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eSpeakingMACKINTOSH BRADLEY & PRICE Level 5, State Insurance Building, 88 Division Street, P.O. Box 8364, Riccarton, Christchurch 8440
Ph: 03-343 5880 | Fax: 03-343 5888 | E-mail: partners@mbp.co.nz | Web: www.mbp.co.nz

Welcome to the Midwinter edition 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, then please don't hesitate to contact us.

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The next issue of Rural eSpeaking will be published in December 2010.

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LEGAL PRACTICES

Selling the Farm to Foreigners

Overseas Investment Act 2005

The issue of selling land to foreigners (or overseas persons) is an emotive one, and a political hot potato. We discuss below the rules governing the sale of land to foreigners, including who can buy and the criteria required.

The Overseas Investment Act 2005 (OIA) restricts the sale of certain land to 'overseas persons' who are defined as:

- » An individual who is neither a New Zealand citizen nor ordinarily resident in New Zealand, or
- » A company that is incorporated outside New Zealand or is a 25% or more subsidiary of a company incorporated outside New Zealand, or
- » Where a company is incorporated in New Zealand, if an overseas person or persons has 25% or more of the control of the company.

What land can be purchased?

Any non-urban land of five hectares or more is 'sensitive land' and an overseas person must obtain consent under the OIA to acquire it.

There are other sub-classes of 'sensitive land' which include land on certain islands, foreshore and seabed, and land held for conservation purposes, as well as land adjacent to those types of land. In those cases the threshold is generally 0.4 of a hectare.

Accordingly, most land that would generally be described as a farm, an orchard or a vineyard is sensitive and therefore an overseas person requires consent to buy it.

What are the criteria for consent?

If you want to sell farmland to an overseas person you must first offer the farmland for sale on the open market to people who are not overseas persons. The Overseas Investment Regulations set out the procedure for offering the land on the open market. An application for consent must include evidence that the advertising criteria have been met.

The application to the Overseas Investment Office is generally made by the buyer. It is a comprehensive and costly application, and must cover all of the consent criteria set out in the OIA.

Some criteria, or 'tests' to be met, differ if the overseas person is able to and intends to reside permanently in New Zealand. In those circumstances the buyer must show that they are of a good character, have the necessary business acumen to carry on the type of farming or business activity for which they are buying the land and that they have the financial resources to carry that investment through.

If the overseas person is not intending to, or able to, reside permanently in New Zealand then an additional test must be met:

- » The applicant must show that the investment (in the land) will, or is likely to, benefit New Zealand or any part of it or group of New Zealanders, as determined by the relevant Ministers, and
- » The relevant Ministers must determine that the benefit will be, or is likely to be, substantial and identifiable.

Satisfying the 'substantial and identifiable' test is extremely difficult.

For example, if a 10-hectare orchard doubled its production, that would not even register on the total production of fruit in New Zealand and it could not satisfy the 'substantial and identifiable' test. Satisfying the test will require significant numbers of permanent jobs, or increases in production that would make a difference to the New Zealand economy.

One of the factors that the Ministers can, however, take into account, is whether the investment would have the effect of protecting and enhancing indigenous flora and fauna, for instance. On a significant pastoral high country sheep station, for example, that test could be met by covenanting areas to the QEII National Trust, opening up more access to trampers and hunters, or embarking on conservation programmes protecting endangered flora and fauna. On a smaller property it is difficult to see how these things can be carried out on the required scale to meet the test.

If you are considering selling your farm, orchard or vineyard and there is a likelihood of overseas interest then it is important to take advice at an early stage. Firstly, you would need to ensure that any advertising requirements are met, so that impediment is removed at the outset. Secondly, should an overseas buyer present themselves, you need to be able to make a fair assessment as to the likelihood of that buyer being able to satisfy the criteria for consent. Even though it is the buyer who makes the application, it can take a long time to process. To be contracted to sell a property for, say, six months or a year when a buyer has little chance of obtaining consent, could be a serious waste of everyone's time and money.

Occupational Safety and Health

The rural perspective

Occupational safety and health (OSH) may be one area that is often forgotten in the day-to-day running of farming operations. However, it is something that people in the rural sector should not ignore.

When the pressures of lambing, shearing, harvesting or milking seem to take precedence, the compliance costs associated with OSH can seem like an unnecessary overhead to the farmer. This is not the case. Ensuring that your farming operations comply with legislative requirements could save you money in the long term.

This hard lesson was learned in a recent case¹ in which a honey production company was fined \$78,000 and ordered to pay reparation of \$60,000 to the family of a beekeeper killed when the ATV he was riding overturned.

From employees to contractors to people buying or inspecting goods offered for sale, as a farmer you have a duty to warn visitors who have permission to be on your property of any work-related or out-of-the-ordinary hazards that you know about that may cause harm. This includes people on your property for recreational purposes, work-related activities and even those carrying out activities unrelated to your work for example, employees of local authorities or electrical supply companies.

Case Study One

Farmer John arranges for a contractor to spread fertiliser on his property. The fertiliser is carted to a bin situated in a paddock where it is then loaded into a truck and spread on a variety of paddocks of varying contour. What are Farmer John's OSH obligations?

Key requirements under OSH legislation are to identify potential hazards; eliminate significant hazards; isolate the significant hazards if elimination is not possible; or minimise the risk of significant hazards if elimination and isolation are not possible.

By assessing the access to the bin (including the design, construction and maintenance of farm tracks), ensuring that any bridges and culverts are capable of supporting the gross weight of vehicles using them, and placing restrictions on when the tracks can be safely used (eg: not used in wet weather) Farmer John will have identified some hazards and will then put systems in place to either eliminate, isolate or mitigate those hazards.

The truck drivers (both bulk and spreading vehicles), if not employed by Farmer John, are responsible for taking all practicable steps to ensure their own safety. They can contribute to the safety of the operation by communicating with Farmer John about any inadequacies found in the access or storage facility and by not applying the fertiliser to paddocks on which it would be unsafe to do so.

Case Study Two

Jack is employed as a shepherd on Sarah's farm. One of Jack's roles is to use a tractor to feed baleage out to stock. He loads one bale onto the bale feeder at the rear of the tractor and stacks two bales on the tractor's front forks. What are Sarah's OSH obligations?

Sarah has many factors to consider. Does Jack have the relevant skills to operate the tractor; is Jack aware of the tractor's limitations due to the load he is transporting and the manner in which he has stacked the front bales, the speed of the tractor, and the terrain on which the tractor is being operated; has the bale feeder been fitted to the tractor correctly; has the tractor been routinely maintained; are there procedures in place for dealing with emergencies?

Having up to date policies in place to ensure employees' safety and ensuring they are appropriately trained (and that training is ongoing) may help to reduce Sarah's liability in the event of an accident. It is not enough to assume that commonsense is a characteristic that all of your employees possess.

Resources

The Department of Labour publishes safety guidelines and recommendations for a variety of agricultural practices ranging from fasting of sheep prior to shearing to guidelines for the safe handling, stacking and transportation of hay bales. These are available from www.osh.govt.nz/order/catalogue.

¹ Masterton District Court, unreported.

Over the Fence

Increase in GST: implications for rural businesses

The GST increase day of 1 October 2010 is rolling around quickly with GST increasing from 12.5% to 15%. All rural businesses should be planning now how to manage the increase. Have you considered the effect of the increase and the changeover date on:

- » Existing contracts/supply agreements which run over 1 October 2010
- » Hire purchase agreements
- » Road user charges
- » Local authority rates
- » Lease agreements, and
- » Accounting processes?

You may decide to pay the whole of the year's rates when the assessment is issued, which will attract GST at 12.5%, rather than paying GST on the two final quarters' rates at 15%.

If you are a lessor, the tax invoice for rent will need to be issued with GST at 15% from 1 October 2010.

There may be some issues arising out of the 'time of supply' of goods and services (and your GST registration on a payments basis or invoice basis) which occur at the changeover date. If you are unsure what to do, we recommend you seek tax advice well before 1 October 2010.

Lack of ease in easements

Consider carefully when you are subdividing off that surplus house and couple of acres how the easements you grant might affect your future use of the land.

Remember when your neighbourly neighbours request a registered easement to protect the water supply use they have enjoyed over your property for many years, that they may sell their property with that easement in place.

The new owner of the land may have a different attitude to the use of the easement.

In a recent High Court case² a new owner of a lifestyle block which had been subdivided off the main farm, physically obstructed the access of the farm owner and its stock trucks along the right of way which the farm owner had reserved when he subdivided off the lifestyle block.

The judge observed that the lifestyle block owners "have not unfortunately grasped that this is a rural right of way specifically designed and created to provide continued access to the (farm owner) for livestock, trucks and farm vehicles..."³.

Although the lifestyle owner did not succeed in court, this serves as a reminder to always imagine a future 'neighbour from hell' when granting an easement. Protect your own use of the facility by ensuring the easement is carefully worded.

Building a house on bare land: GST implications

When you buy land for farming or horticultural purposes and are GST registered, you may claim the input GST paid on that purchase. If you subsequently build a house (for a worker or yourself) the land on which it is built is now being used for a non-taxable purpose. Therefore, you must make a GST adjustment and return to the IRD the output tax calculated on the value of land used for non-taxable purposes.

To calculate the adjustment, generally the pro rata method of apportionment of the total land value is acceptable to the IRD. If you purchased 100 hectares for \$1 million and set aside one hectare for the house site, then the value of land is \$10,000 on which GST must be returned.

There will, however, be instances when the pro rata method will not be acceptable. For example, the total land area may contain features such as part arable, part steep hills, part coastal, which would have distinctive separate values; or part of the land may be zoned differently, such as part rural/part residential and therefore have different values. If the house site is on the more distinctly valuable land, that will be taken into account in calculating the output GST to be returned.

We recommend that if you are contemplating building a house on bare rural land that you get specialist tax and valuation advice.

² Handforth v Kokomoko Farms Limited (High Court, Napier CIV2009-441-477 21/01/2010 Wild J)

³ Ibid para 43