

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

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More duties, greater accountability

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The next issue of Rural eSpeaking will be published in December 2013.

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Copyright, NZ LAW Limited, 2013. Editor: Adrienne Olsen. E-mail: adrienne@adroite.co.nz. Ph: 029 286 3650.

Fire & General Insurance

Be careful with the level of cover you choose

As a result of the Christchurch earthquakes and recent natural events, insurance has been thrust into the limelight, with regard to the increasing cost (and the extent) of cover. The cost of fire and general insurance has increased dramatically and, accordingly, people are looking much more closely at what they are getting for their premiums and at the level of cover they have. In some instances, people are deciding to live with a level of risk, but two recent cases¹ involving the same incident show just how dangerous some of these decisions can be.

Both cases involve the same incident on a 'lifestyle' farming property at Glenhope, south-west of Nelson owned by a company called Three Tuis Limited (TTL). Stephen Garnett and his partner Tracey Lynch own TTL. Stephen and Tracey live on the property and they have several tourist cabins which they built and run as a bed and breakfast business through TTL.

Guests of TTL built a fire in the wood-burner in their cabin on 24 November 2009. At about 2pm on 26 November, some 36 hours after he last saw a fire in the wood-burner, Mr Garnett cleared the ashes out of the woodburner and dumped them by a scrub-covered bank at the edge of a mown lawn surrounding the cabin.

Shortly after that a serious fire took hold on the bank. This spread to the north into an adjacent large forest owned by Nelson Forests Limited and caused considerable damage before the Fire Service controlled it some hours later.

Under s43 of the Forest and Rural Fires Act 1977, property owners and the Fire Service are entitled to recover costs and damages from a person who causes a rural fire.

Nelson Forests Limited claimed \$488,944.24, the New Zealand Fire Service Commission claimed \$571,593.81 and the Waimea Rural Fire Committee claimed \$31,209.69 all against both TTL and Stephen Garnett personally.

Mr Garnett looked to his insurance company which provided cover *"for up to \$2,000,000.00 for your legal liability ... as a result of injury or property damage as a result of accidents in connection with your business occurring ..."*

The Policy Renewal Certificate issued by Tower to Mr Garnett and Ms Lynch stated *"you have declared that the type of farming which is LIFESTYLE FARMING ..."*

In 2009 Tower had been advised by Ms Lynch that the property was being run as a tourism venture. Tower had responded that it was unable to offer cover for this type of commercial use. However, after obtaining a quote from another insurer for an additional \$4,000 premium, Mr Garnett and Ms Lynch decided not to insure the tourist (cabin) business. Instead they continued with their existing policy.

The court found that the accident related to the cabin business, not the lifestyle farming business and so Tower was correct to decline cover. While there was limited cover for liability under the Forest and Rural Fires Act 1977 by virtue of a statutory liability cover (up to \$200,000), Mr Garnett and TTL were left to pay an amount in excess of \$890,000 plus interest for which they were uninsured. This case has several lessons:

- » If you decide not to insure for certain risks, or you only insure parts of your business, expect no sympathy from your insurer or the courts if you suffer loss from those risks. It is not all uncommon to run a normal farming operation in conjunction with other businesses such as home stays, hunting and fishing trips, and adventure tourism.
- » When making a decision not to insure against certain risks, you need to be very aware of what those risks are and how they are managed so that you make a properly informed decision.
- » You need to understand the terms of your policy. In the *Garnett v Tower Insurance* case, Mr Garnett argued that the Forest and Rural Fires Act 1977 indemnity was at the \$2 million level of the rest of the policy. It was not – it was a special extension of up to \$200,000 – no more. ■

¹ *Nelson Forests Limited v Three Tuis Limited* [2013] NZHC856 and *Garnett v Tower Insurance Limited* [2011] NZCA576.

Health and Safety

More duties, greater accountability

The Independent Taskforce on Workplace Health and Safety (the Taskforce) delivered its report to the Minister of Labour, Hon Simon Bridges in April 2013. The Taskforce has said there are “significant weaknesses” in New Zealand’s health and safety system coupled with “the absence ... of elements to drive major improvements or to raise expectations.”² With the spotlight firmly on health and safety, especially following the Pike River disaster and the Christchurch earthquakes (including the collapse of the CTV Building), it’s likely that the Taskforce’s recommendations will be adopted and implemented within the next 6–12 months.

The Taskforce’s recommendations are wide-ranging and will certainly impact on the rural sector. Recommendations likely to be implemented include:

- » The establishment of a single crown agency, WorkSafe New Zealand, to promote, monitor and enforce workplace health and safety. It’s expected that the agency will commence in December 2013. The agency will take over the workplace health and safety investigations and operations role currently performed by the Ministry of Business, Innovation and Employment (MBIE)
- » A yet-to-be-named new Act (New Act) based on the Australian Model Work Health and Safety Act 2011 (Australian Act) will replace the Health and Safety in Employment Act 1992 (HSE Act)
- » The object of the New Act will be to secure, rather than just promote, the health and safety of workers and workplaces. The object will also contain a principle that “workers should be given the **highest level of protection against harm to their health, safety and welfare from hazards and risks arising from work ... as is reasonably practicable.**”
- » The new Act will adopt the concept of a PCBU (a person conducting a business or undertaking). A PCBU will include individual (rural) business owners, trustee (rural) business owners and corporate (rural) business owners. A PCBU must “ensure that, as far as is reasonably practicable, the health and safety of the workers engaged or caused to be engaged by the person; and workers whose activities in carrying out work are influenced or directed by the person, and must also ensure that the health and safety of other persons is not put at risk from work carried out.”³
- » Comparable health and safety duties will extend to participants in the supply chain such as designers, manufacturers, importers and suppliers of plant, substances and structures, and commissioners of plant and structures
- » Significantly, corporate PCBU officers will have specific duties under the New Act. Officers will generally include company directors, people acting as essentially de facto directors, (farm/rural) managers and other senior personnel who are responsible for strategic management and control. Such officers will have their own independent and positive duty to exercise due diligence and to apply best health and safety practice. In anticipation of the New Act, the MBIE has, with the Directors’ Institute of New Zealand, released a guide entitled “Good Governance Practice Guidelines for Managing Health and Safety Risks”. To obtain a copy, go to www.business.govt.nz
- » The New Act will extend the existing manslaughter offence to corporations and revise the corporate liability framework that applies to all offences (including manslaughter), and
- » In terms of enforcement, the positive duty on PCBUs and officers of PCBUs means that if an inspector identifies a breach of a health and safety obligation, such as a failure to undertake due diligence, a prosecution may follow even though no harm has eventuated. Further, the New Act will increase penalties for breaching health and safety obligations to comparable Australian Act levels. Under the Australian Act, reckless conduct offences by individuals incur penalties of up to \$600,000 or five years’ imprisonment, or both; such offences by a body corporate incur penalties of up to \$3 million.

Changes to New Zealand’s health and safety system are inevitable. They are happening and happening soon. It is also inevitable that the rural sector, with its poor health and safety record (noted by the Taskforce at p 10 of its report), will be a targeted by WorkSafe New Zealand. The time for taking steps to implement health and safety due diligence is rapidly approaching, if not here already. ■

² The Report of the Independent Taskforce on Workplace Health and Safety, April 2013, p 10

³ Ibid, p 53.

Over the Fence

Insurance cover when entering into an Agreement for Sale and Purchase

If you are considering entering into an Agreement for Sale and Purchase, whether it be for a rural or residential property, purchasers should be mindful that obtaining insurance for the property may not be as easy as it once has been. Following the recent earthquakes in Wellington and Malborough some insurers are restricting the issuing of new policies. Before any Agreement for Sale and Purchase is confirmed unconditional, purchasers need to first ensure they will have adequate (and acceptable to any lender) insurance cover in place for the property. ■

Is the redundancy landscape changing?

A number of recent cases before the Employment Court have indicated an employer now potentially faces greater hurdles when justifying a dismissal for redundancy. Earlier this year the Employment Court released a decision in the Totara Hills Farm case⁴ where the court found that if a redundancy is challenged by the employee, the employer cannot simply say there was a genuine business reason for the redundancy without the court examining the merits of the claim and the employer's assertion that it had genuine business reasons. The court also emphasised that an employer's obligations of good faith should encompass redeployment. It also found that a fair and reasonable employer would have done more than offer the employee the opportunity to apply for another position. Employers need to be careful about the business case they advance to justify a redundancy. The Employment Court will carefully examine the evidence and, if not in agreement with the employer, may decide the redundancy was not justified. ■

Employment Relations Amendment Bill

The Employment Relations Amendment Bill passed its first reading on 5 June 2013 and has been referred to the select committee; the committee will report back by 5 December 2013.

The Bill amends the Employment Relations Act 2000 to make changes in the following areas:

- » Collective bargaining, including removing the requirement to conclude a collective agreement. It introduces an ability for employers to reduce employees' pay in response to partial strikes
- » Flexible working arrangements, to extend the right to make a request to all employees
- » Part 6A of the Act, in particular, introduces an exemption from certain requirements for small to medium enterprises
- » Good faith, to clarify the requirements for disclosure of information
- » Rest break and meal break provisions, to allow for flexibility, including compensatory measures where there is a failure to provide a break, and
- » The Employment Relations Authority to set time frames for release of determinations.

We'll report on the progress of this legislation through the House. ■

Social Security (Long-term Residential Care): Amendments to means testing

There have been amendments to these regulations (Regulations (No 2) 2013 (SR 2013/189), which came into force on 1 July 2013; they amend Schedule 27 of the Social Security Act 1964 (the Act). Schedule 27 relates to means assessments for long-term residential care.

The relevant asset thresholds set out in Schedule 27 are increased by 0.86%, as required by s155(2) of the Act. This is the change of the movement in the New Zealand Consumers Price Index (All Groups) for the year ended 31 March 2013. The new asset thresholds, rounded up to the nearest whole dollar (as required by s155(3) of the Act), are:

- » Threshold A: \$215,132 (applies to residents with no spouse or partner, or whose spouse or partner also requires care, or whose spouse or partner does not require care but has elected to have Threshold A apply), and
- » Threshold B: \$117,811 (applies to residents with a spouse or partner who does not require care and who has not elected to have Threshold A apply).

If you need more guidance on means testing for long-term residential care, please don't hesitate to contact us. ■