



Tuesday, 19 October 2021

## Legal Advice for Screen Work at Alert Level 3 (Phase 3) in Auckland

ScreenSafe has been seeking clarity about the practical implications of Alert Level 3 (Phase 3) in Auckland.

We have done an in-depth comparison of the [available public guidance](#) compared to the [ScreenSafe COVID-19 Protocols](#) and have also sought WorkSafe and Legal advice.

### Our Initial Assumption

Seeing as hairdressers and other close-contact work can re-open at Phase 3, the initial logical conclusion was that Close Proximity Work in the screen industry would be allowed too.

And looking further, comparing available public guidance and the ScreenSafe Protocols, there seems to be a lot to suggest that Level 3 (Phase 3) in Auckland is very similar to filming at Alert Level 2. Just without regional travel.

### Legal Advice

We sought WorkSafe and legal advice on the following assumption:

*“With the exception of regional travel not being allowed, all other guidance for Level 3 (Phase 3) in Auckland seem to correspond to the equivalent of ScreenSafe Level 2 filming protocols, including an allowance for Close Proximity Work.”*

**The legal opinion we received can be found at the end of this PDF, but essentially it comes down to this: The government has not provided enough information about Phase 3 to form a legal opinion, so they were unable to recommend our assumption.**

Or in legal terms: *“The government has only provided very high level guidance at this stage; until this crystallises into legislation, the government is simply signposting where it – at this stage – intends to move, rather than creating any concrete frameworks, rights or obligations. Therefore, we emphasise that it is simply not possible to provide definitive advice at this stage about the specific activities legally permitted at Phase 3.”*

So as much as we still hope that Phase 3 means we can do Close Proximity work, we just don't know. And we can't offer any definite advice on this.

### Moving Forward

As much as we would all love to be back working again, public health and the safety and wellbeing of cast and crew must be at the forefront of our thinking. It is what has so far provided our clients, funding bodies and overseas clients with the assurance that New Zealand is the right place to base their productions.

We will continue to monitor government guidance and seek WorkSafe and legal advice. And as soon as we have additional advice or clarity, we will issue further guidance.

Attached for your information is the legal opinion we received.

Sincerely,

The ScreenSafe COVID-19 Group

CC:

NZFC

NZ On Air

SPADA

NZAPG

SIGANZ

## Attachment: Legal Advice per 12<sup>th</sup> October 2021

ScreenSafe sent Minter Ellison a proposal outlining our thinking, and drawing obvious comparisons between Level 3 (Phase 3) guidance and ScreenSafe Alert Level 2 Protocols.

### The main questions asked were:

- 1) Is our logic and reference to current legislation and government guidance sound?
  - 2) Are there any major flaws, or serious risk of us breaking the law, based on our conclusions from available government guidance?
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As instructed, we have reviewed ScreenSafe's Phase 3 Proposal and Guidance, and have answered your key questions **below**. However, as an important overriding point, we emphasise that there is currently limited information available in respect of Phase 3, and further that the specific activities that are permitted under this Phase are subject to change by the government at any time and without advance notice. The government has only provided very high level guidance at this stage; until this crystallises into legislation, the government is simply signposting where it – at this stage – intends to move, rather than creating any concrete frameworks, rights or obligations. Therefore, we emphasise that it is simply not possible to provide definitive advice at this stage about the specific activities legally permitted at Phase 3. If ScreenSafe decides to issue its own prescriptive guidance while there remains a high risk of uncertainty and likely future changes by the government in this area, ScreenSafe may be exposed to legal risks if its guidance is not in fact accurate and able to be relied on.

### **1) Is the logic and reference to current legislation and government guidance sound?**

Currently, the government's COVID-19 website indicates that "*close contact businesses, like hairdressers, barbers and beauty salons, can reopen, with workers wearing face coverings*" at Phase 3. Given that close proximity work in the screen industry has previously been classed in the same category as the work of hairdressers and beauty salons, it seems logical (and therefore likely) that such work should be permitted at Phase 3; however, at this stage this is a speculative assessment only, as the government is approaching the Phase shifts with a degree of flexibility that may not necessarily mirror the restrictions seen during previous outbreaks.

The Phase shifts are not a separate legal framework, but appear to be incorporated in the existing Alert Level framework by amending the COVID-19 Public Health Response (Alert Level Requirements) Order (No 12) 2021 (the **Order**); for example, when the government announced that picnics would be permitted under Alert Level 3, clause 32A was inserted into the Order under the Part setting out the requirements for Alert Level 3. At best, the Phase shifts are sign-posting by the government of its intended relaxation of *some* restrictions at Level 3.

For this reason, we do not share your view that the opening of hairdressers "triggers" clause 34 of the Order; clause 34 is specific to physical distancing requirements at Alert Level 2, and the Phase shifts currently appear to be a road-mapping exercise in respect of Alert Level 3. Therefore, we would suggest removing references to this legislation in the Proposal and Guidance, instead noting that it seems likely, on the basis of the (limited) available government guidance and on previous restriction experience, that close proximity work within the screen industry will also be permitted at Phase 3 – but also that this will need to be confirmed by the government.

### **2) Are there any major flaws or serious risk of ScreenSafe breaking the law based on the conclusions drawn from available government guidance?**

As noted above, there is limited government guidance available in respect of Phase 3; without clear guidance (and ideally legislation), it is challenging for ScreenSafe to confidently seek to provide definitive guidance around what will and won't be lawful. Therefore, we would suggest keeping initial guidance as high-level as possible, noting that more comprehensive guidance will be able to be provided when the government provides greater clarity in respect of Phase 3.

We also note that screen industry PCBU's should be conscious that any guidance provided by ScreenSafe should not displace a case-specific risk assessment being carried out, and compliance with other legal obligations.