

Welcome to the Summer 2013 edition of *Rural eSpeaking*. We hope you find that the articles are both interesting and useful to you.

To talk further about any of the topics covered in this newsletter, please be in touch – our contact details are above.

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The next issue of Rural eSpeaking will be published in March 2014.

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Rural Buildings

Earthquake-prone buildings?

Continuing the insurance theme from the Winter-Spring edition of Rural eSpeaking, we explore proposed changes to the way earthquake-prone farm buildings are managed, and the subsequent insurance implications.

Following recommendations made by the Canterbury Earthquakes Royal Commission, the government has recently decided to introduce legislation to change the way in which earthquake-prone buildings are managed. At this stage, these take the form of proposals made by the Ministry of Business, Innovation and Employment (MBIE).

In terms of determining whether a building is 'earthquake prone' you'll have to consider whether:

"... having regard to its condition and to the ground on which it is built, and because of its construction the building –

(a) will have its ultimate capacity exceeded in a moderate earthquake; and

(b) would be likely to collapse causing –

(i) injury or death to persons in the building or to persons on any other property; or

(ii) damage to any other property.¹"

Put more simply, an earthquake-prone building is one that is 33% or less of the strength of a building designed to the current Building Code. So, a building that reaches 34% will not fall within the definition of 'earthquake prone'.

Local authorities will now have to complete a seismic assessment of all non-residential buildings and all multi-unit, multi-storey residential buildings within five years of the legislative amendments taking effect. The local authorities will also need to keep a register of earthquake-prone buildings.

How this is likely to affect the rural sector?

Rural buildings take various forms: from milking sheds and implement sheds, to woolsheds and packhouses. Regardless of use, these farm buildings are all covered under the definition of 'Building' in the Building Act 2004 and all fall within the scope of buildings to be assessed by local authorities.

Consider your implement shed; it may have been built many years ago, be single storey and have relatively little through traffic. Your woolshed, however, may be two storey, constructed in the 1970s and be used by contractors when shearing. Your milking shed or packhouse is likely to be used by many people – both employees and contractors.

At this stage, what rural buildings will/will not be eligible for exemptions hasn't been finally decided. Instead, the MBIE's policy decision includes the statement:

'Owners of some buildings will be able to apply for exemptions from the national timeframe for strengthening. These will be buildings where the effects of them falling are likely to be minimal and could include farm buildings with little passing traffic.'

Whilst the implement shed scenario may be eligible for an exemption from the national timeframe for strengthening, this may not be the case for your woolshed. Depending on what percentage of the Building Code your woolshed reaches, you may need to factor in the cost of strengthening versus the cost of building a new, fully compliant structure. Given that your milking shed and packhouse probably have a lot of through traffic, these buildings may not qualify for the exemption, if strengthening is required. You must also be mindful that you have legal obligations under health and safety legislation to provide a safe workplace. A further consideration is the impact these changes will have on your farm tour/farm stay operation given that farm buildings may be accessed by guests.

Insurance

You'll also need to think about the insurance implications for your buildings. Whilst a building at 34% of the Building Code isn't deemed to be 'earthquake prone', in some cases it may not be possible to get full replacement insurance cover for buildings that are less than 67% of the Building Code. A discussion with your insurer to ascertain their requirements regarding building compliance would be time well spent at this stage.

Amendments to the Building Act are due to be passed into law late this year/early next year and it's only then that we will know its exact implications. ■

¹ Section122, Building Act 2004

Independent Trustees

– Understanding your liability

Many rural properties are owned by family trusts and it's likely that the majority of those trusts have an independent or professional trustee. Often those independent trustees are lawyers or accountants or trustee companies; however a large number of independent trustees are friends or business associates.

A recent story in *The Dominion Post*² recounted how the Napier City Council intended to prosecute a prominent lawyer and accountant, for breaches of the Resource Management Act 1991 in relation to a Napier property that was registered in their names after a 'mountain of rubble was dumped on their property without resource consent.' The article then stated that the lawyer and accountant may not have known about the dumping and that the property was the home of a local construction company director. This case highlights the type of liability that professional trustees face. Many independent trustees, however, don't fully understand the nature of trustee ownership and potential liabilities that can go with it.

When trustees own land, they are the 'legal owners' of that land. They are registered at Land Information New Zealand (LINZ) as owners jointly and there is no mention of any trust.

Trustee liability

The terms of most trust deeds usually offer the trustees protection against liability in the form of an indemnity. The trustees are, however, liable to third parties in a number of ways:

- » Statutory liability: examples of this in the rural context are liabilities under the Income Tax Acts and GST legislation, the Resource Management Act 1991 and Health and Safety in Employment Act 1992
- » Contractual liability: when trustee landowners enter into a contract, such as a loan agreement, mortgage or lease, or agreement to purchase or supply services, and
- » To beneficiaries: the trustees' ultimate liability is to the beneficiaries to carry out their trustee obligations in terms of the trust deed and generally in terms of trust law. Failure to do so can render a trustee personally liable to beneficiaries.

Trustees do generally have a right of indemnity out of the trust property, but this is a separate issue. Where a trust's debts exceed its assets, a trustee may have to meet that liability from their own personal resources.

You can't use a defence to a claim by saying, "I'm an independent trustee, I just let the other trustees who farm the property carry on, I didn't know what they were doing." This argument is often raised by independent trustees on the basis that they had delegated certain responsibilities (such as day-to-day farming operations or tax compliance) to the other trustees.

Trustee obligations

It was made clear in a 2012 case³ that "as a general rule trustees may not delegate their duties or powers". The judgment goes on to point out that there are some exceptions to that general rule, particularly where delegation is specifically permitted by the trust deed or by statute but, even where delegation is allowed, the trustees as a group must still ensure that they meet their trustee obligations.

Accordingly, if you are an independent trustee, before agreeing to take on the role you must:

- » Understand what activities the trust is likely to undertake
- » Properly understand your liability
- » Be actively involved in the trust's decision making
- » Be aware that your responsibilities are to all the beneficiaries
- » Take appropriate professional advice when entering into any contractual arrangements with third parties
- » Always be sure to check that there is a limitation of liability in any contract that you enter into as a trustee
- » Where the trust is engaging in trading activities, make sure that proper procedures are in place to ensure that delegated functions are being carried out and that the trustees' supervisory role is carried out properly, and
- » If you are not getting information that you need or the other trustees are acting without your consent or knowledge, then you should resign.

Taking on the role as an independent trustee is often considered to be an honour, but it comes with significant personal responsibility and obligations; make sure you properly understand what you've taken on. ■

² 15 November 2013

³ *Commissioner of Inland Revenue v Newmarket Trustees Limited* [2012] NZCA 351

Over the Fence

Farmers: Be careful of minimum wage requirements

A farm assistant was not paid the minimum wage by his employer for periods during his employment the Employment Relations Authority (ERA) has recently found⁴.

The employee was working as a farm assistant for a period of just under two years. Towards the end of his employment he lodged a complaint with the Ministry of Business, Innovation and Employment concerning his rate of pay. With his employer's consent a labour inspector carried out an investigation into whether his employer maintained appropriate wage, time and leave records, whether this employee received the minimum wage and investigated any arrears of wages owing.

The employee was paid a salary in equal weekly instalments. The employee's hours of work varied in accordance with the dairy season. During the spring and calving months the employee worked longer hours than during the winter months when the employer's cows were dry.

The ERA held that a salary cannot be used as a mechanism to avoid minimum wage rates. An employer may not average out salary payments made for weeks requiring less work against weeks where hours of work are of a duration that the payment is below minimum rates.

It was found that employees are entitled to be paid the difference between the amount of salary received and the relevant weekly minimum rate plus the hourly rate associated with those weeks above 40 hours per week. In this case, this totalled \$6,473.77. Employers need to be very careful if they are relying on averaging out pay across a farming season particularly for employees being paid lower salaries. ■

Livestock grazing

At this time of the year a number of farmers are looking to enter into arrangements for the grazing of their young stock off-farm.

A significant proportion of these arrangements don't involve a written agreement between the stock owner and the grazer. The benefit of entering into a written agreement should not be underestimated. At the start of the relationship (when things are usually going well) completing a written agreement ensures stock owners and graziers turn their minds to and have discussions regarding important considerations that are otherwise left undefined. This can result in significant misunderstandings and costs should an issue arise.

Important considerations and terms for grazing agreements include:

- » An accurate identification of the parties
- » Accurate detailing of the livestock including total number, type, breed, approximate age, identification details and live weight on arrival
- » The term of the grazing arrangement (note for a term of more than one year specific advice should be obtained in respect of the Personal Property Securities Act 1999 and its application to arrangements)
- » Base fees (often a per head per week price and how and when this is to be paid)
- » Any weight gain adjustment payments (note this may be a particularly important consideration following last season's drought and the impact this had on livestock weights)
- » Target weights, weighing and reporting requirements
- » Any warranties required including TB, DDT and EBL status
- » Good husbandry/farming practices required – for example reporting lines should stock become unwell, restricted grazing near macrocarpa trees, etc
- » Liability for dead and missing stock
- » Rights of access to the land for inspection
- » Details surrounding the administration of animal remedies and mineral supplementation
- » Any mating requirements, and
- » A procedure for resolving any disputes that may arise.

There are of course other matters that may be included depending on the nature of the livestock being grazed and the farm on which the livestock is to be grazed. ■

Entries now open for the Dairy Industry Awards.

Entries close on Friday, 20 December 2013.

Past participants speak highly of the value of entering the competition provides to their business. A 'legal audit' or review may be appropriate to ensure your business is legally compliant as part of preparation for judging.

For more information go to www.dairyindustryawards.co.nz ■

⁴ *Whyte v Labour Inspector* [2013] NZERA Wellington 106