

Welcome to the first issue of *Rural eSpeaking* for 2010.

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

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Personal Property Securities Act Pitfalls

Take care when goods are leased or being stored elsewhere

The Personal Property Securities Act 1999 (PPSA) contains provisions that can impact on an owner's rights on their own goods when those goods are leased to or are being stored by another party; this is called 'bailment'. This article looks at what you need to do to safeguard your assets.

Under the PPSA, a 'security interest' may be created in certain circumstances, without the owner of the asset having knowledge of, or giving consent to, that interest. The result is that, if the asset owner does not take sufficient steps to protect their interest in their own asset, a third party that may have an interest in that asset has priority over that of the owner, without the owner even being aware that they have lost priority.

This situation can arise where the owner of goods leases goods to another person, or has goods stored by another person in a bailment arrangement.

Case study

Farmer Andrew has insufficient storage space on his farm; he asks that his neighbour Farmer Bill store some of his equipment for him. Farmer Bill is likely to have lending from Bank Crucible which is secured by a general security interest in all its 'present and after acquired personal property'.

Farmer Bill then gets into financial difficulty, and Bank Crucible appoints receivers to enforce its security interest. Amongst other assets owned by Farmer Bill, Farmer Andrew's equipment is seized by Bank Crucible.

The bank's view

The bank's rationale is that under the PPSA, as a result of having possession of Farmer Andrew's equipment under a bailment arrangement of an indefinite term, Farmer Bill is deemed to have a security interest in that equipment. Farmer Bill is then capable of giving a security interest in that same equipment to a third party, namely Bank Crucible. By virtue of its general security interest, the bank therefore has a security interest in Farmer Andrew's equipment. While this may seem counter intuitive, the Court of Appeal has recognised that the PPSA represents a significant statutory exception to a well recognised legal principle that "*no one can give what he does not have*".

Whether or not the bank would ultimately be successful is uncertain. The PPSA legislation is relatively new, by no means clear cut and there have been very few cases on this point.

However, there is a very real risk to a farmer in Farmer Andrew's situation, whether a farmer has equipment stored in a neighbour's shed, leases equipment to another farmer for that other farmer's use, or has some stock grazing on another farmer's property.

Remedy

The good news is that you can take very simple steps to protect your interests in your own goods. You can ensure that any lease or bailment arrangement is adequately documented, ensuring it clearly sets out that you retain ownership in the relevant goods, and that this constitutes a security interest in your goods.

You should promptly register your security interest on the PPSR Register, go to www.ppsr.govt.nz/cms/about-us. By doing this you will guarantee your priority in the goods over and above that of a third party, such as a bank.

The 'Moderated' Emissions Trading Scheme.

What's the deal?

The Emissions Trading Scheme (ETS) has been the subject of many changes since first being considered by the Labour Government in 2007. In December 2009, the National Government passed the Climate Change Response (Moderated Emissions Trading) Amendment Act 2009, with a view to making the ETS more workable and affordable. The ETS is by no means straightforward however. This article sets out 'must know' facts about the 'moderated' ETS for the agricultural sector.

Emission units – the new gold?

The ETS introduces a new unit of trade, the emission unit (sometimes called a 'carbon credit') which will be issued by the Crown and called a New Zealand Unit (NZU). Participants will be required to surrender NZUs to the government for emissions associated with their activities each year. Participants will also be able to trade NZUs, both in New Zealand and internationally.

Compliance obligations under the ETS

From 1 January 2012 agricultural sector participants in the ETS will be required to monitor, record and report activities that produce or remove greenhouse gas emissions.

A reprieve of sorts for farmers

Initially, the point of obligation for participation in the ETS in the agricultural sector will be at the processor level (such as fertiliser manufacturers, meat works and dairy processors). This will obviously have flow-on effects in terms of costs and pricing to farmers. However, the government intends to move the point of obligation to the farm level in the future.

What emissions will be covered?

From 1 January 2015 all agricultural gases will be included in the ETS, such as methane from ruminant animals and nitrous oxide from urine, dung and nitrogen fertiliser applied to pasture.

Free allocation

To reduce costs to the agricultural sector, the transitional rules to the ETS enable participants to receive a free allocation of NZUs. A participant's allocation will phase out over time but initially will be at 90% of the industry average emissions per unit of output.

Start preparing now

The ETS is likely to impact the agricultural sector from 1 July 2010 when the stationary energy, industrial processes and liquid fossil fuels industries will be required to enter the ETS, thus increasing prices for fuel, industrial processes and energy.

How can we help?

The ETS is by no means straightforward, and introduces another layer of compliance obligations to the agricultural sector. We can help you to determine your obligations under the ETS, assist you in your compliance obligations including ensuring that appropriate systems are put into place, and work with you to consider ways to use the ETS to your advantage in the future.

Over the Fence

Sharemilkers and Fonterra's capital restructure

Recent changes to the way Fonterra pays its dairy farmers, in particular the dividend portion of the payment, could lead to some problems for sharemilkers and farm owners if not managed correctly.

Sharemilkers with existing sharemilking agreements in place are legally entitled to continue receiving the equivalent portion of the payout they currently receive on Fonterra payments. This includes the dividend portion, for example a 50/50 sharemilker currently receiving 50% of all payments from Fonterra shall continue to receive 50% of all total Fonterra payments.

Fonterra however is legally required to pay the dividend to the shareholder (normally the farm owner) and cannot split the dividend. A new payment system has been devised which, in brief, takes the equivalent of the amount that would be due to the sharemilker if the dividend was split at the terms originally advised to Fonterra out of the shareholder's milk price portion. This will ensure the payment terms agreed to at the start of the sharemilker's contract are honoured. This payment scheme is called the Dividend Related Payment Adjustment (DRPA).

Farm owners will have received in December last year a Dividend Relative Pay Adjustment Form. These forms should have been completed and signed by both parties and returned to Fonterra before 28 February 2010.

Some farm owners and sharemilkers may come up with their own solutions to ensure payments are balanced back to the terms originally agreed to in the contract.

Remember at all times during negotiations that a sharemilker is legally entitled to the equivalent payments that they had been receiving prior to the changes for their current contract.

Farm owners and sharemilkers are advised to ensure communication flows to find the most suitable solution for their own particular situations and to ensure the terms of their sharemilking agreements are honoured.

New minimum wage rates

New minimum wage rates will come into effect on 1 April 2010. The adult minimum wage will increase from \$12.50 to \$12.75/hour. This applies to all employees aged 18 and over and includes those aged 16 and 17 who are not new entrants or trainees.

The trainee and new entrants' minimum wage will increase from \$10.00 to \$10.20/hour also from 1 April 2010.

The training and minimum wage rate applies to employees aged 16 and over who are doing recognised industry training involving at least 60 credits per year. The new entrants' minimum wage rate applies to employees aged 16 and over except for those who have completed 200 hours or three months of employment whichever is shorter or who are supervising or training other workers or who are trainees.

It is important for farmers, particularly when long hours of work are required, to be mindful of the minimum wage rate when setting annual salaries. An employee who works on average 60 hours/week earning \$35,000 per year would likely to fall below the adult minimum wage rate.

Holiday entitlements for Easter 2010

This year Good Friday falls on 2 April and Easter Monday on 5 April 2010.

This means that those employees who would normally work on Friday 2 April and Monday 5 April are entitled to receive a paid day off on both Good Friday and Easter Monday. Alternatively if an employee works on either day they are entitled to time and a half for the actual hours worked and an alternative holiday.

Those employees who work on Good Friday or Easter Monday for whom it is not otherwise a working day are entitled to be paid at time and a half and no alternative holiday.

Holiday entitlements for ANZAC Day 2010

This year ANZAC Day falls on Sunday, 25 April 2010. This means that those who normally work on Sundays are entitled to receive a paid day off on ANZAC Day. Alternatively if an employee works ANZAC Day they are entitled to time and a half for the hours worked and an alternative holiday (if Sunday would otherwise be a working day for the employee).

Those who work on Sunday, 25 April 2010 for whom it is not otherwise a working day are entitled to time and a half for the hours worked and no alternative holiday.