

# fineprint

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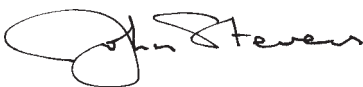


## Editorial

Recreational access to our wonderful landscape is important to us all. From time to time the suggestion is made that increasing foreign ownership of rural land is denying New Zealanders enjoyment of their own countryside. The government is currently undertaking a public consultation on this topic. Fran Boyd touches on some aspects of access to public land in the adjoining story.

Although enjoyment of the outdoors is a treasured part of our national heritage, our politicians have been less keen to preserve the myth that capital gains are not taxed in New Zealand. Many of us have benefited from untaxed capital gains, particularly in times of high inflation. We need to be aware of the many ways in which gains in value can be taxed. On page 4 Ian Turner draws our attention to some key areas where caution is needed.

Enjoy reading this Autumn issue. Next time we will have a new look for you!



John Stevens, Chairman  
NZ LAW Limited

## Locked Gates on Public Roads – Public access issues clarified

*Sometimes the general public is confused about rights of access on public roads. Fran Boyd of Hannan & Seddon – Greymouth, gives readers some guidelines on what should not happen on a public road.*

Some public access to New Zealand's rivers, lakes, forests or recreation areas is provided for by legislation. "Esplanade reserves" and "marginal strips" (commonly referred to as the "Queen's Chain") are some of the terms used to describe areas set aside to provide the general public with access to "the great outdoors". The public also has rights to particular areas by using a public road.

### Public has rights

In New Zealand public road ownership is vested in local councils. However ownership is subject to public rights, such as the right to "pass or repass" along public roads and to do so without hindrance.

This means a council cannot authorise something being placed on a road if it would amount to a public nuisance or interfere with individual rights of access, for example, the placing of a locked gate across the road.

### Some 'obstructions' legal

Not all obstructions or objects on a public road are illegal. In some circumstances,

councils can permit cattle stops and swing gates to be erected. They can also allow monuments, statues and flowerbeds to be erected or placed on a road, provided they do not obstruct vehicles from entering or using the road.

Councils may temporarily close roads and also "stop" (permanently close) a road. Generally, however, an obstruction on a public road that can be considered an "appreciable nuisance" is not allowed. A locked gate with a key that can only be accessed from a neighbouring farmer can be an "appreciable nuisance".

### More a rural issue

Access conflicts are more likely to arise in rural areas where the containment of livestock or access for fishing or recreation are contentious issues.

If you are unsure whether you are entitled to use a particular access road or track, or if there is an obstruction that prevents or restricts access, then you should contact your local council or, in more complex cases, talk with your lawyer.

## Asset-testing to go – But not yet

Asset-testing of the elderly in long-term care is to be phased out, said Ruth Dyson, Associate Health Minister in an announcement in early April.

However this will not begin until 1 July 2005, only a few months away from what is expected to be a general election.

From 1 July 2005 onwards, single people and couples with both partners in care will be able to keep \$150,000 of assets, including property and savings, before they must start to contribute to the cost of their care.

Currently, single people in care are only allowed to keep \$15,000 in assets; for

couples the figure is \$30,000.

The house and car of a couple with only one partner in care will continue to be exempt, but the cash asset redemption will rise to \$55,000. The level in each category will increase by \$10,000 a year from 2006 until all asset testing is removed.

# Wandering Animals

## – Implications for all animal owners

*Wandering stock is hardly an unusual rural occurrence. However, there are quite serious implications for all animals owners if stock wanders and endangers the life, safety or health of the general public, explains Sarah Harvey of Cruickshank Pryde, Invercargill.*

If an animal owner allows stock to stray onto a road causing damage, the owner can be held liable for the cost of the damage caused. This is provided for under the Animals Law Reform Act 1989.

The 1989 Act completely reversed the previous position (still quite commonly believed to be the case) that if a motorist collided with an animal wandering on a road, the driver of the motor vehicle was almost always held to have been negligent. This meant that the driver usually had to pay all the costs of the accident, even if the real cause was the wondering animal. In addition, the farmer could sue the driver for the loss caused by the death of the animal or the need to put it out of its misery.

### Criminal Prosecution

An owner who allows animals to escape can be prosecuted by the police for criminal nuisance under Section 145 of the Crimes Act. In these circumstances, criminal nuisance can be described as failing to take adequate steps to secure the animal knowing that it will endanger the life, safety or health of a member of the public if the animal escapes.

If an owner fails to adequately fence their animals, knowing that they could endanger the public if they escape, then the owner becomes liable for criminal prosecution.

### Fencing

In deciding whether a farmer has been negligent in allowing an animal to stray onto a road, it is necessary to think about fencing and what is the common practice in your particular area.

It is also necessary to consider any other measures taken to prevent the animals from wandering onto the road, as well as any steps to be taken to warn road users of the likely presence of animals on the road.

For example, in some remote areas stock may not be fenced at all. If this is a common practice in the area then that is likely to be enough to avoid a prosecution, particularly if there are cattle stops or signs on the road warning the public of the likelihood of wandering stock.

If animals escape from their paddock because of outside interference, for example a trespasser intentionally opening a gate or tampering with fences and releasing the animals, the owner of the animals would not normally be liable for criminal prosecution or be held liable for the cost of the damage caused by the wandering animals.

The issue of wandering stock is very serious; the maximum penalty for a criminal nuisance prosecution is a term of imprisonment for one year.

### Other Consequences

If a straying animal causes a collision with a motor vehicle, the animal's owner can be liable to bear the cost of repairing the damage caused to the motor vehicle. The animal's owner could also be forced to pay other indirect costs of the collision. These may include the cost to hire a replacement vehicle while repairs are being completed, and maybe a claim for loss of income if the driver and/or passenger is unable to work for a long period.



Cayle Hogue – Photography

If the animal escapes from its paddock and goes onto the property of a neighbour causing damage, the owner of the animal can be liable for the cost of the damage. The neighbour is not able to sue the animal owner for damage caused by wandering animals unless the neighbour's land is adequately fenced. The neighbour, too, has an obligation to adequately fence their own property.

### Conclusion

It is necessary for animal owners to take all reasonable care to ensure their animals are adequately fenced so that they cannot escape from the property. If an animal owner fails to meet the standard of care required in the circumstances, the animal owner may be forced to pay significant amounts of money, and they may also be facing a criminal prosecution.

Now is a good time for farmers to check boundary fences.

# No capital gains tax in New Zealand?

## – Yes, in some circumstances

*Most taxpayers are quite unaware that tax may need to be paid on the profits of some property transactions. Ian Turner of Knapps Lawyers in Richmond (near Nelson) explains who may need to pay particular attention to these provisions.*

Nelson has embraced the café culture enthusiastically and time spent in any of the growing number of cafés will expose you to the usual sights, sounds and aromas. But more than anything else in Nelson you would be exposed to foreign accents.

Foreigners are the highly visible component of the large numbers of people moving to Nelson for the lifestyle offered in the Nelson/Tasman region.

These foreigners bring their skills and culture. They also bring overseas funds and a requirement for housing. Nelson is struggling to meet this demand.

Where demand outstrips supply inevitably there is a price rise; and the property price increases in Nelson recently have been dramatic.

The anticipation of a quick capital gain has led many people to invest in property. It is commonly believed that profits from property investments are tax-free. This is not necessarily true.

### Tax may be payable

If property is purchased for the express purpose of resale, the taxpayer will need to know about Section CD1 of the Income Tax Act. It states:

“... the gross income of any person includes . . . any amount derived from the sale . . . of any land if the land was acquired for the purpose or intention . . . of selling or otherwise disposing of it”.

Many taxpayers run the gauntlet of the Inland Revenue Department believing it

has some difficulty in proving this intention.

### Court cases

There have been a number of cases arguing this point. The courts have made it clear that the intention to resell must have existed at the time of purchase and the intention is wholly subjective.

Judges have found that the intention to resell existed on the basis of references to a tax payer’s intention or purpose in board or meeting minutes, applications for funding, correspondence and actions.

The often used ploy of buying and living in a property for a short period and then reselling does not protect against the provisions of the Act, particularly if the process is continually repeated.

### Land dealers

An even wider net is available to for the IRD to make land dealers pay for profits on property transactions.

The Act includes in the gross income of any person “. . . any amount derived from the sale of land where the tax payer carried on, at the time the land was acquired, the business of dealing in land and the land sold by the tax payer was acquired for the purpose of that business or was sold within 10 years of the date of purchase”.

The concept of dealing has been explained by the court as buying, selling or exchanging land. A person may be deemed to be in the business of dealing in land if there has been a reasonable frequency of transactions or a continuity of effort.

Even where there are a number of land transactions concerning land, there may be a legitimate explanation. Each case must be decided on its own merits.

However, if you are deemed to be a land dealer then any profits you derive from the purchase and sale of land that was purchased for the business or was sold within 10 years of purchase, will be added to your assessable income.

### Builders

Builders are particularly susceptible to this tax imposition. Any amount made from the sale of land where the taxpayer carried on a building business at the time the land was purchased and the taxpayer carried out any improvements to the land is included as assessable income. This occurs where the land sold was purchased for the purpose of the building business or the improved land was sold within 10 years of the completion of the improvements.

The Act does state that the improvements or building work must be something more than “of a minor nature”.

### If the business winds up

For both land dealers and builders the issue of whether the business was being carried out must be determined at the time of purchase. If a land dealer or builder purchases land for the purpose of the business and then ceases trading and winds up the business, care must be exercised in the sale of such land especially if it is sold within 10 years.

The general principles that apply to the risk of taxation on profits that are gained from the sale of land are quite clear. However, each situation is unique. Therefore the overriding message must be that competent and timely legal advice must be obtained.

# Dogs

## – An owner’s responsibilities

*Dogs have been in the news lately for all the wrong reasons. Richard Ayton of Law North Partners in Kerikeri guides readers on the responsibilities of dog owners.*

In New Zealand the Dog Control Act 1996 sets the rules for ownership, control and treatment of dogs.

An owner must register their dog and ensure the dog receives proper care and attention, food, water, shelter and exercise.

Reasonable steps must be taken by the owner to ensure a dog does not cause a nuisance by persistent and loud barking, or howling.

### Safety

An owner must take all reasonable steps to ensure their dog does not injure, endanger, intimidate or otherwise cause distress to any person or other animal. In addition, the owner must take steps to prevent these situations occurring.

There are additional offences relating to dogs being allowed to run amongst stock or poultry, or rush at vehicles.

Any person seeing a dog injuring, endangering or causing distress can either seize or destroy the dog. This also applies where a dog is on the loose near stock.

If you see the need to seize or destroy a dog, you must be sure you are acting correctly. If you are unsure you should involve a dog control officer or, in serious cases, the police.

A dog must be muzzled if it has previously attacked people or stock.

### Damages and Penalties

A dog owner is liable for any damage done by a dog and can be fined by the court. For a child owning a dog, then the parents or guardian are liable for damage. If you are temporarily looking after a dog and

it causes damage, you can still be liable for any damage the dog causes whilst in your care.

Prosecution of a dog owner means a court can impose penalties which may include destruction of the dog.

### Bylaws and regulations

In addition to the legislative requirements, local authorities also impose bylaws and regulations for dogs (and their owners) in public areas such as beaches and parks. Dog owners must ensure they comply with all local authority requirements to avoid accidents to property or, more importantly, to any people.

*Since this article was drafted the government has announced some proposed changes to dog control laws that would come into force on 1 July 2006.*

*From that date, it is proposed that all dog owners must have a securely fenced area that will allow visitors access to the door without coming into contact with a dog.*

*Other proposals are:*

- *Four specifically named breeds of dog must be muzzled in public.*
- *Newly registered dogs will have an identifying microchip.*
- *Dog control officers will have the power to enter a property and seize unregistered dogs.*
- *Penalties for the worst offences will rise dramatically.*

*The government’s proposals have raised a storm of protest from dog owners and a great deal of support from the general public.*

*We will keep you informed of progress.*

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## Post Script

### Noxious Weeds

Currently there are many sharemilking and rural contracts still referring to the outdated terminology “noxious weeds” or “noxious plants”. These terms are not longer defined in any legislation. As a result it is no longer as clear as it once was which plants should be exterminated.

The Biosecurity Act 1993 replaced legislation relating to noxious plants. Now unwanted plants and animals are termed “pests” or “unwanted organisms”. Local authorities now implement pest management strategies under Section 71 of the Act.

Control programmes are being implemented at both national and local levels. A national register of unwanted organisms, along with the status of other plants, can be found at [www.protect.govt.nz](http://www.protect.govt.nz).

In drawing up sharemilking and rural contracts, it is important to say what you mean. Any section containing reference to “noxious weeds and/or plants” must be updated so it is clear to both parties what is actually intended.

### Get a second opinion

Are you concerned about the performance of your investment portfolio? The volatility in international shares over recent years has resulted in many portfolios becoming unbalanced. It is now timely to seek a second opinion about your portfolio.

Your lawyer can refer you to a financial planner who meets industry ‘best practice’ standards. The planner can re-assess your risk profile, review your investment goals and recommend any changes to be made.

A number of excellent investment opportunities are available right now. Call your lawyer for a referral to an appropriate financial planner.

### New OSH laws in force soon

The new OSH laws came into force on Monday, 5 May with stress and fatigue now becoming workplace hazards.

The Department of Labour believes both employers and employees are jointly responsible for keeping themselves and others safe in the workplace.

For general information on the new legislation, look at [www.workinfo.govt.nz](http://www.workinfo.govt.nz) or call the toll-free number during business hours (0800-209-020). For help in ensuring your own business is well prepared for the changes, please call us urgently.

### Changes in the building industry

Subcontractors can now expect a fairer payment process with the Construction Contracts Act 2002 which came into force on 1 April. The ‘pay when paid’ or ‘pay if paid’ clauses, as well as clauses preventing unpaid contractors and subcontractors from suspending work cannot now be used.

Insolvent contractors and/or developers now cannot continue to operate with payment delays and shifting risks on to subcontractors.

The new law is wide-ranging. It affects not only those in commercial construction, but it will also now affect homeowners building or renovating their properties.

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