

**Welcome to the Summer issue of *Rural eSpeaking*.  
We hope you find the articles of interest. If you would  
like to talk further about any of the items covered in  
this newsletter, please don't hesitate to contact us.**

This is the last issue of *Rural eSpeaking* for 2010. Our best wishes to you for  
a Merry Christmas and a safe and happy New Year.

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Now a finite resource

*Access to, and the right to use, water is essential for any rural enterprise. Due to changes to the traditional uses of land and farming methods, and also climatic change, water is increasingly now seen as a finite resource. For the rural community the ability to have access to, and the use of appropriate quantities, of water is increasingly becoming an issue...* [CONTINUE READING](#)

## Access to the Outdoors

Unlocking the gates to your property

*New Zealanders love getting out into the great outdoors – fishing, tramping, water skiing, picnicking, camping, hunting, kayaking and mountain biking. But how do you feel about unlocking the gates to your farm to allow your fellow Kiwis to enjoy these activities?...*  [CONTINUE READING](#)

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The next issue of Rural eSpeaking will be published in March 2011.

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## Water, Water Everywhere

### Now a finite resource

*Access to, and the right to use, water is essential for any rural enterprise. Due to changes to the traditional uses of land and farming methods, and also climatic change, water is increasingly now seen as a finite resource. For the rural community the ability to have access to, and the use of appropriate quantities of, water is increasingly becoming an issue.*

Access to water on a rural property is obtained in two ways:

- » Water is present on the property either by way of surface water such as a stream, lake or dam or under the ground and accessed by way of a bore, or
- » Water is conveyed from another property, usually using rights granted by way of easement.

If the water is already present on your property, then you are free to use it, subject to any restrictions imposed by the Resource Management Act 1991. If you bring water to your property by way of easement, or if the water on your property is subject to rights granted in favour of another property, the terms of the easement are important. An easement is a registered legal right to take or convey water from one point to another. Easements to take and convey water are common but care needs to be taken to ensure that the terms of the easement are understood.

Typical issues that terms of an easement might cover are:

- » Use to which the water might be put
- » Volume of water that can be taken
- » Times that water can be taken
- » Term (most are indefinite, but some are for a fixed term)
- » Number of users, and
- » Sharing of the costs and maintenance.

If your property is subject to a water easement, you need to be aware that the rights granted by that easement are binding on you and cannot be unilaterally changed. For example, if water is getting scarce, and if an unfettered right has been granted to your neighbour to take water by way of easement, then you cannot arbitrarily impose restrictions on their use.

### Resource consents to take water

As well as getting access to water, the other critical issue is the *use* of that water. Generally, no consent is required to use water for domestic purposes or for the watering of stock. Any other use will require resource consent from the requisite local authority, usually the regional council. Water consents range from a simple consent to take water to irrigate a defined area, to very complicated consents that are required for the large irrigation schemes that span significant amounts of land under multiple ownership. As there is such a large range of consents, it is difficult to give any detail with every issue that might arise, but two important issues to note are below.

### Ownership of consent

Unlike easements the ownership of water consents do not attach to the land. Accordingly, it is quite possible and indeed common, for the owner of a consent to take water from a particular bore or stream or dam to be different from the owner of the land on which that bore, stream or dam is situated.

### Terms of consents

It is not sufficient when either acquiring or leasing land to check that the land has a consent; it is important to check the terms of that consent. Matters to look out for are:

- » The term. Typically, terms are becoming shorter as regional councils are looking to gain more control over the consents
- » Use of water. Consents will generally give the right to take and use water by reference to a volume of water, but some will impose restrictions on the time at which water can be taken, and
- » Monitoring. Consents impose monitoring and reporting obligations on consent holders and fees for the council's supervision of this process are increasing.

In summary, the right to take and use water when acquiring a property either by way of purchase or by lease cannot be taken for granted. It is one of the most critical issues which should be checked in relation to the ownership of a property; as both easements and resource consents are public documents, those checks are easy enough to make.

## Access to the Outdoors

### Unlocking the gates to your property

*New Zealanders love getting out into the great outdoors – fishing, tramping, water skiing, picnicking, camping, hunting, kayaking and mountain biking. But how do you feel about unlocking the gates to your farm to allow your fellow Kiwis to enjoy these activities?*

### The dream of public access to the outdoors

Many New Zealanders believe that we all are, or at least we all should be, entitled to ready access to all the foreshore, lakes, rivers, and public reserves throughout the country for recreational purposes.

The reality is that ready public access to all these amenities is a dream, rather than a reality. Often our bodies of water and the land alongside are in private ownership. In addition, in some cases the only way to get to a water body or reserve is to go through private land. As there is no right of public access across private land, there is no way for the public to lawfully access these areas without the consent of the landowner.

If your farm contains or adjoins the foreshore, a lake, a river or a public reserve, this may cause you to breathe a sigh of relief. For stock control or other reasons you may, understandably, prefer not to allow members of the public to access your land.

However, before you get too comfortable, you should check whether all of the land inside your fence actually belongs to you.

### Paper roads forgotten

In many cases, when land in New Zealand was first subdivided and sold to settlers, an area of the land was set aside as 'road' to allow for roads to be formed in the future when required. As well, some land along the coast and major rivers was reserved as road simply as a means to allow public access, with no intention of that road ever being formed.

While many of those 'paper roads' have subsequently been formed into what we recognise to be roads, it is estimated that approximately 56,000 kilometres of unformed paper roads remain. For the last 100 or so years these roads have largely been forgotten as it has been just too difficult to locate those roads and too difficult to physically access them. Many property owners are likely to be unaware that part of what they view to be their land is actually a paper road.

*“Even though these paper roads have been forgotten, the legal position does not change. That is, the public has just as much right to use paper roads (on foot, by horse or by vehicle) as it has to use formed roads.”*

Even though these paper roads have been forgotten, the legal position does not change. That is, the public has just as much right to use paper roads (on foot, by horse or by vehicle) as it has to use formed roads. In addition, it is not lawful to place a gate, fence, or other obstruction across an unformed legal road without the permission of the relevant local authority.

### Paper roads rediscovered

Paper roads are set to be rediscovered by the public. The government has established the New Zealand Walking Access Commission which intends to compile, and publish maps and information about publicly accessible land (including paper roads). You can expect that the public will soon have easy access to information about paper roads and, with 4WDs and GPS, the physical ability to use that information to access the roads.

### What this means for you?

So what does this mean for you as a property owner/lessee with a paper road running through your property? Unless you can negotiate a different arrangement with your local authority, the paper road on your property may soon be advertised as being in the public domain. You can expect members of the public to start exercising their rights of access over that paper road – even if that means they climb over your locked gate to do so. And if there is locked gate obstructing the road, you may also expect a demand from the local authority to remove the lock.

## Over the Fence

### 90-day trial periods

*Since the Employment Relations Amendment Act 2008 came into force on 1 March 2009, many employers have entered into employment agreements with their employees containing 90-day trial period provisions.*

Currently if you employ fewer than 20 employees you can enter into an employment agreement with a *new* employee which includes a 90-day trial period. (The 90-day trial period will be increased to all businesses from 1 April 2011, no matter their size, see article below.) A trial period enables dismissal of an employee within a specified time period (up to 90 days) and the employee is not entitled to pursue a personal grievance in relation to the dismissal. A personal grievance can still be pursued in relation to discrimination or disadvantage.

An employee to which a trial period can apply is defined in the Employment Relations Act 2000 as 'an employee who has not been previously employed by the employer'. In a case last year, *Smith v Stokes Valley Pharmacy (2009) Ltd*<sup>1</sup>, the Employment Court held that when Ms Smith signed her employment agreement (on her second day of work), she was already an employee. She was not a new employee – one who had not previously been employed by her employer. As a consequence the trial period purported to be included in her employment agreement was not in strict compliance with the legislation and could not be relied upon by the employer.

This is a significant decision of the Employment Court. Based on this decision if an employee does not sign their employment agreement *before* starting work, the trial period will be ineffective.

### Changes to employment legislation

In November, legislation was introduced to Parliament for changes to the Employment Relations Act 2000 and Holidays Act 2003. This legislation has a significant impact on employers and employees alike. Nearly all changes will take effect from 1 April 2011; the exceptions are a minor change to the Holidays Act that will take effect prior to Christmas, and a provision regarding employment agreements that will take effect on 1 July 2011.

Changes incorporated into the Employment Relations Amendment Act 210 include:

- » Extending the 90-day trial period provision to all employers
- » Requiring employers to retain a copy of an employee's individual employment agreement, making them subject to penalties if they do not, and clarifying the status of unsigned employment agreements (this change comes into effect on 1 July 2011)
- » Providing labour inspectors with new enforcement tools, and
- » A range of measures to improve resolution processes in personal grievance (PG) cases.

Changes incorporated into the Holidays Amendment Act 2010 include:

- » Allowing the 'cashing in' of one week's annual holiday per year at the employee's request
- » Allowing agreement to transfer the observance of a public holiday to another working day, and
- » Allowing payment for a public holiday, alternative holiday, sick leave or bereavement leave during a close-down period 'as if the close-down period were not in effect'. Note: this change came into effect from 27 November 2010.

### Livestock grazing agreements . . . food for thought

We often hear of farmers who are disgruntled by the state of stock returning home from grazing. Securing good reliable grazing appears to create headaches year in and year out yet many farmers continue to operate without having grazing agreements in place.

Often problems arise simply due to lack of communication and discussion regarding the responsibilities of the parties. Entering into a grazing agreement helps to overcome these communication barriers and draws both parties' attention to the issues to which they need to agree. With differing ideas as to what amounts to 'industry standard' entering into a grazing agreement with clearly defined rights and responsibilities helps eliminate risk and conflict.

Clauses to be considered in grazing agreements (amongst others) include:

- » The term
- » Method and timing of payments (including any weight gain incentive)
- » Liability for losses/deaths
- » Animal health cost responsibilities
- » Rights of inspection, and
- » Dispute resolution procedures.

If you are contemplating sending livestock grazing or taking on livestock grazing, we recommend that you talk with us first so you obtain the best possible outcome.

<sup>1</sup> *Smith v Stokes Valley Pharmacy (2009) Limited* [2010] NZEMPC III