

Winter NEWSLETTER 2021

Kimberly Jarvis – Partner

We welcome Partner Kimberly Jarvis back from parental leave this month, following the arrival of her second child.

Kimberly is a highly respected litigator who has specialised in commercial litigation, employment law and complex relationship

property and international family law disputes, appearing at all levels including the Supreme Court.

Kimberly is recognised amongst our clients for her practical and pragmatic solutions and ability to build strong relationships, and is a dynamic leader of our litigation team.



SENIOR SOLICITOR APPOINTMENTS

We are pleased to recognise achievements in our firm of Leanne Pryde and Ben Taylor who have each been promoted to Senior Solicitor roles.



LEANNE PRYDE
SENIOR SOLICITOR
LL.B

Leanne has a wealth of experience in all kinds of property matters, Wills, Enduring Powers of Attorney and estate planning and has a compassionate approach which is valued particularly in her elder care practice.

Leanne provides good solutions for estate planning and trusts, and has strong connections in the Mosgiel office where she is based 4 days a week.



BEN TAYLOR
SENIOR SOLICITOR
LL.B

Ben is a skilled litigator experienced in various aspects of Court work, including relationship property, employment law, civil and estate litigation.

Our clients value Ben's clear analysis and communication of complex legal issues and his calm approach to what is often a challenging time.

EXCITING CHANGES AHEAD FOR WEBB FARRY

After more than 40 years' at 79 Lower Stuart Street we are excited to share the news that we are on the move!

We will be the proud occupants of the top two floors of a Webb Farry branded building at 70 Stuart Street (previously R&R Sport and Torpedo 7).

We are so fortunate to stay in our prime location close to the Court, Hospital and CBD with all the fabulous boutique cafés, bars

and retailers nearby. When presented with an impressive blank canvas with character features and the opportunity for a fresh modern look it was too good to miss.

For the next few months, our reception, boardroom and client meeting areas will be at Level 8, ASB House. Some of our team will remain in our office on the first floor of 101 Stuart Street (new entrance between Potpourri Café and Gallery De Novo).

These temporary arrangements will enable the exciting fitout of our new offices to be completed for us later this year.

Our postal address (PO Box and DX), phone number, website and email addresses will all remain the same. We welcome you to visit us at ASB House and look forward to unveiling our new building later in the year.

COVID-19 VACCINATIONS FOR EMPLOYEES

The Covid-19 vaccine roll out began on 20 February 2021 and is New Zealand's largest ever vaccination programme. The Government has purchased enough vaccine for everyone aged 16 and over and has made it mandatory for certain workers to undergo Covid-19 vaccinations. New Zealanders enjoy the freedom to refuse medical treatment, so can employers require employees to receive a Covid-19 vaccination?

Employees required to be vaccinated

The Covid-19 Public Health Response (Vaccinations) Order 2021 came into force at the beginning of May 2021. The Order requires certain employees of Government bodies or public function roles to be vaccinated, including those working at the border, in managed quarantine or isolation facilities, and some cabin crew on aircrafts.

Other employees

Private employers must consider their employees' rights to be free from discrimination contained in employment and human rights law. Rights include freedom from discrimination on the grounds of disability, sex, pregnancy and religious or ethical belief, which may all be valid reasons why employees choose not to get vaccinated. The Health and Safety at Work Act 2015 competes against these fundamental rights, as employers have a duty to ensure the health and safety of their workers and the health and safety of people at risk from the work of their business. While practical steps can include the use of PPE, some employers are considering vaccination regimes.



In *Department v Labour Idea Services Ltd* a worker acquired Hepatitis B after being bitten by a patient known to be Hepatitis B positive. The worker suffered acute liver and kidney failure resulting in a liver transplant. The employer had strongly encouraged Hepatitis B vaccinations and in considering whether the employer should have required proof of immunity the Court stated that:

It can hardly be a practicable step demanded of an employer to protect the safety of an employee to require a blood test that the employer has no authority to enforce by either insisting that the test be carried out or by restricting or removing employment if there is a refusal by the employee to do so.

The Court rejected the proposition that the employee should have been prevented from working until she was immune or fully vaccinated and determined that the worker "was provided with all of the information she needed about attending her general practitioner and thereafter medical care and judgement as to treatment lay with that general practitioner."

Aside from those employees covered by the Covid-19 Public Health Response (Vaccinations) Order 2021, it is clear that businesses cannot require that an employee be vaccinated. Businesses can require that certain work must only be done by vaccinated workers if there is a high risk of contracting and transmitting Covid-19 to others. Before a business can decide that their work is high risk and requires vaccination for health and safety reasons, that business must first assess its Covid-19 exposure risk. This is an involved process and must include consultation with workers, unions and other representatives when assessing the risk and when deciding how to eliminate or minimise the risks. Information on how to complete that risk assessment can be found on the Work Safe website.

At this stage, outside of the groups for whom vaccination is already compulsory, it will be a minority of all work in New Zealand that will satisfy the health and safety risk test for requiring vaccination, although this could change if there is a shift in the Covid-19 situation in New Zealand.

By Ben Taylor and Rachel Stedman

Employment rights

It is important to note that a person's vaccination status is personal information and generally an employee will not need to disclose or prove their vaccination status to their employer or potential employer. The exception to this is where work cannot be done by an unvaccinated worker, in which case a business can ask a worker to prove their vaccination status. These rules also apply during job interviews and any information about an employee or a potential employee's vaccination status will need to be collected and handled in accordance with the Privacy Act.

Where an employee is doing work that can only be done by a vaccinated worker but the employee is not vaccinated, the normal principles of employment law will still apply. It is possible for employers and employees to agree on a change in the employee's work duties, a period of paid leave or some other solution, provided that the process is worked through in good faith and results in a fair and reasonable outcome. If all other options have been exhausted, restructuring or redundancy might be considered but employers should take legal advice before exercising this option.

It is possible for workplaces to require new employees to be vaccinated, but if vaccination is not reasonably necessary for the role (based on a health and safety risk assessment) then employers run the risk of being penalised for unlawful discrimination if they reject a potential employee on the basis that the employee cannot prove that they have been vaccinated. Existing employment agreements and workplace policies can be amended by negotiation between employers, employees and unions. This might include variations related to Covid-19, such as vaccination, flexible working or changes to a job description.

The interaction between Covid-19 and employment law is constantly evolving. Get in touch with the team at Webb Farry if you would like to have a discussion about how Covid-19 might affect your role as an employer or your rights as an employee.

THE NEW BRIGHT LINE TEST: WHAT IT MEANS FOR YOU

As part of wider efforts to ease the ongoing housing crisis, New Zealand introduced a bright line tax for residential property transactions in 2015. Although not defined as a Capital Gains Tax, the Bright Line Test deems the rise in value of a residential property ("capital gain") to be taxable income under the Income Tax Act 2007, if the sale occurs within a specified time period of the acquisition (the "Bright Line Period").

The Government announced in March 2021 that it would be extending the Bright Line Test further, as well as amending other tax provisions surrounding residential property, to address the continuing pressure on house prices in New Zealand.

The Old Position

The Original Bright line Test

The first iteration of the Bright Line Test came into effect through the Taxation (Bright Line Test for Residential Land) Act 2015. The Bright Line Period was set at 2 years, and applied to any residential property acquired on or after 1 October 2015.

If a property transaction was caught by the test, it would be exempt from the bright line tax if it came within a statutory exception:

- The property meets the definition of a 'main home' (main home exception);
- The property was inherited;
- The property was being held by an executor or administrator of a deceased person's estate;
- The property was owned by a Trust, and the principal settlor, who lives in the property, does not have a main home.

The main home exception applied where you had treated more than 50% of the property as your primary place of residence, for more than 50% of the time that you owned the property.

Date of Acquisition

The date of acquisition is generally the date a purchaser first acquires an interest in the property (typically the date that an Agreement for Sale and Purchase is entered into) and not the settlement or possession date. The date of acquisition can vary however, depending on the type of land being purchased, and whether the purchaser subsequently nominates another purchaser to complete the transaction.

The 2018 Amendment

In 2018, the Bright Line Period increased from 2 years to 5 years. No other changes were made. The new 5 year test applied to any residential property acquired on or after 29 March 2018.

The New Position:

What Has Changed?

Although the legislation changing the Bright Line Period has been enacted a number of the other changes announced in March 2021 have yet to be passed into law.

The Bright Line Period

The Bright Line Period has been extended from 5 years to 10 years. This new 10 year test will apply to any residential property acquired on or after 27 March 2021.

For newly built ("New Build") properties, the Bright Line Period will remain at 5 years. The Government plans to consult with various New Zealand tax and property communities over the coming months to define what will constitute a New Build for the purposes of the Bright Line Test. While the full scope is currently uncertain, it is expected to include properties acquired within one year of receiving their Code Compliance Certificate under the Building Act 2004.

Once the meaning of New Build is determined, the Government intends that any properties purchased on or after 27 March 2021 that fit the criteria will retroactively have a 5-year Bright Line Test applied.

The 'Main Home' Exception

The earlier main home exception to the Bright Line Test will be amended to embrace 'changes-of-use' during the Bright Line Period. This means that if you sell a residential property during the applicable 10-year Bright Line Period (or five years, for New Builds), the Bright Line Test will apply to any continuous 12-month period (or periods) when the property was not being used as your main home – if any. Consider the following, as an example:

You acquire a residential property (not a new build) in June 2021, and then sell it six years later. During this period, you live in it as your main home for four years, but then rent it out for two years (24 months):

By Tom Clout and Jordan Wilson



- The Bright Line Test will apply to the transaction, because this is a residential property acquired on or after 27 March 2021 and you have sold it within 10 years;
- The main home exception applies for the four years that you used the property as a family home; however
- For the two years that you rented the property out, you will be required to pay tax on a proportionate amount of any capital gain made on the property.

For properties purchased prior to 27 March 2021, the earlier main home exception will continue to apply.

The Deductibility of Interest

Traditionally, the interest paid on any loan used to acquire a residential property has been allowed as a deductible expense against the income derived from that same property in any given tax year. The effect of this is to produce a lower taxable income. This position is changing.

For any residential property acquired on or after 27 March 2021, interest will not be a deductible expense.

Interest on loans for properties acquired before 27 March 2021 can still be claimed as an expense, however, the amount you can claim will decrease by 25% over the next 4 income years until it is completely phased out by 1 April 2025.

What Does This Mean for You?

If you have acquired residential property since 1 October 2015, you will fit into one of three categories:

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If you acquired the property between 1 October 2015 and 28 March 2018 (inclusive):

- The 2-year bright line period will have expired; and
- You can claim any interest payable on the loan used to acquire the property as a deductible expense, however, your ability to claim interest payments as a deductible expense will be phased out by 25% per year over the next four tax years.

If you acquired the property between 29 March 2018 and 26 March 2021 (inclusive):

- Any capital gain on the property will be subject to Bright Line Tax if you sell it within 5 years;
- If you have lived in the property for at least 50% of the time you have owned it, you will be able to claim the main home exception;

- You can claim any interest payable on the loan used to acquire the property as a deductible expense, however, this will be phased out at the rate of 25% per year over the next four years.

If you have acquired the property on or after March 27 2021:

- Any capital gain on the property will be taxable income if you sell it within 10 years. If your home is a new build, the existing 5 year period will apply;
- The new change-of-use rule will apply when calculating the proportion of time you owned the property as your main home, and how much tax is payable on any capital gain;
- You are not able to claim interest payable on the loan used to acquire the property as a deductible expense. Different rules will apply to New Builds.

If you currently own residential property, are thinking of selling a property that is captured within one of the Brightline periods, or are looking to purchase a new property, please feel free to contact us for specific advice on what your Brightline Tax and interest deductibility implications may be.

The information in this article is general in nature and subject to amendment once the relevant taxing provisions have been enacted.

WHO'S WHO

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