



## Looking After Your Forest

### Commonly asked questions

Many rural land and forestry block owners ask practical questions about how to deal with the day to day management of their properties. We have consulted with people in the forestry sector and have answered five commonly asked questions.

#### Boundary fences

*Who is responsible for paying for the costs of a boundary fence?*

To build or repair a boundary fence, you and your neighbour should aim to pay half the costs each. The first step is to approach your neighbour to discuss the matter. You should tell your neighbour what work you want to do and how much the work will cost.

If your neighbour will not co-operate, a formal procedure must be followed before you can do any work on a boundary fence and claim a contribution from your neighbour. The procedure requires you to serve a written notice setting out the details of your proposal. Talk with us beforehand as specific items should be included.

If a fence is damaged or destroyed, the party responsible for the damage is liable to pay the full costs to repair the damaged fence. For example, if a branch falls causing damage to a fence or a tree is pushing a fence over, the party owning the tree causing the damage is liable to pay the full costs to repair the damaged fence.

If you cannot reach an agreement with your neighbour as to who is responsible to pay for the cost or repair of boundary fences, the matter can be taken to either the Disputes Tribunal or the District Court depending on the amount involved.

#### Trees on a give-and-take boundary

*Who owns the trees on a give-and-take boundary if the forester plants trees over the legal boundary but inside the fence?*

A 'give-and-take boundary' exists when a 'give-and-take fence' has been built over the legal boundary of an adjoining property because it was impracticable or undesirable to build a fence on the legal boundary of the adjoining land. Although there may be a

number of reasons for a boundary such as this, the most common reason is that the terrain makes it impractical to construct a fence on the legal boundary, eg: over the top of a sandhill or through a pond.

If a forester plants trees over the legal boundary but inside the give-and-take fence, the forester does not automatically have ownership of those trees. The Fencing Act 1978 states that simply because you are in occupation of land due to the presence of a give-and-take fence, this will not give you any ownership rights over that land.

However, it may be possible to gain ownership of the trees by paying some form of compensation. The courts have held that although the presence of a give-and-take fence may effectively dispossess a forester of the trees which they have planted, this can be remedied with compensation in the form of land or a monetary sum or the grant of a 'forestry right'.

## Trespass

*What are my rights and what procedure should I follow if someone is trespassing?*

The occupier of land has certain rights against trespassers under the Trespass Act 1980. An occupier of land is defined as any person in lawful occupation of the land; and this also includes employees.

An occupier can ask a trespasser to leave the land. If the trespasser refuses to leave, then an offence has been committed *unless* it was necessary for them to be on the land to protect themselves, another person or their property.

It is possible to give warnings in anticipation of trespass where a person has trespassed on land before, or an occupier has reasonable cause to suspect that a person may trespass. A warning can be delivered either orally or in writing. Alternatively service by a bailiff saves personal contact and makes the process 'more official'. We would recommend also serving a copy of the warning to the local police. However, it is important to note that a general notice on the land warning people they are trespassing is not sufficient notice to a trespasser.

If a person trespasses on the land within two years of the date of the oral or written

warning, they have committed an offence unless it was necessary for them to be on the land to protect themselves, another person or their property.

If you find a person trespassing, as an occupier you (or a member of the police) can request that the person gives their name, particulars and firearms license number. It is an offence for that person to refuse to give you accurate information.

Refusal to leave the land once a warning has been given or trespassing within two years of a warning makes the trespasser liable to prosecution. This could bring a maximum sentence of six months imprisonment or a \$1,000 fine.

## Dealing with a dangerous trespasser

In some circumstances, approaching a trespasser may be dangerous, in which case the police should be called. However, it is important to note that if you warn a trespasser off your land and they refuse to go, they have committed an offence.

It pays to use commonsense depending with whom you are dealing. You do not want your hayshed burnt down.

## Wandering stock

*What can I do if someone's stock gets onto my land and damages, say, trees and fences?*

Damage caused by straying stock from neighbouring land is covered by the tort known as cattle trespass (even if the damage is caused by sheep!). Like trespass, discussed above, cattle trespass applies where land is passed over without the consent of the owner.

Under the rules of cattle trespass the keeper of livestock is liable for the damage caused by stock straying onto another's land. It does not apply where stock stray onto a highway and then onto another's land which is covered by different rules.

If the property or land is damaged due to cattle trespass you can either claim damages or impound the trespassing stock. There are special statutory procedures to follow when impounding stock. Don't even consider disposing of the stock by selling it; you could be charged with theft.

However the stock owner is not liable to pay damages if the claimant's land was not adequately fenced. Occupiers are therefore obligated to 'fence out' (fencing in order to protect their own land from outside intruders) before any claim can succeed.

There are other defences against a claim of cattle trespass such as that the occupier consented to the stock entering the land, that the trespass was caused by the act of a stranger or that the claimant contributed to the trespass by their actions.

Where you can establish a claim for cattle trespass the damages recoverable are those which are a *natural consequence of the trespass* such as damage to land and crops, chattels and other stock. For example the damage to sapling trees would be recoverable if cattle had eaten and trampled them.

## Fires

*Can I light fires anywhere on my land if it is near a forestry block?*

The Forest & Rural Fires Act 1977 imposes restrictions only on the lighting of fires in certain areas when the National Rural Fire Officer deems the fire hazard as extreme. However, lighting fires within a 1km radius of a forest noted in the New Zealand Gazette is also prohibited.

Therefore if your land adjoins a forestry block that has been 'gazetted', any fire must be at least 1km away from the forest boundary. To find out if a particular forest has been gazetted, contact your local rural fire authority or, if appropriate, your local authority.

Lighting a fire in breach of this legislation is a criminal offence which can impose a penalty of up to one month's imprisonment and fines of up to \$400 (or in the case of a corporate a fine of up to \$7,500).

## Conclusion

It will be apparent to readers that although they do have rights as land owners, correct procedures need to be followed to ensure those rights can be enforced. If you are unsure about the correct procedures if you have trespassers (people or stock) or are worried about any aspect of your forest, do contact us before proceeding.

# Insolvency Law Reforms Key Amendments

The Insolvency Law Reforms were passed late last year and it is expected that the legislation will be operational by mid-2007. We discuss the key amendments below.

The reforms encompass changes to insolvency, bankruptcy law and the Companies Act 1993 liquidation provisions. The key amendments are the:

- Introduction of a 'voluntary administration' regime
- Amendment of the voidable transaction provisions
- Amendment of the liquidation 'priority' provisions of the Companies Act
- Introduction of rules and prohibitions on the use of phoenix companies, and the
- Introduction of a 'no asset procedure' as a one-off alternative to bankruptcy.

## Voluntary administration

For insolvent companies with the potential for rehabilitation the court, or secured creditors, can place the company into voluntary administration and appoint a voluntary administrator. The voluntary administrator will manage the company, organise creditors' meetings and draw up a restructuring plan. Once a company is in voluntary administration creditors can vote on whether the company should be restructured or placed in liquidation.

At present the Inland Revenue Department (IRD) has priority over creditors in receiving payment. Given that the creditors vote on the outcome of a company, the IRD will be inclined to evaluate its potential recovery out of voluntary administration against its recovery out of liquidation.

For the voluntary administration procedure to be effective all creditors will need to be treated equally and paid out in accordance with the principle that all creditors in the class are treated equally. The IRD's official priority defeats this.

The procedure will require approval from 50% of creditors representing 75% of the value of a company's debt. Accordingly, 26% of the debt will defeat the proposed arrangement. Thus a significant creditor could defeat the procedure if they vote for liquidation rather than voluntary administration.

If the first wave of voluntary administrations are undone by the IRD voting against

restructuring and rehabilitation plans, then voluntary administration will lose the confidence of the market.

## Voidable transactions

Individuals and corporations are generally insolvent in a technical sense for some time before formal insolvency. Voidable transactions law reverses some transactions that occurred before formal insolvency and recovers assets for distribution to the general body of creditors with some equality.

The reforms harmonise, as far as possible, the personal and corporate voidable transaction provisions. Consistency will be achieved between the procedure, timeframes and tests.

## Companies Act – Priority

The established position is that creditors 'of the same class' will rank equally.

Amendments to the Companies Act provide for a re-ordering of the 'priority' between the creditors of a company that is in liquidation. One of the major changes is protection for creditors who have filed claims and who have sought to protect or preserve the company's assets prior to liquidation. The change is seen as a reward for protecting assets which may otherwise have 'disappeared' prior to the liquidation.

It is important that creditors make themselves aware of their priority under the new regime.

## Phoenix companies

A phoenix company carries on business using the name of a failed company or one that is similar to the failed company name. There has been concern over directors of failed companies immediately moving to phoenix companies, and taking advantage of the goodwill in the name of the failed company, to the detriment of creditors.

The reforms focus on tightening the current laws to prevent abuse of phoenix company arrangements by the directors of failed businesses. The reforms restrict directors re-using the name of a failed company, impose criminal sanctions and

make the directors personally liable for debts of the phoenix company.

It is important to understand that the reforms place no restriction on phoenix companies as such. Rather, it is the director of the failed company who is subject to restraint. That person must not be a director (nor take part in the management, etc) of a company that is a phoenix company in relation to the failed company for five years after the liquidation. Breach of that restraint has two consequences under the Companies Act:

1. It constitutes a criminal offence, with a maximum penalty of five years imprisonment or a fine of \$200,000 (new s386A(2)); and
2. The director may be personally liable for all or part of the debts of the phoenix company (new s386C).

## No asset procedure

The 'no asset procedure' will be a one-off 12 month alternative procedure from bankruptcy for debtors with total assets between \$1,000 and \$40,000. A debtor with no realisable assets, and who has not been bankrupt or used the scheme before, will qualify for the procedure.

As far as the debtor is concerned, the benefit of the no asset procedure is that their debts are cancelled on discharge. However the debtor has a duty to:

- Provide the Official Assignee with assistance, documents and information, and to
- Notify the Official Assignee of any change in circumstances which allows payment of an amount towards their debts. Additionally, the debtor is subject to a restriction on obtaining credit.

Also, anything begun under the Insolvency Act 1967 must be completed under that legislation including the estate of a person adjudicated bankrupt under that Act.

## Conclusion

These amendments amount to a modernisation (and some say

*(Continued on page 6)*

# Commercial Property Leases

Make your lease a valuable business asset, not a liability

**When considering leasing a commercial property any business owner must ensure the lease will meet the needs and circumstances of their business. We discuss below some key issues to consider in order to get the best lease for you and your business.**

Entering into a commercial property lease as a tenant requires serious thought. The lease must meet both your present and future business needs. In addition, it will normally create a personal liability, and this may continue after your business vacates the premises.

Before signing anything – whether it is the lease itself or merely an agreement to lease – remember to talk with us first.

Even an agreement to lease may seem a simple document but it may bind you to lease terms that you may later regret.

If you feel pressure to sign an agreement to lease, do so only if it has a clause making it subject to approval by a lawyer.

Every business owner needs to have legal advice on the suitability of the lease terms for their needs. Help will be given to negotiate terms to achieve a balanced lease that meets the needs and expectations of both you and the landlord.

## The first step

If you are considering entering into a commercial property lease you must first consider your business needs and explain them to us. Ask yourself these questions:

- Is the property in the right location?
- Is the property appropriately zoned with the necessary resource consents in place for your business to operate legally?
- Are there any proposed zoning changes that may impact on your business?
- What do the neighbours do? Could their activities impact negatively on your business?
- Will your business expand in the future and, if so, will the property cope with that expansion? If the property is unlikely to be suitable if the business expands, how soon can you get out of the lease?

If the property meets your needs, we should review the lease together

to ensure you understand your rights and obligations:

**Lease term:** Do you want a fixed term lease, for example, nine years or is it better to have a shorter term such as three years with two rights of renewal of three years each that would allow you to consider your options every three years?

**Rent reviews:** How often is rent reviewed? Is the review on the lease renewal date? Do you have to renew the lease before you know what the rent will be on renewal? What is the mechanism for rent reviews? Is there a ratchet clause which means rent is not reduced even if market rents drop?



**Assignment:** Can the lease be assigned if you want to leave or sell your business? If so, does your liability continue and does it continue beyond the current lease term if the new tenant renews the lease? Are there any restraints of trade preventing a particular assignment?

**Maintenance:** What is the tenant's responsibility? What does the landlord

have to do? What are you obliged to do at the end of the lease, eg: replace carpets, re-paint?

**Plant, fixtures and fitting:** Is it clear what the landlord owns and what your rights are in regard to removing what you own at the end of the lease?

**Outgoings:** What other outgoings will there be, apart from the rent? If there are other tenants in the property, how do you share those costs, eg: rates and maintenance costs?

**Costs:** Do you have to pay the landlord's costs for preparing the lease? If so, is there a limit on those costs?

**Signage:** Can you put up the signs that are needed for your business? Are there limits on style, size, etc?

**Rent free period:** Can you get a rent free period while you set up premises for trading? Many landlords will consider this to attract tenants.

**Insurance:** Who insures the building? What sort of cover and who pays? Do you have to insure plate glass or pay for the landlord's loss of rents insurance?

**Shared use:** If you lease part of a building, is it clear what rights or responsibilities you have for, say, use of carparks and cleaning shared facilities?

These are some of the key issues to consider. Depending on your particular circumstances or the nature of the lease or your business there may be other issues that we will need to discuss.

The fundamental issue is that the lease, as far as possible, should meet your business needs and that you clearly understand your rights and obligations under that lease. You then should have a lease that fits your business plan and is an asset, not a liability.

# Charities

## Prepare for registration early

**The Charities Commission provides support for the charitable sector, and registers and monitors charitable entities that wish to retain (or obtain) a tax-exempt status. With about 40,000 charities registered with the Inland Revenue Department and of those at least 20,000 appear to be active, our advice is for charities to register early and not wait until mid-2008.**

Charities should register with the Charities Commission before 1 July 2008. The Charities Act 2005 aims to provide the public with more information and transparency on charities.

### Tax exempt status

For existing charities wanting to retain their tax exempt status, or for new charities wanting to establish tax exempt status, registration with the Charities Commission must be completed before 1 July 2008. Tax exempt status gives exemption from income tax for non-business income, for business income derived by or in support of charities, and from gift duty for people who make gifts to charity.

### Registration

Registration is completed using an application form, completion of an officer certification form for each of the charity's officers, and supplying a copy of the rules and all amendments. Each officer of the charity needs to qualify under the required criteria.

### Charitable purpose

To register successfully a charity must prove that it is carrying out charitable purposes and activities. 'Charitable purpose' includes every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community. In addition a charity must provide a public benefit and not result in the private benefit or profit of an individual.

### Charities Register

The Charities Register will help build and maintain public confidence with information being available for public searching. On registration each charity will have a unique number which must be disclosed to the public upon enquiry.

### Reporting obligations

Each registered charity must file an annual return within six months of its balance date. The annual return outlines the charitable purpose and activities, and provides basic financial data which includes the charity's income, outgoings and net worth. Charities will also be required to notify the Commission if certain core information, such as the organisation's charitable purpose, has changed. Late filing fees will apply.

### Legal name

The charity's legal name will be the name established under legislation such as the Incorporated Societies Act 1908, the Charitable Trusts Act 1957, the Companies Act 1993, or a name established under any other Act of Parliament. If none of the above applies the legal name will be the name by which the charity is commonly known, as long as the name is not offensive or liable to mislead the public.

### Is registration voluntary?

Charities are not obliged to register with the Charities Commission. However, charities that do not register will not have tax-exempt status and will not be able to use the words 'Registered Charitable Entity'. Non-registration is likely to result in less public support for the charity.

Charities wishing to register with the Charities Commission should look at [www.charities.govt.nz](http://www.charities.govt.nz) then contact us to ensure that the charity's rules and its officers comply with the provisions of the Charities Act. If charities delay then their registration application may not be processed before 1 July 2008. Lack of registration is bound to have adverse financial consequences for the charity. We strongly recommend that charities start planning now to ensure their registration takes place sooner rather than later.

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## Tax changes – how does the new fair dividend rate (FDR) work?

By and large, the new tax rules apply to less than 10% shareholdings in offshore resident unit trusts and offshore companies, unless certain exemptions apply. The new rules do not apply to individuals if their total cost of offshore shares (excluding shares in Australian resident-listed companies on an ASX approved index) is NZ\$50,000 or less. The FDR is the primary method for calculating taxable income on foreign equities for these investors.

Under the FDR, investors holding offshore investments will be taxed at their marginal rate (19.5%, 33% or 39%) on 5% of the market value of their total offshore equity investments held at the beginning of each tax year, plus what is coined as quick sale adjustments (QSA).

Individual and family trust investors can elect to have tax calculated on the lesser of any actual total gains and 5% of the value of the shares held. If the actual return (market value movements and dividends) exceeds 5% of opening market value, no tax is payable on the excess.

Dividends will not be taxed separately and losses will not be deductible, but foreign tax credits can be offset against the tax payable. Managed funds will be taxed on 5% of the average market value of their offshore portfolio plus QSAs.

The changes apply from 1 April 2007 for investors with a tax year end of 31 March and later in the year for managed funds with a balance date of other than 31 March. If you have any questions about how the changes may affect you and your investments, please contact us and we can put you in touch with a Portfolio Group adviser who will be able to assist you.

Source: *Strategi Ltd*

## Farmers enjoy new weather service

Internet and mobile phone users can now access the MetService's new rural weather service. Found on [www.metservice.com](http://www.metservice.com), look on the sidebar for NZ Rural Weather and go from there.

The rural section includes weather warnings for specific areas, and a three day hour by hour report for 40 different locations with a graph with rainfall (mm/hr), temperature and wind (direction/speed).

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## Insolvency Law Reforms Key Amendments

simplification) of insolvency. The reforms offer an alternative to bankruptcy for those facing financial difficulties for the first time. Access should be improved by the transfer of some functions from the courts directly to the Official Assignee.

Companies Act changes will provide more consistency with the Australian model. There is some scepticism the changes will have little impact given that our amendments seem to provide the IRD with more protection and greater power than in Australia. We will watch developments with interest.

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