

# Fineprint

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## Property Leases

### Late rent reviews

**Whether you are a landlord or a tenant, you must know the date the rent for your premises or business is due to be reviewed. Rent is a normal expense for most businesses, and should be budgeted for and paid regularly. Some tenants, however, have received a nasty shock when presented with an account for back-rent which they didn't realise (or had conveniently overlooked) was due.**

#### Rent review timing

A lease should set out the rent review dates and a procedure for the review to be carried out. But what happens when the rent review is missed or overlooked? Can a landlord review the rent and enforce an increase, some months or indeed years past the review date? There is some sympathy for the view that a landlord who forgets the right to a rental review should miss out on the benefit of any back-rent. Landlords, of course, say the lease dates are fixed in the contract and the new rent applies from those dates, even though the review process may take place some time later.

A landlord may be entitled to an increase in rent backdated many months to the rental review date, even though the review was overlooked by both landlord and tenant. The delay between the review date and the actual rent review itself can be avoided by stating in the lease that "time is of the essence"; that is, the review must be carried out within the time stipulated in the lease, otherwise the benefit of the rent review is lost. However, not all leases actually specify that the timing "is of the essence" when reviewing the rent – and this can be a trap.

The courts have held that, if no prejudice has been suffered by the tenant due to the late review notice and that the reasons for missing the review are acceptable or understandable, an extension of time for the review is appropriate.

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### Catch-up rent

The new rent may be payable and backdated from the review date stated in the lease, unless another date has been agreed to or that the timing of the review was clearly stated as being “essential” to the contract and that date has been missed. If, as the tenant, you had overlooked this yourself and had not budgeted for an increase, this can be a nasty surprise.

Usually landlords can enforce a late rent review. However, the parties may make the timing essential and binding, either in the lease itself or by implication. For example, where a time limit has been missed by one party (landlord or tenant) the other party could serve notice making the timing “of the essence”. This would force the other party to complete the rent review within the appropriate time.

### Say nothing – do nothing?

Some tenants are well aware that the rent review date has been and gone, and hope that the landlord has forgotten. The longer this goes unnoticed, they hope and believe, the less chance they have of being hit with a rent increase. But tenants should check the lease wording. If the timing of the review is not clearly stated as being an essential term, then the rent review process can be started and completed by the landlord quite some time (months or even a year or more) after the date specified, and backdated rental will apply.

The most common commercial lease sets out easy-to-understand procedures for rent review. The tenant may want to initiate the

review which could well avoid being whacked with a later, backdated surprise! The lease, however, needs to provide for the tenant to be able to trigger the review rather than only the landlord.

Most lawyers use the standard Auckland District Law Society commercial lease form. This has a rent review clause which states (among other things) that the party wishing to start the review process cannot give notice of intention later than the next review date. Also, the annual rent agreed or imposed under the review shall start from the “review date”, or the date of receipt of the review notice – if that notice was served more than three months after the relevant rent review date.

If there is no “ratchet clause” in the lease which could allow the new rent to possibly be decreased if market rents have dropped, then the tenant is well advised to speak up and initiate the review.

### Notices

Where a review clause clearly states that the timing is essential to the rent review process, the landlord must promptly carry out the process and issue a rent review notice or the right to increase the rent may be lost.

At one time there was no requirement for any notice to be served to set the review in motion. Now, however, if either party can trigger the review process, then notice must be served within a reasonable time. The landlord is usually required to serve a notice stating the new market rent.

If the tenant objects, the tenant must serve the landlord with a counter-notice. A mere expression of disappointment or disagreement by the tenant to the proposed new rent is not an adequate counter-notice.

### Disputes

Either the landlord or tenant can apply to the court, or submit a dispute to arbitration, to determine the fairness of imposing a late rent review. The court or arbitrator will take account of the length of the delay, the amount at stake, who contributed to or caused the delay and what fault (if any) there was caused by that party, and whether the other party – either landlord or tenant – has been prejudiced by the delay.

If there has been a drop in market rentals, the landlord may keep quiet and hope the tenant does not trigger the review process. Then some months later, if the market lifts, the landlord could spring the rent review, backdated to the due date. The argument would then be in determining the historic fair value at that date.

### Read your lease!

Both landlords and tenants are well advised to check the provisions of their leases carefully, and be aware of the rent review details and the procedures to be adopted at review time.

A lease is an important, robust legal contract and should not be regarded as a simple form-filling exercise. If rent review issues are not addressed and recorded properly for both the landlord and the tenant, then it could prove costly – for both parties.

# Retirement Villages Act

## The finer details

*Fineprint's* Summer 2004 issue ran a story on the Retirement Villages Act 2003. Readers may want more detail on some issues.

While the main protective framework of the legislation came into force on 1 February 2004, some of the finer details are due to be enacted on a date/dates to be appointed by the Governor-General by Order-in-Council.

This delayed commencement applies to the Registrar's power of inspection, the requirements relating to registered offices

and the appointment of a Statutory Supervisor, as well as the effect of the Act on other pieces of legislation.

In addition, the first four schedules of the Act are yet to be finalised. These contain the following standard forms:

- Form of Register
- Disclosure Statements
- Occupation Right Agreements

- Code of Residents' Rights.

However, despite these omissions, the protections offered by the Act to prospective and incumbent residents are now available. If you are considering moving to a retirement village, please call us; the legislation requires a lawyer to explain the Occupation Right Agreement.

# Urban Sprawl

## What rights for a farmer?

Urban sprawl is nothing new. For centuries people farming near large cities such as London and Paris have had to contend with residential and industrial construction on land that was previously farmland. In New Zealand, however, legislation can now allow farming to become non-sustainable, with the potential to sideline the economic backbone of this country – this article explains.



With the increasing movement of people into urban areas, there is pressure on district planners in areas of high growth to create more residential land. As a result, there is urban sprawl out into existing rural areas. Does this mean that the requirement for more residential areas overrides the rights of the farmers – particularly in relation to any activity that a farmer is carrying on legitimately?

In the past, the answer to this question would always have been “no”. However, the interpretation of the Resource Management Act 1991 (RMA) which has now been in operation for over ten years appears, in some cases, to have brought a “yes” answer.

### Resource Management Act objective

The purpose of the RMA is to promote the sustainable management of natural and physical resources. The Act also refers to enabling people to provide for their social and economic well-being.

Does this mean the RMA can be used to take away, in effect, a person’s livelihood without any real compensation? It seems one local authority has decided that is exactly what it means, albeit not in a direct way.

### Farmers’ rights

Imagine a farmer whose property has always been bordered by other farms, but is situated close to town. The farmer would have thought quite reasonably that the proximity to town was a benefit in that it would add value to the farm on any resale, there could be the possibility of subdivision into residential lots and therefore the value of the property would be further increased.

Take the example, in the Waikato, of a pig farm which had been on its existing site for over 50 years. During that time the piggery had expanded. At all times the farm owner had obtained, and complied with, all the necessary consents relating to the disposal of effluent and other matters relating to the farm.

The town steadily grew and the outskirts came right up to the pig farm. A number of the residential newcomers objected in particular to the piggery smell, and made complaints to the local authority. The local authority, using the RMA, monitored those complaints and imposed increasingly more stringent conditions on the resource consents for the pig farm.

Over a period of about five years the conditions imposed became so draconian that the pig farmer was forced to close his business. During this period the farmer, who had owned the property for over 25

To add insult to injury, the council had not rezoned the land on which the pig farm was situated, despite the fact the town was right at the farm boundary. The land is still zoned “rural” and therefore any possibility of an immediate increase in value was unavailable as the pig farmer was not able to subdivide his property and take advantage of the urban sprawl.

The farmer is now trying to obtain consent from the local authority to subdivide his land to provide funds to meet his debts and provide some livelihood.

Effectively the local authority removed the farmer’s livelihood and did not have to pay any compensation. The farmer was penalised by the actions of the local authority without making any changes to the way his business was run.

### Conclusion

The Resource Management Act is not all bad. Local authorities are, in a number of cases, doing a good job of protecting the environment and the rural areas. It must be remembered that although the number of farmers is low in comparison with the total population of New Zealand, the total farming area which is controlled by the primary sector and contribution it makes towards the economy of New Zealand is very large.

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**“ The purpose of the RMA is to promote the sustainable management of natural and physical resources. The Act also refers to enabling people to provide for their social and economic well-being.”**

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years, was required to spend a vast amount of money in legal and consultancy fees in an attempt to persuade the local authority that the existing use rights should remain.

Little or no notice was taken of the fact the local authority had rezoned land adjacent to the farm “residential” so that the urban development could take place.

Farmers generally have managed their farms as a sustainable resource; agriculture is still the economic backbone of the country. Urban sprawl seems intent upon breaking that backbone by the use of the RMA to stop farming close to towns with out any compensation; that does not seem right.

# Electronic Transactions Act

## Implications for business

**If you transact business electronically, rely on email for most business processes, store paper records or provide information in hard copy, then the Electronic Transactions Act 2002 may have some implications for your business.**

The Electronic Transactions Act 2002 was passed in October 2002, but only came into full force on 21 November 2003 with the passing of the related Electronic Transactions Regulations 2003.

In a nutshell, the new Act endorses the use of electronic technology by:

- Confirming that electronic methods of communication are legally effective and on the same legal footing as paper-based means; and
- Permitting paper-based legal requirements to be met electronically.

The Act's intent is to bring more certainty to e-commerce transactions and to enhance business efficiency by reducing business compliance costs.

While it is probably too early to predict the impact of the Act on business, the indications are that many people are still not familiar with the wide-ranging implications this legislation brings.

On a practical level, documents can now be stored in electronic form. As a result, for example, record-keeping requirements under the companies' legislation can now be satisfied by storing the documents electronically. Pharmacies may electronically store controlled drug prescriptions.

The Act does not require anyone to use electronic technology but allows for its use as a substitute for paper-based communications. However, there are limitations.

### Concerns

When the Act was passed, there were three major concerns regarding its impact. These were in areas of credit disclosure, notices relating to the destruction of animals under the National Parks Act and the Conservation Act, and record keeping for tax purposes.

The Regulations have addressed some of these initial concerns, however, only time will tell of their effectiveness. For instance, the Act allows tax information to be kept electronically

as long as, if and when required by the Inland Revenue Department, an exact image of the original document can be reproduced. Scanning documents for storage may be a tedious task. Similar measures have been introduced to address the other concerns.

Most readers will come across agreements and contracts that require notices to be given in writing, such as advising certain conditions relating to a transaction have or have not been met.

This requirement can now be satisfied electronically. However, the party receiving the notice must have consented to receive the information electronically. Businesses must now be more pro-active in monitoring any electronic communications.

In addition, businesses must also be cautious when deleting any former employee's email files as they may contain contractual agreements or notice provisions with customers or suppliers.

### Limitations

While the Act promises a great deal for e-commerce, there are a number of traps for the unwary which, if not considered, could prove costly. The more visible of these are that the Act does not:

- Override other legislation that has specific provisions relating to the use of electronic technology. For example, the Land Transfer Act permits the Registrar-General of Land to specify certain technology (the LandOnline system) for electronically filing land transfer documents; and it does not
- Apply to certain documents where the use of electronic technology may be inappropriate, for example, wills, public notices, court documents, bills of lading, cheques and search warrants. The exceptions are wide, varied and can be changed by regulation at any time.

Despite some shortcomings, having this legislation is a far better proposition than not having it. The Act tidies up some of the key issues relating to doing business electronically.

## Managed Funds Show Strong Recovery

Managed funds demonstrated a strong recovery in 2003. The average balanced fund achieved a positive return of 10.3% after tax and fees, which is very welcome news compared with the result in 2002 of -8.5%.

Outstanding results were produced by funds invested in New Zealand, Asian and technology shares. International share funds returned to positive territory but in many cases, only just.

The rapidly appreciating New Zealand dollar negated many of the investment gains made by international, particularly US, managed funds. However, past cycles indicate the New Zealand dollar will eventually weaken against the US dollar and create foreign exchange gains for those already invested into international markets. Now is a good time to capitalise the New Zealand dollar's strength and invest offshore.

Private Portfolio Service, a master trust that offers access to quality, wholesale managed funds around the world, has reported good performance in most sectors and provides an ideal investment vehicle for today's market.

Contact us for a referral to a local financial planner who meets industry best practice standards and who we are confident can provide investment recommendations and financial advice to maximise your financial security.

Source: TPG

# Help with managing the change

## Holidays Act 2003

The new Holidays Act 2003 came into effect on 1 April 2004. Employers, in particular, must be aware of the provisions in the new legislation and to have a process to manage the transition to the new law. This article gives an overview on the major issues in the legislation.

The Holidays Act 2003 has had a great deal of publicity in the business pages over the past few months, with much of the discussion centering around the impact on employers. One of the most public issues has been the move from the statutory entitlement of three weeks annual leave to four weeks. However, there is a great deal more to be taken into account.

### Working on a public holiday

Over the Easter weekend, employers will have already grappled with the new provisions that require an employee working on a public holiday to be paid at time-and-a-half for the hours worked and to be given one day's leave in lieu of having to work that day. Some businesses increased prices for the public holidays in order to recover their increased fixed costs; others closed for the two public holidays unable to afford the wage cost increases.

### Annual leave

From 1 April 2007 employees are entitled to four weeks annual leave. For employees already receiving four weeks annual leave, the new provisions do not entitle them to five weeks leave from 2007 onwards.

#### *Existing annual leave entitlements*

Employers must ensure that an employee's annual holiday entitlements have carried forward after 1 April 2004.

### 'Special leave' replaced

The new Holidays Act replaces 'special leave' with 'sick leave' and 'bereavement leave'. If an employee has any special leave owing, this became 'sick leave' from 1 April. Entitlements under the old legislation to 31 March were transferred over to the new regime from 1 April onwards.

#### *Sick leave*

On completion of six months current continuous employment, an employee

becomes entitled to five days paid sick leave, and a further five days leave on the completion of each subsequent 12-month period.

Sick leave can be taken when an employee is ill, or when their spouse or dependent person (such as a child or parent) is injured or ill and needs care.

#### *Bereavement leave*

Most employees are entitled to bereavement leave after six months continuous employment. An employer may ask for proof or evidence of a bereavement. There is no maximum number of bereavement days allowed per year. On the death of an immediate family member an employee may take up to three days paid leave. Bereavement leave does not have to be taken immediately or on consecutive days, nor does it have to be taken at all. In a situation where there are a number of deaths at the same time, an employee may take three days for each death.

In the case of the death outside the immediate family and an employee considers themselves to be bereaved, one day of paid leave may be taken if the employer accepts that the employee has suffered a bereavement.

### Employment agreements

Many individual employment agreements will have leave provisions that are inconsistent with the Holidays Act 2003. Although those agreements will continue to apply for other employment conditions, they will not apply with the new provisions of annual, public holidays, sick or bereavement leave.

Our advice is to review all employment agreements. If you are unsure of anything, please don't hesitate to contact us.

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Wain & Naysmith - Blenheim  
Walker MacGeorge & Co - Waimate  
Welsh McCarthy - Hawera  
Wilkinson Adams - Dunedin  
Woodward Chrisp - Gisborne

# Postscript

## Leaky buildings

The Weathertight Homes Resolution Service has, at mid-April 2004, 1,821 active claims, with almost 60% of these being in the Auckland area. The WHRS has so far completed 74 resolutions.

If you believe your house or building has been affected by leaky building syndrome, check the government's website [www.weathertightness.govt.nz](http://www.weathertightness.govt.nz) – for information and to register a leaky building problem.

Alternatively, ring the toll-free line – 0800-116 926 during normal business hours.

## Tax break for small business

Small business will benefit from about-to-be-introduced tax legislation. As part of the government's initiative to get closer to business, from 1 April 2005 a 6.7% discount on voluntary provisional tax paid in the first year of operation. This will be available to the self-employed and people who derive income from partnerships during their first year of business.

The current situation has businesses paying a two years' worth of tax in their second year, putting real pressure on cash flows and the ability to survive.

## Paid parental leave scheme extended

The Government announced in March an extension of the paid parental leave scheme. Paid parental leave will be extended from 12 to 14 weeks; and employees will only have to spend six months in the job in order to qualify. This will bring the New Zealand scheme into line with International Labour Organisation standards.

The paid parental leave period extends from 12 weeks to 13 weeks from 1 December 2004, and 14 weeks from 1 December 2005.

Self-employed parents, part-timers, casual and season workers are still excluded from the scheme.

For more detailed information about the paid parental leave scheme, look at [www.dol.govt.nz](http://www.dol.govt.nz), then 'employment relationships'. Alternatively, call the Employment Relations Service on 0800-800 863.

## Retail hours on public holidays

Whilst the government has indicated shop trading hours on public holidays will change for Easter Day, retailers should note that the status quo remains in the meantime.

In April there are four public holidays: Good Friday, Easter Day, Easter Monday and Anzac Day. Most retailers were not supposed to open on Good Friday or on Easter Day. Trading is allowed on Easter Monday. On Anzac Day (Sunday, 25 April) shops may open from 1pm onwards.

For more guidance look at the NZ Retailers Association's website [www.retail.org.nz](http://www.retail.org.nz) then on 'What's New'.