

PropertySpeaking

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L A W Y E R S

Welcome to the first edition of *Property Speaking* for 2017. We hope you find the articles both interesting and useful.

To talk further about any of the topics covered in this e-newsletter, please don't hesitate to contact us – our details are above.



Sharing a Driveway Know your rights and obligations

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Key tax considerations

Becoming an Airbnb host sounds like the perfect way to fund some overseas travel for yourself and rent out your home while you are away. The popularity of online booking platforms such as Airbnb, BookaBach and Holiday Homes has grown significantly over the past few years. They are seen as easy for property owners to market and rent their property to the end user, and it turns idle holiday homes or spare bedrooms into income earning assets.

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Your KiwiSaver funds – more flexible than you might think

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More on multi offers

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Grants available to insulate rental properties

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Sharing a Driveway

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Right of way easement

The most common shared driveway is formed by an easement, granting 'A' the right of way over 'B' (or part of 'B'). The rights and obligations of each party will be found in the easement certificate or instrument registered on the titles to the respective properties. It's likely those easement instruments will refer to the Land Transfer Regulations 2002 and Schedule 5 of the Property Law Act 2007, which set out the implied rights and covenants that apply in right of way easements.

Both the Regulations and the Act allow the grantee and the grantor (and their agents, invitees, tenants and so on) the right to pass and re-pass over the easement area on foot, or with vehicles, machinery, plant and stock. The parties must repair any damage that they cause and they must keep it clear of obstructions such as parked vehicles or wheelie bins. If your neighbour parks on the right of way but you can still get past, then they may not be in breach of the implied rights.

The Regulations state that the cost of general repairs and maintenance of the right of way is to be *shared equally* between the parties who use the right of way. The Act states, however, that each party must make a '*reasonable contribution*' to the cost. This would generally mean that the owner of the rear property would contribute more than the owner of the front property, as they would use a larger portion of the driveway. Your easement instrument should indicate whether the Regulations or the Act apply.

Access lot

These days it's common for subdivisions to contain 'access lots' that allow you to reach your property. These are recorded on your title, showing that

you own a share of the access lot along with your neighbours who also use it.

For example, if five properties use the access lot, each property is likely to own a 1/5th share. The Act generally also applies to access lots. Again, your title will give details as to your rights and obligations in respect of the access lot. It is, however, likely that the maintenance and repair costs would be borne by the properties based on their share of the access lot.

Body corporate

If you own a property within a body corporate then your body corporate's rules will govern the use of your driveway (or 'common area' as it may be known).

Body corporates usually have tighter rules regarding the use of the common area. The rules can restrict the noise level of vehicles, hours of use and prohibit parking on the common area. This can be an issue if you only have one allocated park in the body corporate, but use more than one vehicle.

Your body corporate is responsible for the maintenance and upkeep of the common area; this is paid for with your body corporate levies.

If you have a dispute regarding the use of the common area, it's likely that the body corporate rules will specify a dispute resolution process.

Cross lease

If you own a property with a cross lease title your driveway is also generally called a 'common area' and is owned by all properties in the cross lease. The lease document registered on your title will explain how the common area can be used. Usually, however, the common area is designated solely to allow access to your flat and it's likely that you may not park on the common area. Maintenance costs are likely to be shared equally between the parties to the cross lease.

If you have an issue with your neighbour over the shared driveway, we suggest you contact us to ensure you're 100% clear on your rights and obligations that specifically relate to your property *before you talk with your neighbour*.

Remember that at the end of the day you'll have to continue living beside each other, so losing your temper and getting your neighbour's car towed away from the driveway will not be the best course of action! ●





Airbnb

Key tax considerations

Becoming an Airbnb host sounds like the perfect way to fund some overseas travel for yourself and rent out your home while you are away.

The popularity of online booking platforms such as Airbnb, BookaBach and Holiday Homes has grown significantly over the past few years. They are seen as easy for property owners to market and rent their property to the end user, and it turns idle holiday homes or spare bedrooms into income earning assets. BookaBach currently has more than 12,200 holiday rentals and Airbnb has 15,000+ hosts. Airbnb hosts' average annual income in 2016 was \$3,800.

If you want to become an Airbnb host, you'll need to consider your income tax situation, GST and your ownership structure.

Income tax

Mixed use apportionment

Airbnb rental income is specifically taxable under the Income Tax Act 2007.

Deductions are allowed if incurred in deriving income or in carrying on business to derive income, and they are subject to limitations:

For Airbnb rentals, the deductions are usually split between:

- » Direct costs connected to the derivation of income, for example, commission fees, cleaning costs and so on, and
- » Mixed use costs (rates, interest, power, etc) are apportioned if your property has both a private and an income derivation.

The mixed use apportionment (MUA) rules apply if there's private use of your property, income use of your property, and there's a period of non-use of 62+ days in an income year.

The formula for determining MUA percentage is:

$$\text{Expenditure} \times \frac{\text{Income earning days}}{\text{Income earning days} + \text{counted days}}$$

Let's use Lewis and Tara as an example.

They stay in their beach house all January and another 19 days over the rest of the year. They rent their house to unrelated guests for \$400/night for 100 days a year.

The MUA rules apply:

- » 50 x private days
- » 100 x income earning days
- » 215 x non-use days
- » Private use is 50/150 (33%), and
- » 67% of mixed use costs can be claimed.

Under general apportionment rules, availability would mean Lewis and Tara's claim is based on 315/365 days = 86.3%.

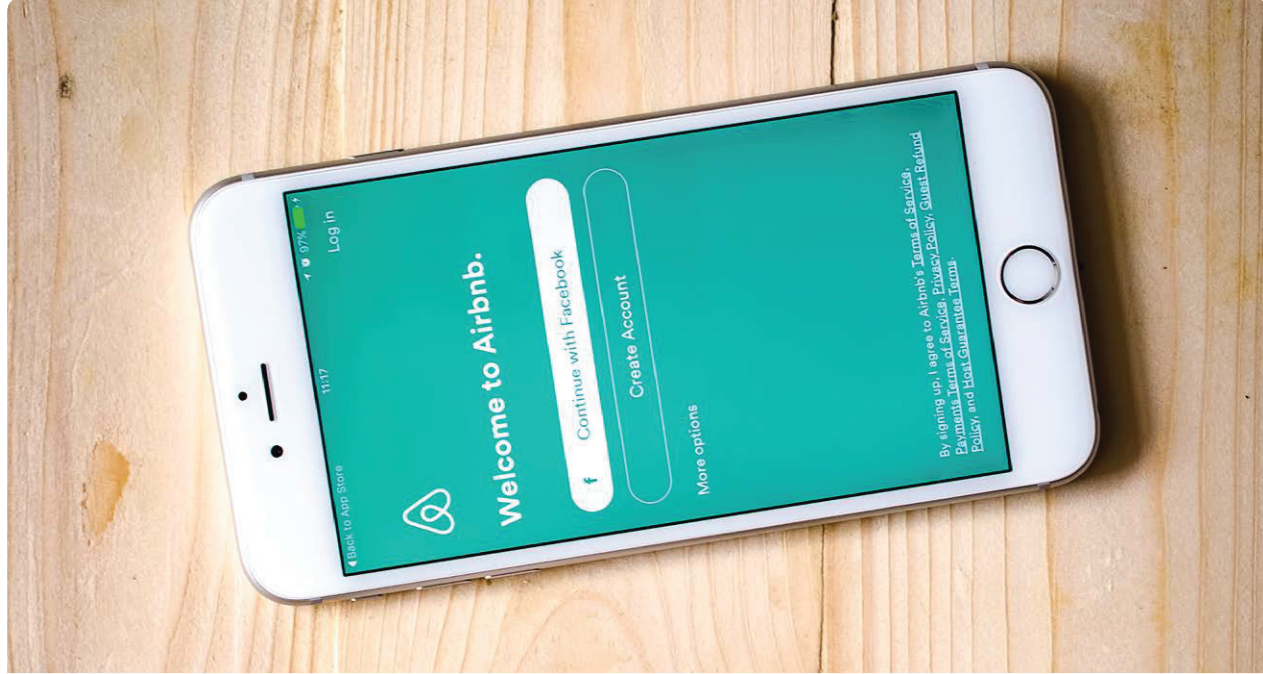
Their direct Airbnb costs are \$2,750 (cleaning, marketing and supplies). The mixed costs are \$34,000 (interest, power, internet, Sky and insurance) of which Lewis and Tara can claim 67% which is \$22,780.

Their tax calculation is:

- » Income \$40,000
- » Deducting their direct costs (\$2,750) and mixed costs (\$22,780), and
- » Profit is \$14,470.

Apportionment of deductions

Deductions must be for actual expenditure incurred in gaining income, they must be fair and reasonable, and based on fact and not speculation.



Property Briefs

Your KiwiSaver funds – more flexible that you might think

By now, most first home buyers are aware that they can use a portion of their KiwiSaver balance to contribute towards the equity in their house purchase.

What isn't commonly known is that it's possible to have a home owned by a trust, or partly owned by a trust, or a home owned in part shares by other people (parents, for example) and you can still use your KiwiSaver funds to contribute towards the purchase.

This flexibility comes with certain conditions, the usual one being that the person using their KiwiSaver must use the property as their primary place of residence.

If you want to buy your first home using a trust as your ownership structure, or want an ownership structure that allows you to be flexible with parents or other sources of cash which contribute towards the equity position, it's well worth talking with us and your KiwiSaver provider to see if this will work for you. ●

More on multi offers

In a property market short of stock, buyers are hearing that their offer "might be a multi offer." This creates a lot of confusion and uncertainty. Although we covered multi offers in our Summer 2016 edition, we believe it's worth reiterating our advice in this tight real estate market.

Once you see a property to buy, you'll need to get your offer prepared, checked and presented quickly.

First in – first served. Right? Wrong! There are no real rules around how offers are to be presented to sellers by real estate agents. If one buyer makes a written offer, but the agent knows a second party is also wanting to make an offer, the agent is in a difficult position. Their client (the seller) will want to view all of the offers and most sellers are prepared to wait until all offers are ready to be presented. This can often mean a

situation that started out as a single offer, can quickly evolve to a multi offer situation.

As a prospective buyer, what do you do if you have invested time and money getting an offer prepared, thinking you would be the only one?

There's no simple answer unfortunately. It's the real estate agent's responsibility to treat each purchaser fairly. The only real way to do this is for them to put the first offer on hold until all other prospective buyers also have their offers ready.

This results in almost every listing being a de facto multi offer. In order to manage and protect your own expectations, you should approach a purchase with this in mind.

Real estate agents are not the only ones who can prepare and present offers to the seller. A buyer can instruct their lawyer to prepare an offer and present to the seller's lawyer which has the effect of getting around the multi offer process.

If you are experiencing multi offer situations, talk with us on how best to protect yourself and give yourself the best chance of succeeding with your purchase. ●





Property Briefs

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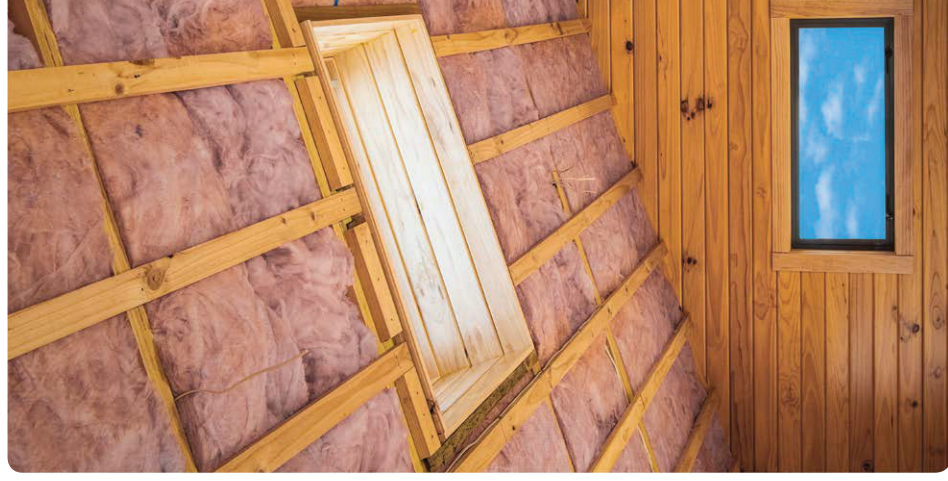
Grants available to insulate rental properties

Recent changes to the Residential Tenancies Act 1986 require all rental properties to have ceiling and underfloor insulation meeting a set standard, where reasonably practicable, by 1 July 2019.

A limited number of grants (for 50% of the cost) are available through Warm Up New Zealand: Healthy Homes, on a first-come-first-served basis for rental properties occupied by low-income tenants and are not owned by a government agency. The criteria are:

- » Rental property was built before 2000
- » The named tenant has a Community Services Card, and
- » The named tenant has been referred by the Ministry of Health's *Healthy Homes* programme.

It's important to keep your tenants warm and dry. To find out more, click [here](#).



Airbnb

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The onus is on the taxpayer that the apportionment is appropriate.

In the case of property the courts have accepted the floor area apportionment as a form of measurement and it must also consider the use of the area.

Where MUA rules don't apply, then you must still make an apportionment between private and income earning use. There is no single prescribed formula for apportionment.

In summary, income is assessable and deductions are direct costs that are deductible if related to that income; mixed costs are to be apportioned and deductible if related to income. It's advisable to talk with your accountant on this.

GST

GST registration is only required where the gross rental income exceeds the threshold of \$60,000+. Registering for GST will impact on the cash return and, if you sell your property, it will be subject to GST.

Ownership

Airbnb properties can be owned as joint tenants, tenants in common or in a partnership as defined in the Partnerships

Act 1908. You will need to discuss income tax and GST implications with your accountant.

Other considerations

Rates/Consents: Local councils may impose additional requirements for visitor accommodation for which you may need to register. There could also be additional rate charges or resource consent application requirements.

Insurance: Standard house and/or contents insurance does not cover Airbnb-type rental. Talk with your insurer so you have appropriate and sufficient insurance.

Lending: Lenders treat the provision of visitor accommodation differently to long term rental. Airbnb rental income may not be counted as revenue, unless you can show sufficient activity for an extended period (so you're operating more like a business). As well, generally banks will not lend to cover upcoming GST payments.

Opening up your home to Airbnb guests can be an amazing experience. But it will only be that way if you keep good accounting records, provide accurate information to the Inland Revenue and ensure you have sufficient funds on hand to pay your outgoings such as GST, rates, insurance and interest repayments on time. ■