit the fallout from any claim made. As a will maker, it is best to remember your moral duty to provide for your family members. Careful consideration should be given to the circumstances of a situation where you may wish to leave someone out of your will; remembering that they could bring a claim against your estate under this Act. Some will makers consider leaving something, rather than nothing, which could be considered as fulfilling your moral duty and rebuking a claim against your estate. You can also make a written explanation of why your estate has been left to certain people (and not others) and keep this in your deeds with your will.

For more information on the class of people 4 to 6, please contact your lawyer direct as each category has specific rules and restrictions relating to them.

Attribution vs market salary rules

The introduction of the 39% tax rate for individuals who earn over $180,000 from 1 April 2021 has reignited Inland Revenue's interest in the income attribution and market salary regimes. These rules currently prevent a person from having income earnt from individual efforts or "personal services" taxed through an associated entity at a lower tax rate. With an 11% difference between the top individual tax rate and the NZ company tax rate, the application of these rules is likely to be closely scrutinised in upcoming years.

The attribution rules will generally apply when a taxpayer who earns income of more than $70,000 from personal services inserts an associated entity between themselves and the party acquiring their services. These rules do not strictly apply if the associated entity derives income from numerous, unrelated parties, provided one party does not make up 80% or more of the entity's income.

For example, compare the two scenarios:

1. Paul contracts Sarah Limited for $200,000 – all the services are performed by Sarah, and Paul is Sarah Limited's only client.
2. Four non-associated individuals: Paul, Eugene, Rebecca and John, each contract Sarah Limited for $50,000 each – all the services are performed by Sarah.

The income attribution rules would only apply to scenario 1 above, forcing Sarah to return all of Sarah Limited's net income in her personal tax return.

However, in the second scenario, although the income attribution rules do not apply, the market salary principles still need to be considered to determine the amount of income to return in Sarah's personal tax return.

The Supreme Court established the leading precedent in the case of Penny & Hooper v Commissioner of Inland Revenue (2009) that a failure to pay a "commercially realistic salary" for services rendered is an important consideration in determining whether an arrangement amounts to tax avoidance.

Revenue Alert 21/01, released on 29 March 2021 ahead of the increase in the top marginal tax rate, also provides further guidance, and states that Inland Revenue is more likely to examine arrangements where the salary paid from an entity to an associated working individual is less than 80% of the entity's net income. While this is not a legislated de minimis rule, it suggests it is unlikely Inland Revenue will challenge the amount of an individual's salary if the 80% threshold is met. On the other hand, not meeting the threshold should not automatically amount to tax avoidance.

Both the attribution and market salary regimes should be kept in mind when determining salary levels. People don't often appreciate that there is both a specific set of income attribution provisions to consider and a separate market salary principle as per 'Penny & Hooper'.

Snippets

Trees under Emissions Trading Scheme

As climate change issues come more clearly into focus, so do the relevance and effects of the Emissions Trading Scheme (ETS). If you are in the ETS, or are buying or currently own a property that has trees that are affected by the rules and regulations surrounding the ETS, then you definitely need to be vigilant. There is no doubt that combined assistance is required from your lawyer and accountant alongside the consultants that are at the coalface implementing and administering the ETS.

1990 is a key year with regard to the ETS. Forests planted before 1st January 1990 cannot be counted as additional carbon storage under the ETS, they are part of the baseline emissions and removals, and cannot be registered to earn units for carbon storage. This means that should an owner of such trees cut them down and change the land use (i.e., not replant the relevant area with new trees) without being granted an exemption or offset, the owner would then pay for any emissions that are created from the deforestation. The effect is a line drawn which can hugely discourage excess deforestation. Realistically, only forestry use is appropriate for those lands. On the other side of the coin, trees planted after the 31st December 1989 are entitled to be in the ETS with the pluses and minuses it has to offer.

There are offsets and flexibility. The rights of the pre and post 1990 landowners are starkly different. Caution is paramount. Understanding of long-term plans within the area and their implications are crucial. In many instances, the same rural land being sold may house trees whose planting dates straddle the 1989-1990 guideline.

The ETS has become entrenched, with 1st January 1990 being the unbending default position.

Seller/agent slip-ups

One of the clearly defined and longstanding requirements regarding the sale and purchase of land in New Zealand is that the agreement must be in writing and signed by both the accurate seller and purchaser.

When the seller of the land uses a real estate agent to assist with the sale, that agent is the seller's agent. Under the law of agency, any representation made by the agent is deemed to be on behalf of their seller principal. However, within the parameters of the selling of land process outlined above there are opportunities for slip-ups to occur.

If a misrepresentation, made by the seller or their agent, occurs between the commencement of the marketing program and the signing of an agreement for sale and purchase document, then an issue may arise where what is purported to be on sale, is not totally reflected in the written agreement.

The facts are very important here. The misrepresentation made must directly affect the purchaser's decision to buy the land. If the chain of causation is broken between the making of any misrepresentation (either verbally or in writing) and the signing of the written agreement, then the claim would fail. The test is that the purchaser made the decision to buy, with the misrepresented facts being part of the marketing facts presented – which were not amended, clarified or rectified along the way.

If any issues arise in this area, it is advised to obtain legal advice as soon as possible; whether you are a seller or a buyer. Time frames apply and everyone involved needs to be put on notice.

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