

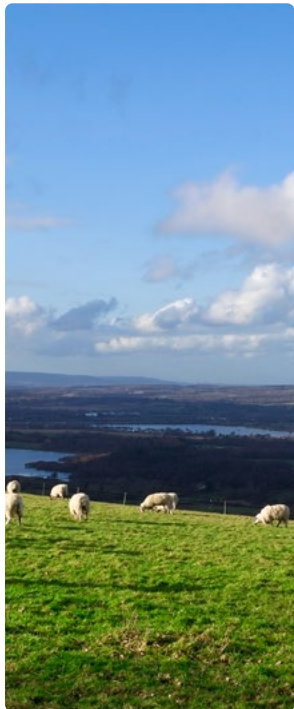
# Rural eSpeaking | ISSUE 32 Autumn 2020

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Welcome to the Autumn edition of *Rural eSpeaking*. We are all living, and managing our businesses, in extraordinary times as the world battles COVID-19. Our thoughts are with you, your families and colleagues as New Zealand emerges from the lockdown into, we hope soon, more of a business as usual situation.

We hope you find the articles to be both interesting and useful. If you would like to talk further with us on any of the topics covered in *Rural eSpeaking*, or indeed on any rural/legal matter, please don't hesitate to contact us.



## COVID-19

### Agriculture continues to be the mainstay of our economy

The COVID-19 virus that is sweeping the world will impact upon us all. The repercussions will differ depending on where you live, what age you are and what you do, but it will be there nonetheless.

Being deemed 'essential', the agriculture sector could continue production throughout Alert Level 4, and now in Level 3.

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## Rural leases

### What if I can't get on the land in an extraordinary situation?

As a result of the COVID-19 Alert Level 4 situation, one of the issues that has arisen in the commercial leasing area is that of tenants being unable to access their leased buildings. These tenants are in non-essential industries and are therefore prohibited from working, other than from home. But what could happen in the future for the rural sector if you can't access your land?

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## Over the fence

### Genuine reasons for fixed-term employment

Fixed-term employment agreements are a useful tool when you do not require a permanent employee but need someone for a stated period of time.

### Read terms of trade!

Reading the terms of trade can seem tedious. However, not reading and agreeing to the other side's terms of trade before agreeing to trade can lead to problems for your wallet and your peace of mind.

### New Privacy Act will affect rural sector businesses

The new Privacy Act will come into force on 1 November 2020. Replacing the Privacy Act 1993, the new legislation reflects the needs of the digital age.

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## COVID-19

### Agriculture continues to be the mainstay of our economy

The COVID-19 virus that is sweeping the world will impact upon us all and pretty much everybody in the world one way or another. The repercussions will differ depending on where you live, what age you are and what you do, but it will be there nonetheless.

The economic impact of the virus is uncertain but it will be significant. In New Zealand, the immediate effect was on the tourism, hospitality and retail sectors.

### Challenges ahead for agriculture

Sectors such as agriculture, which are deemed 'essential', could carry on even

during Alert Level 4 but will continue to experience significant difficulties, including:

- » Disrupted supply chains
- » Disrupted markets, both domestic and international
- » The need to change packing and processing set ups to ensure social distancing, etc and the costs associated with that, and both direct costs and indirect costs associated with the slowdown of processing, and
- » Markets either disappearing or shrinking.

The country has just moved to Alert Level 3 and (hopefully) two weeks thereafter will move to Level 2. Some of the immediate difficulties for the agricultural sector will be alleviated as the alert levels lower, but the economy (both local and international) will be disrupted for some time.

Of particular concern is the hospitality sector which is obviously a large user of meat, vegetables and fruit that our

agricultural producers supply; it will take some time for this sector to recover.

Tourism levels will take a very long time to be restored and, as a result, the market for feeding and accommodating those tourists will be depressed for some time to come.

### Agriculture is the linchpin of our economy

What is evident from this crisis is the value that the agriculture sector holds to the New Zealand economy. Prior to COVID-19, the agriculture sector seemed to be suffering from a surfeit of bad press and, in particular, was seen as the main villain in environmental matters; this seems to have been largely forgotten at the moment. For example, 'Our Freshwater 2020' Report, that was released by the Ministry for the Environment and Statistics New Zealand in early April, barely raised comment in the media. Imagine what might have been if we weren't battling COVID-19?

What the current situation does show us is that in order for us to remain economically viable as a nation, we need many strings to our bow. Until February, tourism was New Zealand's largest industry in terms of foreign exchange earnings. It now contributes nothing to the economy and it will take years to recover. What that recovery will look like no-one is really sure.

Agriculture itself has suffered blows over the years, including PSA, *Mycoplasma bovis* and other viruses or diseases, and it continues to face threats, particularly in the biosecurity area. Agriculture is, however, a diverse sector and its strength is that if one area suffers a setback or is down for a period other areas continue to do well.

One would hope that some of the bad press that has been following the sector in recent years will now show a bit more balance and acknowledge the contribution that agriculture makes to New Zealand's economy. ●

# Rural leases

## What if I can't get on the land in an extraordinary situation?

As a result of the COVID-19 Alert Level 4 situation, one of the issues that has arisen in the commercial leasing area is that of tenants being unable to access their leased buildings. These tenants are in non-essential industries and are therefore prohibited from working, other than from home. This affects commercial leases right across the spectrum from hospitality, retail, office to warehousing.

Leasing is common in the rural sector, particularly in the pastoral, horticultural and cropping areas. Agriculture, being an essential industry, is not directly affected by this prohibition on accessing leased land.

## No access to land can be an issue

It does, however, raise an issue for the rural sector because there are scenarios in which similar problems could arise as a result of an inability to access the land due to an event outside the control of either the lessor or the lessee. Possibilities might be:

- » A biosecurity issue, or
- » An earthquake or some other event that impacts on the land or access to it.

## Looking back to the 'red zone'

In the commercial leasing area, attempts were made to deal with this issue following the Christchurch earthquakes. Many buildings were undamaged by the earthquakes but lessees couldn't access them because they were located in the 'red zone'.

Most commercial leases had fairly comprehensive provisions dealing with what would happen in the event buildings were damaged by an event such as an earthquake but were silent when dealing with buildings that weren't damaged but the lessee was, by law, prohibited from entry.

## What is 'fair'?

The standard commercial lease (the Auckland District Law Society form) was amended following the Christchurch earthquakes. It now includes a clause that says, in short, if a lessee was precluded from

being able to access the property because of an 'emergency' (the definition of which includes 'epidemic') to 'fully operate' its business, then a 'fair' proportion of the rent and outgoings would cease during the period that the lessee couldn't access the building.

While this clause may sound good, it is currently causing major issues throughout the country, mainly because no-one has previously had to establish what is 'fair'. While most lessors and lessees can come to an agreement, there are obviously cases where the parties will have difficulty in establishing what might be fair in their situations.

## Rural sector situation

Most rural leases have never had comprehensive provisions dealing with damage to buildings simply because, in the main, it is land rather than buildings being leased. Certainly there may be farm buildings on the land but the bulk of the rent is payable for the use of the land. Land is not seen as something that could be damaged in the same way as buildings could be by fire or earthquake. Very few rural leases would

have provisions similar to the standard commercial lease after the Christchurch events.

What would happen, however, if an agricultural lessee was unable to access their leased land due to a biosecurity issue that meant certain areas weren't accessible or perhaps stock wasn't allowed on the land, or trees or vines were required to be removed?

A lessee would need to rely on two possibilities, that are slightly similar:

- » A force majeure clause, or
- » Doctrine of frustration.

## Force majeure

Not all leases will have a force majeure clause; it may well be that such a clause may become more common as a result of the current situation. A typical force majeure clause would begin as follows:

*In the event of the inability of any party to this lease to perform its obligations under this lease by reason of riot, earthquake, volcanic activity, fire, storm, operation of*

# Over the fence

## Genuine reasons for fixed-term employment



Fixed-term employment agreements are a useful tool when, as an employer, you do not require a permanent employee but need an employee for a stated period of time, or until the conclusion of a specific project, or for a specified event.

The Employment Relations Act 2000 imposes specific requirements that must be complied with for a fixed-term employment agreement to be valid.

You must have 'genuine reasons' based on reasonable grounds for making the employment fixed-term.

You must advise your employee as to the reasons for the fixed-term provision, and record when or how their employment will end in a written employment agreement. If you don't adequately record the reasons

for a fixed-term, and when or how the employment will end, the fixed-term may not be valid, and you may be expected to treat your employee as a permanent staff member. This could open you up to a claim of unjustified dismissal.

Examples of 'genuine reasons' may be to cover another employee who is on an extended period of leave or your need for additional resources for a specific project. Employing someone who is on a work visa, or other type of immigration visa, is not a genuine reason for fixed-term employment because the expiry of a work visa is merely a circumstance of your employee. Your employee should be hired as a permanent employee with provisions included in their individual employment agreement about holding and retaining a valid work visa. ●

## Read terms of trade!

Reading terms of trade for every new service provider and piece of technology can seem tedious. However, not reading and agreeing to the other side's terms of trade before agreeing to trade can lead to problems for your wallet and your peace of mind. We set out a few examples of why it is important to carefully read terms of trade.

Limitations on liability are often included in terms of trade. Limitations may mean, for example, that a supplier who does not provide all the goods ordered, or if some of their goods are defective, will only be

liable for the cost of the shortfall, not for the potential costs that might result from that shortfall. Some limitations will even cap liability at a fixed amount that may fall well short of the loss they cause.

Watch out for delivery terms. Terms of trade will often state whether time is, or is not, of the essence. This can either mean that a supplier is not bound to deliver goods by any certain date, regardless of the consequences, or that a purchaser need not pay for goods received before or after certain dates.

As vital as it is to read the terms of trade of any business you are dealing with, it is even more important to ensure that your business has its own terms of trade. There are many protections and conditions that are not legally available unless agreed to by the parties. ●

## New Privacy Act will affect rural sector businesses

The new Privacy Act will come into force on 1 November 2020. Replacing the Privacy Act 1993, the new legislation reflects the needs of the digital age. The changes aim to promote and protect privacy and give confidence that your personal information is properly protected. This will affect all rural businesses and businesses across the board that collect, store and use personal information about their employees, clients and /or customers.



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## Rural leases

*law or other like cause beyond the control of that party, such party will upon service of written notice specifying the force majeure event be released from its obligations under this lease if and to the extent that such party is prevented or delayed from performing its obligations.*

A clause such as this would probably cover a regulation preventing the lessee's use of the land and covers earthquakes and other natural events that might impact on the lessee's ability to perform their obligations. The words 'operation of law' may well cover the type of regulation relied on by the government for its COVID-19 Alert system.

## Doctrine of frustration

This is more complicated. Frustration is where an event outside the control of either party causes the subject matter of a contract to become impossible to perform. Frustration is much more difficult to prove and it's unlikely to be available if the event was temporary and the lease term was relatively long.

## Other situations

What if the event falls short of precluding a lessee from occupying the land but the purpose for which the lessee leased the land had disappeared or changed significantly? An example is a cropping lessee supplying a

fast food chain that stops buying produce because their business has been shut down.

In the event of a biosecurity issue, what if the land can't be re-stocked, or trees or vines need to be pulled, and the land left fallow for a period? A force majeure clause is less likely to apply and the lessor would rely on the fairly standard warranty as to the suitability of the land which often goes along the following lines: *The Lessor does not warrant that the land is or will remain suitable or adequate for any of the purposes of the Lessee.*

## Lessees will be reviewing leases

It is often not until we have an event such as COVID-19 that the failings of some contractual arrangements are laid bare. No doubt the clause that was inserted into commercial leases after Christchurch will be reviewed, debated and possibly modified as a result of the COVID-19 issue.

In the rural space, lessees will also want to review their leasing arrangements to ensure they are adequately protected if something, outside their control, affects their ability to use the land for the purpose for which it has been leased. ●

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## Over the fence

Key changes are:

- >> **Mandatory reporting of privacy breaches:** where a privacy breach occurs causing, or posing a risk of harm, businesses will be required to inform the individual concerned of the breach, and report that breach to the Privacy Commissioner
- >> **Destroying information to avoid disclosure:** if you request information from a business, that business cannot destroy the information to avoid disclosing it to you
- >> **Compliance notices:** the Privacy Commissioner will be able to issue compliance notices to make businesses do something, or stop doing something,

to comply with the amended privacy law, and

- >> **Information stored or processed by one agency on behalf of another:** if you are a New Zealand business that uses an overseas service provider, it will be your responsibility to ensure that the overseas provider complies with our privacy laws. You should be asking any overseas providers, such as cloud software, what they are doing to meet New Zealand privacy laws. New offences will be created with increased fines.

Remember, if you hold private information you must ensure that you store it securely and that you dispose of it safely when you no longer require that information. ●

