

Rural eSpeaking

ISSUE 33
Winter – Spring 2020

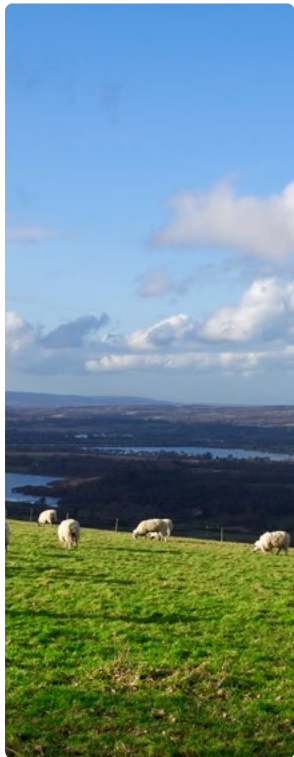
M A C T O D D

L A W Y E R S

MACTODD 11-17 Church Street, Queenstown 9300, PO Box 653, Queenstown 9348
Ph: 03 441 0125 | queenstown@mactodd.co.nz | www.mactodd.co.nz
Also in Wanaka and Cromwell

Welcome to the Winter-Spring edition of *Rural eSpeaking*. We hope you find the articles both interesting and useful.

If you would like to talk further about any of the topics we have covered in this edition, or indeed any other legal matter, please don't hesitate to contact us. Our details are to the right.



Rural leases

More on COVID and access issues to land

In the Autumn edition, we discussed the situation that COVID had caused with leases where tenants were unable to access their premises due to lockdown. Potential issues for the rural leasing sector arose particularly given that rural leases are often in a different form to urban commercial property leases.

Since then, the government has proposed further changes to the Property Law Act 2007 where there may be rent relief if there has been a negative impact on a tenant's business due to extraordinary circumstances.

PAGE 2 >>

National Environmental Standards for Freshwater 2020

The National Environmental Standards for Freshwater 2020 are due to be published later this year. Some parts of it will take effect 28 days after it is published while other parts won't come into effect until the winter of 2021.

Our article sets out the requirements under the Standards and we give a 'to do' list of activities that farmers will need to carry out to conform with those requirements.

PAGE 3 >>

Over the fence

Tougher firearms legislation now in force

The Arms Legislation Act 2020 came into force on 24 June. The legislation imposes tighter controls on the use and possession of firearms.

Temporary work visas

The government has announced changes to the temporary work visa process. Whilst not a permanent solution to migrant labour issues, these will help farmers to retain their migrant workforce through the upcoming busy period of calving and peak milk production.

New environmental legislation passed

The Climate Change Response (Emissions Trading Reform) Amendment Act 2020 (ETR) received Royal Assent on 22 June 2020; some parts are already in force.

Recommendation for the RMA be repealed

Very late in July, the government-appointed panel recommended that the Resource Management Act 1991 be repealed and replaced with two separate pieces of legislation.

PAGE 4 >>



DISCLAIMER: All the information published in *Rural eSpeaking* is true and accurate to the best of the authors' knowledge. It should not be a substitute for legal advice. No liability is assumed by the authors or publisher for losses suffered by any person or organisation relying directly or indirectly on this newsletter. Views expressed are those of individual authors, and do not necessarily reflect the view of this firm. Articles appearing in *Rural eSpeaking* may be reproduced with prior approval from the editor and credit given to the source.

Copyright, NZ LAW Limited, 2020. Editor: Adrienne Olsen, Adroite Communications. E: adrienne@adroite.co.nz. M: 029 286 3650

The next issue of *Rural eSpeaking* will be published in the summer.

If you do not want to receive this newsletter anymore, please

unsubscribe



Rural leases

More on COVID and access issues to land

In the Autumn edition of *Rural eSpeaking* we discussed the situation that COVID had caused with leases where tenants were unable to access their premises due to lockdown restrictions. Potential issues for the rural leasing sector arose from this problem, particularly given that rural leases are often in a different form to urban commercial property leases.

The article pointed out that the main lease issue due to COVID was the inability of tenants to access their premises. Since we published the Autumn edition, the government has announced that it proposes further changes to the Property Law Act 2007 where it would imply in certain leases a clause similar to that in the latest version of Auckland District Law Society (ADLS) lease, section 27.5, where a tenant has:

- » Twenty or fewer full-time equivalent staff per lease site
- » A New Zealand-based business, and
- » Not already come to an agreement for a rent abatement with their landlord.

Of interest to rural tenants is that the government's proposals indicated that the clause would have a wider effect than the ADLS 'no access' clause in section 27.5. It would particularly apply 'where there is, or has been, a material negative impact on a Tenant's business due to COVID-19, *whether or not the Lessee is able to access the premises*' (our italics).

As you can see, a tenant's ability to access the premises is not the only criteria in the proposal. The more important criteria would appear to be whether or not COVID has had a materially negative impact on a tenant's business. Therefore, if the proposed legislation is enacted, it would mean that where, in the rural lease setting, a tenant may still have been able to actively access,

and farm or crop the land, if the business has been affected by COVID they could still take advantage of this implied clause. An example of this is where a lettuce supplier for a fast food chain has still had access to their growing crop, but the demand for salad leaves had disappeared as takeaway outlets had been closed during Level 4.

There have been instances where supply chains have been disrupted (see the example above) or ordinary 'on account' or prepayments for supply have not been made and cash flow problems have arisen. It would appear that, in these circumstances, the ability to require a good faith negotiation for a rent abatement (or other measures) would be available under the proposals.

Clear guidelines needed

The other point to note about the government's proposal is that the Cabinet paper made it clear that it would implement clear statutory guidelines for interpreting

the implied clause. The weakness of the ADLS clause is that there is nothing surrounding the clause to give guidance as to what factors should be considered when determining what is a *fair* (our italics) proportion of rent to abate, etc. As a result, it would appear that the proposed legislation would be fairly prescriptive as to what factors should be taken into account when interpreting and applying the implied clause.

The New Zealand First party, that had supported the proposed legislation, has now withdrawn its support. As a result, it has just been announced that rather than proceeding with these changes right now, the government will establish a fund (\$40 million) to help pay arbitration costs for tenants and landlords.

Post-election, given the current polling trends, it may well be that the changes proposed by this government will be back on the agenda.

National Environmental Standards for Freshwater 2020

Water was the hot topic in the 2017 election campaign. This year, with an election coming up shortly, there seems to have been little talk of water (or much policy at all, so far) with COVID still taking up most of the news space, closely followed by scandals of various sorts.

The National Environmental Standards for Freshwater 2020 (the Freshwater NES), however, are due to be published later this year. Some parts of it will take effect 28 days after it is published while other parts won't come into effect until the winter of 2021. This year is more than half over, and with the first half of the year being severely disrupted by the COVID lockdown and because the election is looming, there can be no certainty that the new Freshwater NES will be published this year. There is no certainty as to what form it will take, given we may not know which parties will form the government – perhaps sometime in October.

Whatever shape the next government takes, the new Freshwater NES will be published sooner or later as water continues to be one

of the major environmental issues for the country, notwithstanding the late July 2020 panel recommendation that the Resource Management Act 1991 (under which the Freshwater NES falls) be repealed and replaced by two new pieces of legislation. Any replacement legislation is likely to be several years away.

Requirements set

The Freshwater NES will set requirements for carrying out certain activities that pose risk to freshwater and freshwater ecosystems. In many cases, people will need consents under the Resource Management Act 1991 (RMA) from their regional council for carrying out certain activities.

The Standards are designed to:

- » Protect existing inland and coastal wetlands
- » Protect urban and rural streams from in-filling
- » Ensure connectivity of fish habitats (fish passage)

- » Set minimum requirements for feedlots and other stockholding areas (to take effect in the winter of 2021)
- » Improve poor practice intensive winter grazing of forage crops (to take effect in the winter of 2021)
- » Restrict further agricultural intensification until the end of 2024, and
- » Limit the discharge of synthetic nitrogen fertiliser to land, and to require reporting of fertiliser use (to take effect in the winter of 2021).

To do list for farmers

It is obvious from the list above that the Standards are at a higher level than current requirements and that some farming practices must change. In some areas, certain farming practices may become uneconomic as a result of the new Standards required.

To conform with the new Standards, farmers will need to:

- » Make sure cattle, pigs and deer are kept out of waterways from July 2025 at the latest. Stock must be kept out of any streams more than one metre wide and stock must be kept at least three metres back from banks
- » For dairy farmers, synthetic nitrogen fertiliser must be kept below a cap of 190 kilograms of fertiliser per hectare per year. All dairy farmers will need to report synthetic nitrogen fertiliser use to their regional council once a year from mid-2022
- » Protect wetlands and streams on their properties, so these areas cannot be drained or developed, and
- » Report water usage electronically (this will be phased in over six years) if you have existing resource consents to take certain quantities of water.

As well, resource consents will be needed for:

- » Intensifying land use, for example, conversion of land into a dairy farm. This will apply from when the Regulations come into force until the end of 2024

Over the fence

Tougher firearms legislation now in force



The Arms Legislation Act 2020 received Royal Assent on 24 June 2020 and came into force immediately. The legislation imposes tighter controls on the use and possession of firearms. A key change is the introduction of a firearms registry, which will track how many firearms are in legal circulation, who holds them, who is selling them and who is buying them. People holding a firearms licence will be required to update the registry as they buy or sell guns.

Further changes include:

- » The term of a firearms licence will be reduced to five years for first-time licence holders and those who have previously had their licence revoked or expired. The long-term firearms licence lasts for 10 years

- » Offences and penalties have been increased to reflect the seriousness of the offending. Possessing a firearm without a licence now has a penalty of up to one year in prison or a \$15,000 fine
- » Additional high-risk firearms, such as semi-automatic pistols and rifles, are now prohibited
- » Endorsements can be obtained to possess prohibited firearms where these are needed for pest control purposes. However the term of the licence is shorter and must be renewed before the licence expires, and
- » People who come to New Zealand who are issued a licence for up to a year will no longer be able to purchase and take ownership of a firearm in New Zealand.

Additional changes will follow over a three-year period, including new rules to determine who is 'fit and proper' to possess firearms and who will be disqualified from holding a firearms licence.

Temporary work visas

Following extensive lobbying by the rural sector, the government has announced changes to the temporary work visa process. These changes are not a permanent solution to migrant labour issues but will help farmers to retain their migrant workforce through the upcoming busy period of calving and peak milk production.

Key changes are:

1. Extending temporary work visas due to expire by the end of 2020 by six months
2. Delaying the start of the stand-down period by six months to February 2021 instead of August 2020, and
3. Reducing the duration of all new low-skilled essential skills visas from twelve to six months for the next 18 months.

The temporary extension of existing visas and delay to the stand-down period is beneficial, but this is coupled with a reduced period for new low-skilled visas, meaning low-skilled staff will require a visa renewal every six months, including a labour market test.

New environmental legislation

The Climate Change Response (Emissions Trading Reform) Amendment Act 2020 (ETR) received Royal Assent on 22 June 2020. Some of the legislation came into force immediately, other parts have rolling starts until 1 January 2024. To see the exact dates, click [here](#).

This legislation imposes serious costs/penalties which present a challenge for farmers trying to earn their social licence to operate. In line with this, the Essential Fresh Water Package (the Freshwater NES, referred to [here](#) in this edition of *Rural eSpeaking*) is still to be finalised, bringing in new policies to achieve the two main



>> continued from page 2

Rural leases

In any event, there are other avenues for a tenant to explore if their leased property is damaged to the extent that it becomes unfit for use – storm or earthquake damage are prime examples.

The Property Law Act 2007 implies, in all leases of land, for rent and outgoings to abate 'in a fair and just proportion' if the premises are destroyed or damaged by certain causes; those causes include flood, storm, earthquake or volcanic activity (not pandemic, unfortunately). The specific terms of a lease can, however, negate this implied term.

Ability to terminate a lease

Also implied in all leases of land is the lessee's ability to terminate their lease on reasonable notice to the landlord if it is an express or implied term of the lease that the leased premises may be used for one or more specified purposes and at any time during the lease the premises can't be used for those purposes. Therefore, the lease terms will be very important when considering whether or not a tenant could terminate their lease for this reason. However, most leases include a clause where the landlord expressly states that there is no warranty or representation that the premises are suitable or will remain suitable for the tenant's use rendering this option unavailable to many tenants.

COVID and damage situations both show the importance of considering unexpected events when negotiating leases. Landlords and tenants tend to concentrate on rent and term when negotiating on the basis other obligations are 'standard'. Thought should be given to those wider issues as once a lease is signed, it constitutes a binding commitment for, sometimes, quite an extended period of time. ●

>> continued from page 3

National Environmental Standards for Freshwater 2020

- >> Winter grazing on forage crops, in certain circumstances such as on paddocks with more than a 10 degree slope or if you want to graze forage crops on more than 50 hectares or 10% of your farm (whichever is greater)
- >> Stockholding pads from 1 July 2021 (unless your current pad conforms to the minimum standard), and
- >> Feedlots from when the Regulations come into force.

In the medium term, all farmers will need to have a freshwater module in their farm plan. This is not required immediately but it should be completed over the next 12 months or so as the government will be working with sector groups to develop new Regulations which will set out the exact requirements for mandatory freshwater modules.

Much of what is proposed has been well forecast and, in many cases, many farmers are already taking steps to comply with what they know is coming. ●



>> continued from page 4

Over the fence

objectives: to stop further degradation and to reverse past damage to waterways.

Generally, the ETR aims to provide more certainty for businesses, make the scheme more accessible and improve its administration in relation to reducing greenhouse gas emissions.

For further information on the regulations imposed by the ETR please go [here](#).

Recommendation to repeal the RMA

Very late in July, the government-appointed panel recommended that the Resource Management Act 1991 (RMA) be repealed and replaced with two separate pieces of legislation.

After a comprehensive review and extensive consultation led by retired Court of Appeal Judge, Tony Randerson QC, the panel recommended that a Natural and Built Environments Act and a Strategic Planning Act replace the current legislation.

Minister for the Environment, the Hon David Parker, said, "The RMA has doubled in size from its original length. It has become too costly, takes too long, and has not adequately protected the environment. It is for the next Government to consider the report, and decide which aspects to adopt and decide whether to implement it in whole or in part."

The Minister said, however, he expected political parties would develop their policies for the upcoming general election campaign in light of the report's findings.

To read more about the review and its recommendations, click [here](#). ●