

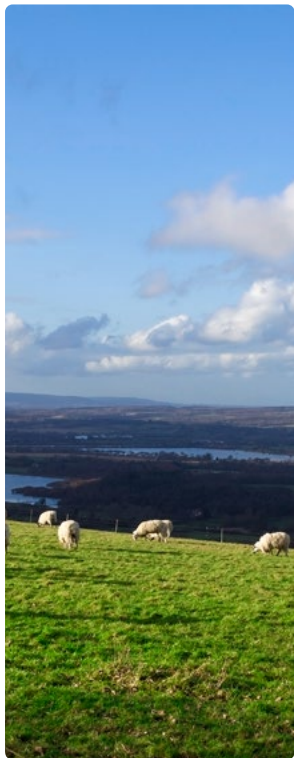
Rural eSpeaking | ISSUE 34 Summer 2020

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Welcome to the Summer, and final, edition of *Rural eSpeaking* for 2020. We hope you find the articles in this e-newsletter are 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.



Investment in farming A focus on syndicated farm investments

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PAGE 2 >>

The finite supply of water

Water easements

Water is an absolute necessity for any type of farming or horticultural activity.

Historically viewed as an infinite and expendable resource, water is now seen as having a finite supply and must be dealt with as a commodity.

If you are acquiring or subdividing rural land, the supply of water must be addressed very early on.

PAGE 3 >>

Over the fence

Crown Pastoral Land Reform Bill – submissions open

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Synlait settles Pōkeno land dispute

The dispute illustrates the importance of checking titles before purchasing, particularly reviewing any registered interests on it.

Reminder: Trusts Act 2019 comes into effect on 30 January 2021

The Trusts Act 2019 comes into effect on 30 January 2021 and brings major changes to existing trust law. Trusts will continue to have an important role in succession planning. If you haven't already done so, you should consider the reasons why your trust was created in order to decide whether these new obligations mean retaining your trust continues to be worthwhile.

PAGE 4 >>



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Rural eSpeaking
will be published
in Autumn 2021.

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Investment in farming

A focus on syndicated farm investments

With the current low interest rate regime looking set to continue for some time, investors are increasingly looking at ways to generate a reasonable income either for their retirement or for other forms of saving.

Recently, commercial property syndicates have come back into fashion. Their popularity is based on the return that they are able to provide to investors, notwithstanding the risks inherent in that sort of investment.

Similarly, syndicated investments in farming have had a resurgence. This type of investment has always been popular, particularly in the forestry and dairy sectors. In recent years, however, there has been a big move into the horticultural sector with kiwifruit, apple, cherry and other horticultural syndications being offered on a regular basis.

How farming syndicated investment works

Farm syndicates can be structured in different ways. One that is becoming common, is for a property syndicate to buy land and then enter into a lease with either the farmer or the horticulturalist. This enables the promoter to offer investors a fixed return that is, on the face of it anyway, less subject to the fluctuations and returns

that are inherent in the horticultural and farming sectors.

Typically, the initial rent payable under the lease will be calculated with reference to a fixed return on the capital invested, thus enabling the promoter to offer a fixed return to the syndicate's investors. Sometimes there will also be an element of profit-share. This type of property syndication can be seen as an opportunity for a farmer to release capital and to continue farming. In these instances, a farmer would sell their land to a promoter and then take a lease back. The farmer has released their capital which is banked; they can then farm with the peace of mind of only having to pay their rent, but otherwise the farming operation continues as usual.

Risks for both sides

The risk for the farmer is that having sold their land there is no longer an asset that can be used as security for any borrowing. If there is a situation where they still need, for example, a seasonal overdraft, can they offer security to their lender? Theoretically having released all their capital, the farmer should have the resources to continue to farm but must also ensure there are sufficient funds for the farm to cover the bad years as well as the good years. They need to be able to do this because in the bad years they will still need to pay the same rent (and perhaps other fixed outgoings) as they do in the good years.

For the syndicate, the risk is that the farmer fails. In much the same way as the

commercial property syndicates periodically fall over because of the failure of a tenant, the same thing can happen with the farmer who may have a series of bad years, drought, disease, low prices or some similar event outside of their control and they can no longer pay the rent on the land.

For the farm syndicate, having the farmer unable to pay the rent may not be an issue in the sense that, under their lease, the syndicate has the right to terminate a lease and re-let the land to somebody else. However, if the entire sector is in a downturn, it may well be that the syndicate cannot re-let the property on the same terms or there may be a time lag between the failure of the original tenant and when the property can be re-let. During this period, the syndicate itself will have to run the farms and, thus,





The finite supply of water

Water easements

Water is an absolute necessity for any type of farming or horticultural activity. Historically viewed as an infinite and expendable resource, water is now seen as having a finite supply and must be dealt with as a commodity. The right to access water from a source, such as a spring or well, and the right to use that water are different, but related, issues.

Throughout New Zealand there are thousands of water easements that create a legal right for one or more landowners to take water from a source on another landowner's property and to convey it to their own property. Many of these easements have been in place for years, often decades. As such, they were put in place in a different time and well before some of the issues now facing us.

The use of water from sources on private land for domestic and stock watering has always been a right that did not need a resource consent. Its use for irrigation, however, has required a consent.

These days, consents are more difficult to obtain. In some areas of the country, there are moratoriums on the issue of new consents; these are being issued for shorter periods or with more conditions attached. In several regions, water is regarded as an 'over-allocated resource.'

Easements

To take and use water for irrigation two things are often required – an easement to get water from its source, and a resource consent to use that water.

Some easements contain restrictions on the use to which water can be put; a typical restriction is 'domestic or stock use only.'

For those people with no such restriction, problems can arise where different users of the same source apply for new or renewed water consents. The owner of the land on which the water source is situated could find themselves competing against an adjoining owner who has an easement right

relating to the same source for what is now regarded as a finite and increasingly scarce resource.

Another issue arises where more users than originally intended have the right to take water from the same source.

Explaining the problem

A typical example is where a large farm may have been subdivided and the water source was on only one of the blocks. Usually in that situation, the property that didn't have the water source would, as part of the subdivision process, have been granted a water easement to take water from the source on the other block.

Where one or other of the blocks is further subdivided, particularly for a lifestyle subdivision, the number of users of that particular source of supply can increase substantially. The landowner on whose land the supply is situated may have little or no control over this.

Once again, historical easements didn't tend to limit the number of users, it simply gave one party the right to take water from another. As a matter of law, when a 'dominant' tenement, that is the party with the right to take and convey water from other land is subdivided, then the right to take and convey goes with the other titles that are created out of the original title.

Both of the above issues can be addressed when new easements are created. The first can be dealt with by either limiting the amount of water that the dominant tenement can take, or to put an order of priority of the right to take water or apply for resource consent. In the second instance, there can be a restriction on the number of users that the dominant tenement can supply.

As you can see, both the above situations are relatively easy to address on the creation of new easements – but what of the 50, 60 or 100-year-old easement?

Over the fence

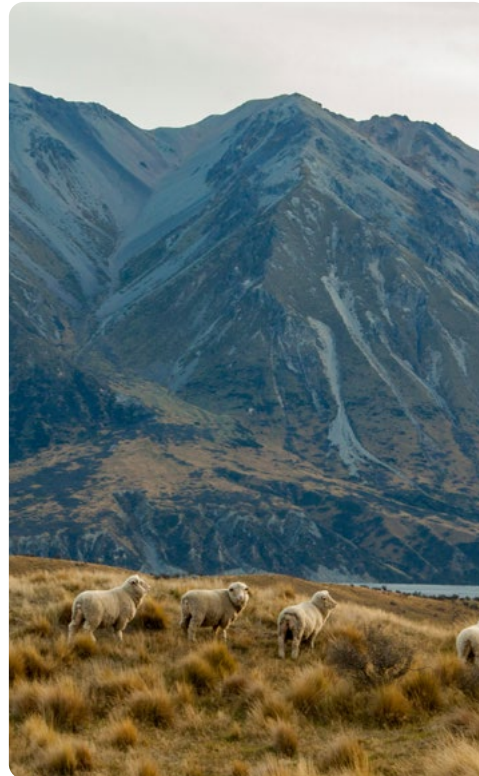
Crown Pastoral Land Reform Bill – submissions open

Introduced to the House in July by the then Minister of Land Information, the Hon Eugenie Sage, the Crown Pastoral Land Reform Bill was drafted in early 2019 following consultation on enduring stewardship of Crown pastoral land. Submissions are now open for you to have your say on this proposed legislation.

The Bill records the following proposed key changes:

- » Ending the tenure review process which has resulted in former Crown pastoral land being freeholded and subject to more intensive farming
- » Moving towards an outcomes-based approach to encourage pastoral farming that is sustainable, and decision-making that better recognises impacts on inherent values
- » Providing a clearer, more transparent, statutory decision-making process, with stronger accountability mechanisms and more opportunity for public input, and
- » Supporting strong and enduring Crown-Māori relationships and recognising the relationship of tangata whenua with their ancestral lands.

The Bill classifies pastoral activities as permitted, discretionary or prohibited according to the impact of those activities



on inherent land values. Discretionary activities require consent from the Commissioner of Crown Lands. Discretionary consent applications being processed if and when the Bill comes into force will be considered under the new system.

The Commissioner may decline discretionary pastoral activities or recreation permits if there is a reasonable alternative that has fewer adverse effects on inherent land values.

To have your say on this proposed legislation, submissions on the Bill are now open. Look [here](#) for more information.

Synlait settles Pōkeno land dispute

The lengthy legal battle around Synlait's north Waikato development appears to be over. Synlait Milk has reported that settlement has been reached between it, New Zealand Industrial Park and Karl Ye over its land at Pōkeno.

The proceedings began shortly after Synlait bought a 28-hectare site in Pōkeno in February 2018. The contract was conditional upon the removal of the land covenants which restricted the use of the land to grazing, lifestyle farming or forestry.

In November 2018 the High Court removed the covenants and transferred the title to Synlait.

Synlait had already started construction of its new factory prior to the judgment – its second nutritional milk powder manufacturing site.

Karl Ye, the neighbouring landowner, appealed to the Court of Appeal and, in May 2019, the court ordered for the historic land covenants to be reinstated. This effectively prevented the site being used as a factory.

Synlait then appealed to the Supreme Court claiming the covenants were irrelevant as the land had been rezoned industrial and this was

supported by the presence of the Yashili New Zealand Dairy Company in the area.

The Supreme Court heard the appeal in June 2020; after that, the parties negotiated a settlement. The settlement agreement details are confidential, however Synlait did note the settlement price was reasonable and not material to them.

Land covenants have the ability to bind not only the current owners, but also successor owners of property. The covenants had only been agreed to in August 1998 but were to last for a period of 200 years. It is important to seek legal advice to check the title to any land you wish to purchase including reviewing any registered interests on it particularly for the purpose for which you would like to use the land.

If Synlait had not negotiated a settlement and the Supreme Court had found against the company, its \$250 million factory would be unusable. Unsurprisingly, there was a jump in the Synlait share price following the announcement.

Reminder: Trusts Act 2019 comes into effect on 30 January

The Trusts Act 2019 comes into effect on 30 January 2021. For the first time in 60 years, there will be major changes to existing trust law. The aim of this legislation is to create more

>> continued from page 2

Investment in farming

the return it can generate and pay the investors might not be what was initially promised.

More investors are good for farming

As long as all the parties are aware of the risk in a farm syndication, and protect themselves accordingly, the proposition of having more people investing into the farming and horticultural sectors is sound. The ability to raise capital is always a limiting factor on a farmer and, with the banks taking a more conservative view on some farming and horticultural sectors, this type of syndicated investment gives the sector access to capital (of which there would appear to be plenty around) that might not otherwise be available.

If you are thinking of either entering into a farm syndicate, or are considering selling your land to a syndicate, please talk with us early on for tailored advice. ●



>> continued from page 3

The finite supply of water

Dealing with longstanding easements

The only way to vary these longstanding easements is by the mutual agreement of all parties with rights under the easement or by application under s317 of the Property Law Act 2007. This section allows an easement or covenant to be modified or extinguished *because of a change since its creation in all or any of the following* (our italics) depending on:

- >> The nature or extent of the use being made of the benefited land, the burdened land, or both
- >> The character of the neighbourhood
- >> Any other circumstance the court considers relevant, and
- >> The continuation in force of the easement or covenant in its existing form would impede the reasonable use of the burdened land in a different way, or to a different extent, from that which could reasonably have been foreseen by the original parties to the easement or covenant at the time of its creation.

S317 does, however, require an application to the court. This is an expensive process and the outcome is uncertain, particularly where some parties to the easement are being affected and oppose the application.

There is no guarantee of supply of water under an easement or the right to use that water for your preferred use.

Talk with us early on if you are acquiring or subdividing land where water is an issue. ●

>> continued from page 4

Over the fence

transparency around trustee decisions, and to allow trusts to be run with more efficiency and clarity for all parties.

The Act imposes additional compliance duties for trustees including the requirement to provide basic trust information to each beneficiary, keeping core trust documentation, limiting the trustee exemption and indemnity clauses, and imposing mandatory and default duties on them.

Trusts will continue to have an important role in succession planning. If you haven't already done so, you should consider the reasons why your trust was created in order to decide whether these new obligations mean retaining your trust continues to be worthwhile. ●

