

# Fineprint

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## Resource Management Amendment Act 2003

No relief from the minefield

The Resource Management Act 1991 (RMA) is regarded by many as a minefield, to be negotiated by landowners, developers, councils and others with a mixture of fear and trepidation. What relief is now available with the long awaited Amendment Act that came into effect on 1 August 2003? Many believe nothing has really changed for the better, and some of the ground the Environment Court had cleared is now full of new dangers.

First introduced in 1999 by the National-led Coalition Government, the Amendment Act has been a long time in the making. At the time it was promoted as a bill that would make the RMA more user-friendly, lower costs and reduce unnecessary delays. When it was introduced to Parliament in March 2003, however, it looked quite different.

Specific provisions have been lost in the new legislation. These included cost-cutting measures such as allowing bodies other than councils to process resource consents and allowing for appeals to the Environment Court on questions of notification which continue to be dealt with by way of judicial review in the High Court, so all appeals to a council's processes could be dealt with in one place.

There were other provisions that were modified, such as proposals for limited notification of suitable consent applications.

### Limited notifications

The concept of 'limited notification' started well enough with a proposal that rather than full public notification, suitable consent applications need only involve notice to those who may be adversely affected by the proposal. What has changed with the Amendment Act however, is that if one or more of those potential objectors does not agree to the proposal and raises an objection, everyone involved (including those who have already agreed to the proposal) gets to have another go at it.

What this means for any person who applies for a consent on a limited notification basis is that they need to protect their position with those people with whom they have negotiated agreement,

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particularly if this has involved payment, as they may come back for a second bite if another person later makes an objection.

### Permitted baseline activity

Additional provisions to this new legislation include 'permitted baseline activity'; the idea of which is sound enough. It came about following a series of high-profile cases, including *Bayley v Manukau City Council*. In broad terms what the Court of Appeal was saying to councils/consent authorities was that in considering the potential adverse effects of a proposed activity it could ignore effects that were already contemplated by activities that were permitted under the Local Resource Management Plan. This concept was tested in a number of cases which followed by applying it to different decision processes and in different ways. The upshot of all this was that everyone involved had a pretty good idea of what the rules were and when they applied.

In a move to help 'clarify' the law, certain changes were put into the Amendment Act to instruct councils/consent authorities when and how to apply the 'permitted baseline'. Perhaps out of fear that councils did not want to be committed in every case, the actual wording which emerged was deliberately vague, enabling councils a choice (in effect) of whether to apply the baseline or not. What seems to have been lost sight of, is that this is intended as a 'public process' and having gained some precious certainty by the courts through development of case law, few will thank the existing government for throwing the issue wide open again.

### Habitual objectors

The degree to which the Amendment Act might assist in the smooth running of the planning and consent process is one measure of its success. There are some participants who have gained a reputation for making the process as difficult as possible. Some commentators describe this as the 'objection industry' which in its worst form is characterised by groups which habitually lodge objections to any local, high-profile resource consent application which is publicly notified, on the basis that they represent a legitimate body of 'public interest'.

The problem for the Environment Court is to sort out the less deserving claims and appeals and to put some pressure on those parties in an appropriate way. Prior to the Amendment Act the Environment Court could help deal with less meritorious objections by imposing an order for payment of security for costs. This sort of order provided a discipline upon public interest groups as litigants to either pay money into court or otherwise satisfy the court that they could later meet a costs award, if they had court costs ordered against them following judgment.

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Much to the relief of the 'objection industry' this important tool was removed from the Environment Court by the Amendment Act. By getting advice early, consent applicants may be able to minimise exposure, in some cases, to the worst aspects of the 'objection industry'. What everyone needs to bear in mind however is that, in some cases, the Environment Court will be largely powerless to save them from the extra costs and delays associated with unmeritorious objections and appeals. A court order that the objector group contributes to your costs may be useless if the group is an empty shell. In some respects it is surprising that this change has not become more controversial; it should have been.

### Financial contributions

There are some areas of the RMA which will always be controversial, whether subject to law changes or not. Provisions that enable a council to impose charges on consent applications by way of 'financial contributions' are a primary example of this. This is just one of the areas touched on by

the Amendment Act which has affected over 160 sections of the RMA.

The development of Resource Management Plans is an evolutionary process. First they are proposed, then submissions are made. Council hearings follow with decisions on individual aspects of a plan, which can then be followed by appeals and subsequent litigation in some cases, before a plan is finally ready – or in planning language it becomes 'operative'. This is a process which can take years, during which the provisions of the plan are in a process of fine-tuning. By the time the plan is ready it is time to put up a new one all over again.

A council's power to require 'financial contributions', particularly for development, is a powerful planning tool to control development and help provide for infrastructure. In the past, calculation of the contribution was based on the provisions of an operative plan that had been finalised and completed through the public process. The Amendment Act has made a change which allows councils to set 'financial contributions' on the basis of proposed plans which have not been through the public process.

Why is this important? The change allows councils to accelerate increases in financial contributions. If developers apply for consent and pay a financial contribution which is later reduced for other developers because the plan provisions are knocked back by public protest, the developer will only be able to recover the amount they have overspent if they have obtained effective protection against later contribution changes, and they have followed the progress of the relevant plan provisions to see what happened to them after they were finalised.

### What's in this for you?

If you were optimistic that the Resource Management Amendment Act would make the process easier, quicker or less expensive, you may be disappointed. Much of the benefit that the original bill contained was removed; and much of what was introduced has only exacerbated the problems. Perhaps we will see more case law from the Environment Court to help steer us through the minefield. In the meantime, watch your step!

# Dairy Herd Purchase

Make sure the transaction process is watertight

**When buying a dairy herd, the purchase process is usually straightforward. However, there are some important issues that should be considered relating to the manner in which purchase funds are routed.**

Purchasing a dairy herd is arguably the most important purchase a farmer will make, apart from farmland itself. The farmer will rely on his or her own judgement on the quality of the stock and the price paid. However, settlement must be completed in a manner that protects the purchaser and the lender.

If this process is not carried out correctly, the purchaser can end up without a herd despite having paid for it. There is a potential situation where the vendor's bank can uplift the stock due to non-payment of the vendor's debts.

## What is common practice?

In forward sale contracts it is common for stock companies to contact the vendor's bank and seek confirmation that the stock can be sold with clear title. This confirmation is usually given from the bank on the proviso that any funds outstanding from the vendor to the bank are repaid. This situation has led to numerous disputes between stock agents and lawyers about the correct process for the repayment of the bank, and the subsequent release of clear title to the livestock.

Lawyers have an obligation to the purchaser's bank or other lender to ensure that clear title is obtained to secure the purchaser's bank's interest in the livestock. In the past, stock agents have suggested clear title is achieved by the purchaser paying the livestock settlement funds to the stock agent. This is not right. In these circumstances, clear title is provided when the vendor's bank receives any money that is owed to it on the livestock by the vendor. Until this occurs the vendor has not given clear title to the purchaser of the livestock. As a consequence the purchaser's cash contribution for the purchase of the herd, and any financing they have obtained to complete the purchase, may be in jeopardy.

Stock companies have argued that they will pay the bank any sums outstanding. However, there is a risk that if a livestock company goes into receivership then the settlement funds may not be on-paid to the vendor's bank, thus leaving the vendor's bank in a position where it still holds security over the livestock now owned by the purchaser.

Not only does this potential situation leave a vendor's bank still having security,

but also the vendor is left out of pocket for the share of the settlement money if settlement funds are not on-paid.

## The solution

The solution to this potential problem is for the purchaser to insist (in cases where security is held over the livestock being purchased) that payment is made on settlement to the vendor's lawyer. The lawyer can, through its trust account, ensure that the bank is repaid and the vendor receives the balance of the settlement funds.

This situation is in contrast to the banking system operated by many stock companies. The proceeds from all transactions are deposited into a global account and paid out from there. In a situation of receivership, a global bank account can be frozen and the secured creditors of the stock company may have first call on all funds.

In these transactions the insistence by a purchaser on payment through the vendor's lawyer's trust account ensures that the purchaser and the bank have their respective interests protected. In addition, it offers more protection for the vendors.

## Fair Trading Act – net widens for directors' liability

The Winter 2003 issue contained the article "Pitfalls of Company Directors" highlighting the implications of a Court of Appeal decision on the liability of directors acting on behalf of their company. The article stated the 'net' of the Fair Trading Act 1986 was intended to be cast widely, hence the broad interpretations placed on the particular provisions of the Act.

The Court of Appeal decision, coupled with the amendment to the limitation period, has the potential to cast the 'net' far wider than anticipated.

Prior to the Fair Trading Amendment Act 2001, the time limit was three years to start proceedings; this ran from the date of the complaint.

That rule changed on 1 May 2001. A claim can now be made at any time within three years after the date on which the loss or damage, or likelihood of loss or damage, was discovered or reasonably have been discovered. This means that the three-year period for bringing a claim now starts when loss (or the likelihood of loss) should have been apparent. This has the potential to allow claims to be brought many years after the conduct complained of, thus adding to the potential liabilities a director may face.

The problem with the limitation period, as currently formulated, is that claims are permitted well after the events giving rise to the claim. There is a real risk that there will be uncertainty as to when time actually

starts to run and ascertaining when someone should have known that they had a claim. In addition, people's recollections dim with time; they may not be able to recall precisely the events giving rise to the claim.

The cumulative effect of the Court of Appeal's willingness to impose liability on company directors, servants and agents for breaches of the Fair Trading Act, coupled with changes to the period during which a claim can be brought, further broadens the potential liability to be faced by people occupying those positions.

# Anyone Want a Monopoly?

Intellectual property is hot

**“The most exciting phrase to hear in science, the one that heralds the most discoveries, is not ‘eureka!’, but ‘that’s funny’.” – Isaac Asimov**

The book *What Color Is Your Parachute\** lists intellectual property attorneys as being one of the top 10 hottest professions. No wonder. With ‘knowledge economies’ highlighting the importance of intangibles over commodities, there is a huge demand for people who can not only understand intellectual property (IP) but can also work it.

It is vital that New Zealanders, and in particular innovative engineers, understand what intellectual property is about and use it strategically; this will help ensure our survival in the world economy and beat the odds.

## Recognising the power of IP – the kiwifruit dream

Here is an example of how the recognition, capture and exploitation of IP can give far greater value than merely shipping out commodities.

Say you have invented kiwifruit liqueur. Most people would consider local sales and possible export of this commodity. Dig deeper...

Kiwifruit has a high acid content. The commodity is kiwifruit liqueur, but the intellectual property is a new process for making a palatable drink from high acid fruit. This could be easily adapted to other fruit such as citrus. Oh, you say, let’s export citrus liqueur. Dig deeper...

The IP in the manufacturing process could be patented to prevent imitation by competitors. Then, the IP can be exported/licensed overseas to citrus growers in the US and Spain, kiwifruit orchards in Italy and Chile, and pineapple plantations in Australia and the Pacific.

A revenue stream can be generated without having to ship out the commodity. In addition, as part of the licence, you could stipulate that the New Zealand IP is recognised in any publicity, thus confirming our place on the edge of innovation and encouraging overseas investors to look here.

## Strategic use of IP

Intellectual property strategy is more than just protecting your brand and ideas with trade mark registrations and patents. IP is about research, understanding your markets, knowing your budget, acknowledging what you and your staff know, and being clear about your goals.

Research is vital. Too many people invest time, money and effort into a project without research. This does not need to be expensive, although you should seek guidance from a patent attorney. You can search a number of free intellectual property databases (check [www.jaws.co.nz](http://www.jaws.co.nz) for some of these links).



**Analysis of patent mapping** Patent mapping is a tool to find where your competitors (or potential licensees) are concentrating their IP and to find potential niche markets for your product or areas which have been deemed uncommercial. By conducting a more strategic analysis of the results of patent searching, you can plan the direction of your research and development programme (R & D) and investigate potential licensees.

## Market value – present and future?

Will the technology be outdated or is the world moving in that direction? This can help you decide whether it is worthwhile spending money on IP protection.

**R & D spend** This component must be factored into the product price. If the IP is not protected, competitors can copy your product and produce it without an R & D loading on the price. Your product is then undercut.

**Competition** Are competitors likely to be deterred by any IP protection? Could they be encouraged to license your IP from you?

**Product life – short or long-term?** You may not need to spend money on formal protection of your IP on a short-term product. Instead, you could get away with hitting the market hard, getting established and leaving little room for competitors.

**Competitors’ location** Is it possible to predict where your competitors are likely to market or manufacture, and file patent applications preventing their growth in that area? When you have developed and protected your base technology, is it worthwhile looking at protecting your add-ons, thus stifling your competitors and building up a useful IP ‘fence’ around your key technologies?

**Leverage** Can your IP portfolio be used as leverage to secure funds from investors or raise loans from the bank?

## Put it all together

In summary, IP is the lifeblood of a business. Without it your business may struggle to exist. By taking steps to recognise and strategically protect that intellectual property, your business may reap the benefits of a more stable future and perhaps even gain a niche monopoly.

This article begins an informal series on intellectual property by process engineering and management/IP expert, Robert Snoep.

\* Richard Nelson Bolles, *What Color Is Your Parachute?* A practical manual for job-hunters and career-changers; Ten Speed Press, published annually.

# Funeral Trusts

## Why have one?

**Funeral arrangements are not everybody's favourite topic. However, as funeral directors promote prepaid funerals, the alternative of a funeral trust is often raised.**

### Prepayment of funeral costs?

The cost of a funeral varies depending on location, type and style of funeral director, the choices made by the family and the wishes of the deceased. Subject to those factors, the cost of an average funeral is likely to be about \$5,000. Most funeral directors provide a service where you can plan and pre-pay for your own funeral, but an interesting and useful alternative is a funeral trust.

### What is a funeral trust?

A funeral trust is a separate trust with sufficient funds set aside for funeral expenses. To keep legal costs to a minimum a funeral trust is set up using a fairly standard format. For instance, law firm partners may be the trustees, funds will probably be deposited in a bank term deposit, and the trust's compliance costs (such as filing a tax return) will be paid out of interest with the balance of income then added to the capital.

### Who should have one?

Establishing a funeral trust will appeal to anyone who wishes to set aside their funeral costs to make it easier for their family. Under the current rest home subsidy policy it is possible to set aside up to \$10,000 without affecting eligibility for a rest home subsidy – about \$5,000 more than the current cost of an average funeral.

Without a funeral trust, funeral costs will be deducted from the deceased's assets. If the deceased was already on a rest home subsidy because their assets have been reduced to the required level, funeral costs will be deducted from those meagre assets.

A pre-paid funeral trust, on the other hand, sets aside funeral costs and probably some extra, increasing the amount available to

the beneficiaries. For many people a funeral trust brings peace of mind to both themselves and their families, and it will appeal to those who want to plan their finances carefully. People considering setting up a funeral trust must understand that they will forego any future income from the capital used to set up the trust.

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**“ A funeral trust is a separate trust set aside for funeral expenses... a funeral trust will appeal to anyone who wishes to set aside their funeral costs to make it easier for their family.”**

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### When should you form a funeral trust?

Whilst it probably appeals to older people: a funeral trust can be formed at any time so long as you have the cash or assets to put into it.

However, we do give one word of warning: the transfer of funds into the funeral trust may be a dutiable gift and must form part of any gifting programme that you are undertaking. That aspect should be discussed very carefully with us.

### What will it cost?

Setting up a funeral trust is a fairly routine procedure – which keeps costs to a minimum. However, any trust must be tailor-made to an individual's needs.

### How do I start?

Call us to talk more about setting up a funeral trust; we'll be happy to discuss it with you.

NZ LAW Limited is an association of independent legal practices with member firms located throughout New Zealand. There are 52 member firms practising in over 60 locations.

NZ LAW member firms have agreed to co-operate together to develop a national working relationship. Membership enables firms to access one another's skills and information whilst maintaining client confidentiality.

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Welsh McCarthy - Hawera  
Wilkinson Adams - Dunedin  
Woodward Chrisp - Gisborne

# Postscript

## Time to check your investment portfolio

Investment markets around the world have shown significant improvement since March. Now is the time to review your portfolio to ensure it is correctly structured to maximise risk-adjusted returns over the coming period.

A well-constructed investment portfolio should be developed by a qualified financial planner after completing (with you) a comprehensive data collection booklet and risk assessment questionnaire.

A written financial plan will then be prepared that outlines the appropriate asset allocation, ownership structure for the investments and investment product recommendations. The aim is to obtain an appropriate 'risk-adjusted return' for the portfolio, not just the highest total return.

A good investment portfolio should also be well diversified, with an appropriate allocation to cash, fixed interest, property and shares, as well as a mixture of onshore and offshore investments.

We can recommend appropriately qualified financial planners who meet industry best practice standards.

*Source: TPG*

## Quick help for businesses

Complaints from businesses that compliance issues take up too much valuable time have resulted in the government launching a 'one-stop' business website.

Managed by New Zealand Trade & Enterprise, the site offers information on employing staff, ACC, tax, OSH and e-commerce business advice. It also provides advice on starting a business and issues to consider when closing, selling or winding up a business. There is a free e-newsletter available on a wide variety of topics.

Website: [www.biz.org.nz](http://www.biz.org.nz) E-mail: [info@biz.org.nz](mailto:info@biz.org.nz) Toll free: 0800-42 49 46

## Fonterra makes changes to peak notes

Just after the Winter 2003 issue was published with a story on dairy farm sales and Fonterra share transfers (page 4), Fonterra announced a proposal that the peak notes may be scrubbed.

Currently, Fonterra dairy farmers with a high milk yield in the high production months of October and November are required to buy peak notes to offset the additional costs of milk collection and production over that period.

Fonterra proposes that a lower milk price be paid to high production farmers, thus offsetting the higher factory costs. This would help ease dairy farmers' frustrations in calculating capital requirements at the end of the season. The new system would also benefit Fonterra which uses huge resources in the calculation of peak note requirements.