

Rural eSpeaking

ISSUE 40 | Summer 2022

Welcome to the Summer edition of *Rural eSpeaking*, our final issue for 2022. We hope you find the articles 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 on any other legal matter, please don't hesitate to contact us. Our details are at the top right.



Trusts and succession

Trustee duties in farm succession planning

The Trusts Act 2019 imposes mandatory and default duties on trustees.

When trustees are considering a succession plan for a trust-owned farm property, there may not be equal treatment between beneficiaries. One beneficiary may be favoured over others (common in a farm succession scenario) or acting in the favour of one or more beneficiaries who may also be trustees.

We give trustees a steer on how to plan for this situation.

PAGE 2 ▶



Protecting productive land

New policy statement: NPS-HPL

Following the *Our Land 2018* joint report from the Ministry for the Environment and Stats NZ, as well as a certain amount of political pressure, the government gazetted the National Policy Statement for Highly Productive Land (NPS-HPL) on 19 September 2022.

Over the next three years, every regional council must map any land that is designated 'highly productive land'.

PAGE 3 ▶



Over the fence

Increase in Recognised Seasonal Employer visas

An additional 3,000 Recognised Seasonal Employer visas are now available to meet the increasing demand for horticultural sector employees.

Updates to intensive winter grazing requirements

New rules came into force on 1 November regulating winter grazing on an annual forage crop between 1 May and 30 September in any one year.

Proposed changes to the dairy and cattle code of welfare

The Code of Welfare for Dairy Cattle has been reviewed and submissions made. We list some of the proposed changes.

PAGE 4 ▶

Trusts and succession

Trustee duties in farm succession planning

In a previous edition¹ of *Rural eSpeaking*, we covered certain aspects of the changes to trust law brought about by the Trusts Act 2019, particularly in relation to succession. That article focused primarily on the duties imposed by the Act on trustees to provide information to beneficiaries and some of the implications of that.

The Act also codified trustees' duties to beneficiaries, with the guiding principle set out in section 21:

'In performing the mandatory duties set out in sections 23 to 27 and (except to the extent modified or excluded by the terms of the trust) the default duties set out in sections 29 to 38, a trustee must have regard to the context and objectives [our emphasis] of the trust.'

The mandatory duties are pretty self-explanatory. These are a duty to:

- + Know the terms of the trust
- + Act in accordance with the terms of the trust
- + Act honestly and in good faith, and
- + Act for the benefit of beneficiaries or to further permitted purpose of the trust.

Those duties would all seem self-evident, but practice suggests that many trustees have difficulty in knowing the terms of the trust or acting in accordance with the terms of the trust, particularly without advice. In that situation, a trustee's duty is to ensure that they are appropriately advised so that they can carry out their duties properly.

Default duties bring the most angst

It is the default duties that are likely to cause trustees more difficulty. These duties can be modified by the trust deed and virtually all new trust deeds since the Act has come into force modify these to the maximum extent permissible. Older trust deeds may impliedly modify some or all of these, but not by specific reference to the Act (for obvious reasons).

There are 11 default duties but the ones most likely to cause trustees difficulty in terms of succession or future planning are the duties to:

- + Not exercise power for their own benefit
- + Not bind or commit trustees to future exercise of discretion
- + Avoid conflict of interest, and
- + Act impartially.

Affecting farm succession planning

If trustees are considering a succession plan for a trust-owned farm property that may not result in an equality of treatment between beneficiaries, the first step is to have a thorough review of the trust deed. The review will ascertain exactly who the beneficiaries are; in the case of the older trusts this could be a wide group. From this, trustees can establish what restrictions there are on their power to act, particularly where there is some element of favouring one beneficiary over another (common in a farm succession scenario), or acting in the favour of one or more beneficiaries who may also be trustees.

¹ *Rural eSpeaking*, Autumn 2021, No 35.



RETURN TO FRONT PAGE

Many trust deeds have been reviewed, or are under review, since the Act came into effect on 30 January 2021. Where possible, trust deeds are being modified to ensure that, as far as possible, these default duties are excluded. Some older trust deeds, however, don't have a power to vary the terms of the trust. In this situation, trustees are faced with having to act within the terms of the existing trust or, where there is a power of resettlement, exercising their power to resettle the entire trust capital on a new trust, although this can be an expensive exercise and have tax implications. Another option is court orders.

Who are the beneficiaries?

The other area that trustees are looking at is the definition of beneficiaries. Older trust deeds tend to have an extremely wide beneficiary pool.

One way to limit the exposure of trustees to challenges from disaffected beneficiaries is to reduce that beneficiary pool to core family members, and to exclude the wider family such as spouses, stepchildren, etc.

Why is this all important?

In the context of farm succession, families often have the difficulty of having significant capital assets but insufficient cash or borrowing capability to enable absolute equality between children if one child is going to have the farm.

Often the other children are asked to accept a lesser share of the trust to enable the farming operation to be carried on by one sibling. By reducing the beneficiary pool, and by excluding the trustees' default duties as far as possible, there is greater

CONTINUE TO PAGE 5

Protecting productive land

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Following the *Our Land 2018* joint report from the Ministry for the Environment and Stats NZ, as well as a certain amount of political pressure, the government gazetted the National Policy Statement for Highly Productive Land (NPS-HPL) on 19 September 2022.

The NPS-HPL came into effect on 17 October 2022 (the commencement date) and requires every regional council to map as highly productive land any land in its region that is:

- + In a general rural zone or rural production zone
- + Predominantly Land Use Capability (LUC) 1, 2 or 3 land, and
- + Forms a large and geographically cohesive area.

This mapping must take place within three years from the commencement date.

Protection of urban expansion on highly productive land

The *Our Land 2018* report found that, amongst other things:

'Urban expansion is reducing the availability of some of our most versatile productive land. Studies based on changes in land cover indicate that between 1990 and 2008, 29 percent of new urban areas were on some of our most versatile land. Fragmentation can also be a pressure on urban fringes: in 2013, lifestyle blocks occupied 10 percent of New Zealand's most versatile land. This may block future options for agricultural production.'

Accordingly, the intent of the NPS-HPL is to protect highly productive land for use in land-based primary production, both now and for future generations.

It does this by requiring the mapping of highly productive land and putting significant restrictions on the ability of local authorities to zone this land for subdivision, urban development or rural lifestyle purposes.

LUC 1, 2 or 3 land is arable land that is suitable for cropping, viticulture, berry fruit, pastoralism, tree crops and forestry. LUC class 1 has minimal limitations and is highly suitable for those uses whereas LUC class 3 has moderate limitations for those uses.

Regional councils may also map land that is not LUC 1, 2 or 3 land as highly productive if the land is, or has, the potential to be highly productive for land-based primary production in that region having regard to a variety of factors.

Exceptions

There are, as always, some exceptions: to the NPS-HPL. These are:

- + Land that, if already identified for future urban development, must not be mapped as highly productive land
- + Certain territorial authorities may allow urban rezoning of highly productive land if:
 - Urban rezoning is required to provide sufficient development capacity to meet demand for housing or business to give effect to a National Policy Statement on Urban Development 2020



RETURN TO FRONT PAGE

- There are no other reasonable, practical or feasible options providing at least sufficient development capacity within the same locality and market while achieving a well-functioning urban environment, and
- The environmental, social, cultural and economic effects of benefits of rezoning outweigh the long term environmental, social, cultural and any economic costs associated with the loss of highly productive land for land-based primary production, taking into account both tangible and intangible values.

There are further prescribed matters that the territorial authority must consider when making its decisions on whether or not to rezone highly productive land. There are also similar restrictions in relation to the subdivision of highly productive land and zoning highly productive land for rural lifestyle purposes. Territorial authorities are required to avoid *'inappropriate use or development of highly productive land that is not land based primary production.'*

On a practical level

It will be interesting to see the practical effect of the NPS-HPL around the country. Many of our urban areas are built on highly productive land, for obvious historical reasons. Those areas that spring to mind are the productive vegetable growing areas of Pukekohe and the Horowhenua, and the apple and wine growing regions of Hawke's Bay, Marlborough and Nelson. Some urban areas in this country have little room for expansion other than on highly productive land.

The rural community will welcome the NPS-HPL but it will present difficulties for town planners to figure out how to deal with the much-publicised need for further housing. Allowing higher destiny development in district plans may be one solution to these problems. +

Over the fence



Recognised Seasonal Employer visas

In September, the government announced an increase to the Recognised Seasonal Employer visa cap to meet the increasing demand for horticultural sector employees. An additional 3,000 RSE visas can now be granted for the 2022–23 year, making a total of 19,000 available RSE visas.

An RSE visa applicant must meet the following requirements:

- + Be 18 years of age or older
- + Live in an eligible Pacific country at the date of their application, these include the Federated States of Micronesia, Fiji, Kiribati, Nauru, Palau, Papua New Guinea, the Republic of Marshall Islands, Samoa, the Solomon Islands, Tonga, Tuvalu and Vanuatu
- + Work in recognised areas such as the fruit, vegetable or wine sectors, and
- + Work a minimum of 30 hours/week and be paid a minimum of \$22.10/hour.

A successful RSE visa holder cannot enter New Zealand until 14 days before the

start date of their visa and must leave New Zealand before their visa expires. An RSE visa holder may, however, apply for a further RSE Limited visa where they are to continue working for a recognised employer and have not already stayed in New Zealand for the maximum time allowed, which is seven months in an 11-month period. It is worth noting that RSE Limited visas are only granted in exceptional circumstances.

It is important to understand your legal responsibilities when employing an RSE visa holder. If you are unsure about your obligations, please don't hesitate to contact us.

Updates to intensive winter grazing requirements

In September 2020, the government introduced the Resource Management (National Environment Standards for Freshwater) Regulations 2020 in an attempt to regulate certain activities which pose a potential risk to freshwater and the environment.

One activity covered by these Regulations is intensive winter grazing (the grazing of livestock on an annual forage crop at any time from 1 May to 30 September of the same year). On 1 November 2022, new regulations came into force in respect of intensive winter grazing (the Updated Regulations); these will impact farmers across New Zealand.

The first change is the requirement to have an intensive winter grazing management plan in place. The purpose of the plan is to identify the potential risks of intensive winter grazing, how you will mitigate those risks on your farm and to identify whether your current intensive winter grazing practices will still be considered a permitted activity (an activity that does not require a resource consent) under the Updated Regulations.

The Updated Regulations have changed which activities are considered a permitted activity.

More restrictions include, for example, the total area on which you can implement intensive winter grazing, the slope of land and stock distance from waterways. If you are unable to comply with the Updated Regulations, you must apply for a resource consent by 1 May 2023.

It is important to understand your legal responsibilities about intensive winter grazing. If you are unsure about your obligations, please don't hesitate to contact us, or your local council.

Proposed changes to the dairy and cattle code of welfare

The National Animal Welfare Advisory Committee has recently reviewed and consulted on the minimum standards and

best practice for the Code of Welfare for Dairy Cattle.

The Code was last reviewed in 2008, before the Animal Welfare Act 2015 came into force. This Act records that animals are capable of experiencing emotions; negative experiences for animals should be reduced and exposure to good experiences should be increased. As a result, a review of the Code is needed to bring the standards and regulations in line with the Act.

The proposed changes to the Code include:

- + Changes to the body condition score requirements. This score provides an indication of a cow's body fat reserve, which can be useful in respect of assessing the health of the cow
- + Provision of shade and shelter (previously the requirements were that animals must be provided with means to minimise the effects of adverse weather)
- + Restrictions on the use of hip clamps
- + Banning the use of electrified backing and top gates
- + Banning the use of electro-immobilisation devices
- + Transport restrictions relating to travel time, time from the cows last being milked and water being provided at collection areas, and
- + Requirements around lying areas for cattle especially within intensive winter grazing systems.

Submissions on the proposed changes closed in June of this year. The National Animal Welfare Advisory Committee is now reviewing submissions.

If you have any queries in relation to the proposed changes, or what this means for you, please don't hesitate to contact us. +

[CONTINUED FROM PAGE 2](#)[RETURN TO FRONT PAGE](#)

Trusts and succession

protection for the trustees when making decisions about which some beneficiaries may be unhappy.

Risks

There is, however, always a risk in amending a trust deed by excluding certain beneficiaries and excluding trustees' default duties. The risk is that by making those decisions, the trustees can leave their actions open to challenge – on the basis that they weren't exercising their power to exclude beneficiaries or vary the trust for a proper purpose; this is one of the mandatory duties that cannot be excluded. If, for example, a group of trustees exclude all the settlor's children except for one and then remove all their default duties in order to leave the trustees free to benefit that beneficiary solely, the previous decision (to exclude beneficiaries, and varying the trust) would be open to challenge.

Have a plan all can live with

As always for succession matters, the best answer is to come up with a plan that all of the core beneficiaries can live with and buy into. This would ordinarily take some time to plan so that the farming operation is in a position to enable the desired succession to take place and also to accommodate siblings who are not involved in the farming operation.

Sometimes, however, this isn't possible. If the trustees are faced with making difficult decisions that may be unpopular with some beneficiaries, they must be very careful to understand what they can and cannot do and to seek (and take) professional advice. +

