

Rural eSpeaking

M A C T O D D

L A W Y E R S

11-17 Church Street, Queenstown 9300, PO Box 653, Queenstown 9348
T 03 441 0125 | queenstown@mactodd.co.nz | www.mactodd.co.nz
Also in Wanaka and Cromwell

ISSUE 36 | Winter 2021

We hope you enjoy reading this Winter edition of *Rural eSpeaking*, and find the articles both interesting and useful.

If you would like to talk further about any of the topics we have covered in this edition, or indeed on any other legal matter, please don't hesitate to contact us. Our details are on the right.



Significant Natural Areas

What are they? Should I be concerned?

The identification of 'Significant Natural Areas' has been in the news lately. How are these areas defined and what are the implications for rural landowners?

There has also been some confusion as to how 'significant' is defined; this had led to inconsistencies between local authorities recording these areas.

There may be some greater certainty when the proposed National Policy Statement for Indigenous Biodiversity (NPSIB) is finalised.

PAGE 2 ►



Buying or leasing Māori land

What does 'alienation' mean in this context?

There are significant amounts of Māori land in New Zealand in productive rural areas. Much of this land is farmed by way of lease, sometimes in conjunction with adjoining general freehold land. Sometimes these 'joint' farms have been farmed in this way for generations.

For Māori land to be leased or sold, however, specific rules apply. We outline the rules around the 'alienation' of Māori land in the provisions of the Te Ture Whenua Maori Act 1993.

PAGE 3 ►



Over the fence

Climate Change Commission: carbon farming

The Commission has recommended the Emissions Trading Scheme be amended to manage exotic afforestation.

Dairy worker border exception process

In June, the Minister of Agriculture approved a Class Border Exemption for 200 migrant dairy farm workers (and their families). There were 150 positions available for herd managers or assistant farm managers, and 50 positions for farm assistants.

What is a 'state of emergency'?

A local state of emergency was declared in late May after significant flooding in mid-Canterbury and in Westport in mid-July. We explain what this entails and the powers given to the authorities in such a situation.

PAGE 4 ►

Significant Natural Areas

What are they? Should I be concerned?

The identification of 'Significant Natural Areas' has been in the news lately. How are these areas defined and what are the implications for rural landowners?

The legislative basis identifying significant natural areas is in section 6 of the Resource Management Act 1991 (RMA):

'6 Matters of national importance

*In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, **shall recognise and provide** [our emphasis] for the following matters of national importance:*

...

(c) the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna.

...

The RMA is nearly 30 years old, but it is only fairly recently that the people exercising the functions and powers under it (in respect of this section, mainly being regional councils) have stepped up the process of identifying the areas of 'significant indigenous vegetation and significant habitats of indigenous fauna'. This is the first step in complying with their obligations under section 6(c) of the Act.

In practical terms, regional councils are identifying and recording these areas within their territory – some of which are

on private land. This process has, however, been somewhat controversial partly because what is 'significant' is not defined by the Act and, as a result, it has been left to each council to interpret this individually, largely using case law and ecological guidance. This has led to inconsistencies between local authorities recording these areas.

Implications for rural landowners

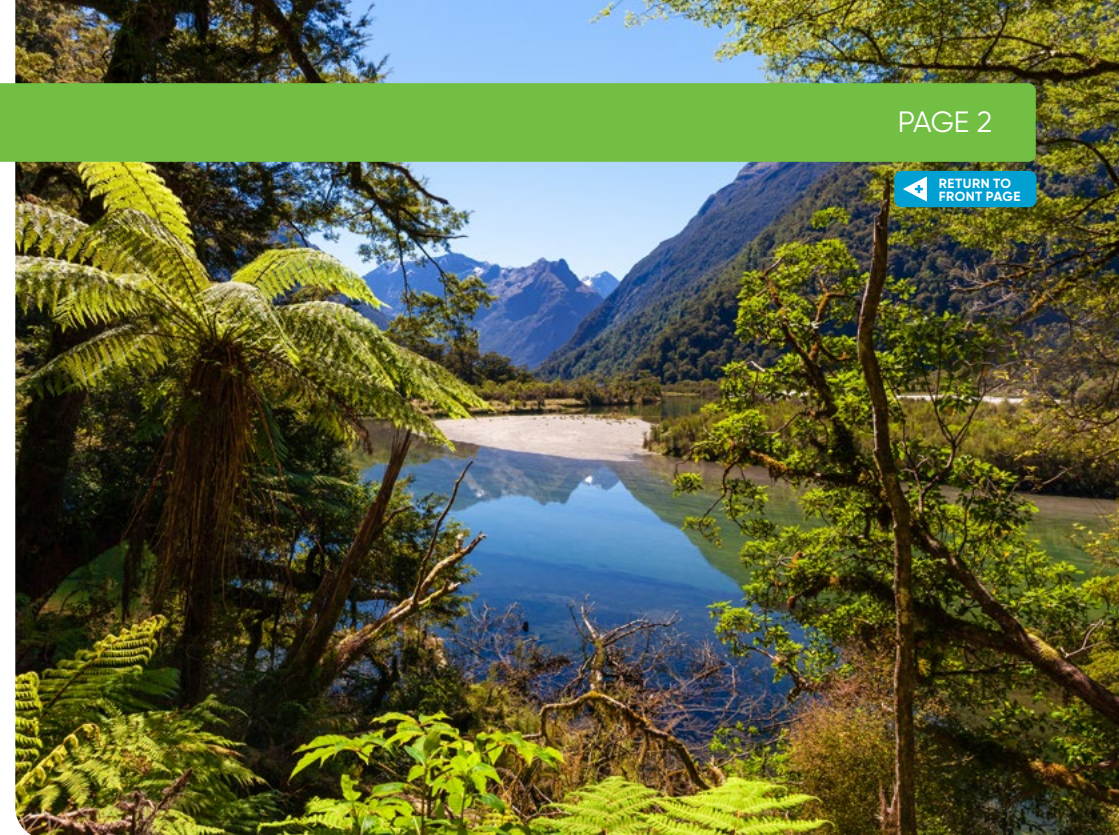
What does it mean for a landowner once a significant natural area has been identified on their land?

First, it means is that the area will be identified on the council's records.

Second, the use to which that land can be put is likely to be more controlled. That doesn't necessarily mean that its existing use will be stopped – although it could. It does mean, generally speaking, that existing activities are unlikely to be able to be intensified and new activities are likely to be subject to tighter controls, if permitted at all.

The concern for a private landowner having such an area on their land is that it potentially reduces the value of that land by limiting the use to which it is put; it also reduces the ability to change or vary the current farming practices in relation to the land. It is seen as a fetter to an individual's private property rights.

Is there any compensation for a landowner who has such an area identified on their land? The answer is no. Direct government compensation has been ruled out. There have, however, been instances where



[RETURN TO FRONT PAGE](#)

the Native Heritage Fund has purchased land where large significant natural areas have been identified. There may be some financial assistance in the form of rates rebates, or funding for fencing of the areas and for pest control.

More certainty with NPSIB?

Some greater certainty might be achieved when the proposed National Policy Statement for Indigenous Biodiversity (NPSIB) is finalised. A draft NPSIB was released in 2018 and recently the Associate Minister for the Environment, the Hon Phil Twyford, agreed to extend the timeframe for the delivery of the final version of the NPSIB to the end of this year.

The intention of the NPSIB is to provide 'clear direction to Councils on their responsibilities for identifying, protecting, managing and restoring indigenous

biodiversity under the Resource Management Act 1991'. Therefore, at the very least, the NPSIB should provide some consistency between councils and certainty for landowners as to what the effect of having a significant natural area on their land might mean.

Given that the entire RMA is being reviewed and is likely to be repealed and replaced by two separate statutes, one has to presume that the current uncertainty and inconsistency may continue for some time. Whatever the form of the new laws relating to the use and development of land takes, it is certain that rules relating to the protection of indigenous flora and fauna will be an important part of that reform. Given the work that has already gone into the draft NPSIB, we presume it will be captured by the new legislation in one way or another. +

Buying or leasing Māori land

What does 'alienation' mean in this context?

There are significant amounts of Māori land in New Zealand in productive rural areas. Much of this land is farmed by way of lease, sometimes in conjunction with adjoining general freehold land. Sometimes these 'joint' farms have been farmed in this way for generations.

For Māori land to be leased or sold, however, specific rules apply. The Te Ture Whenua Māori Act 1993 governs the 'alienation' of Māori land.

Why Māori land is so tightly controlled

The preamble to the legislation tells us why alienation of Māori land is so tightly controlled as it states:

'Whereas it is desirable to recognise that land is a taonga tuku iho of special significance to Māori people and, for that reason, to promote the retention of that land in the hands of its owners [our emphasis], their whanau and their hapu, and to protect wahi tapu: and to facilitate the occupation, development and utilisation of that land for the benefit of its owners, their whanau, and their hapu: And whereas it is desirable to maintain a court and to establish mechanisms to assist the Māori people to achieve the implementation of these principles.'

'Alienation' under the Act is a very wide term and includes:

- + Every form of disposition of Māori land or of any legal or equitable interest in Māori land, whether divided or undivided
- + The making or grant of any lease, licence, easement, profit, mortgage, charge, encumbrance, or trust over or in respect of Māori land
- + Any contract or arrangement to dispose of Māori land or of any interest in Māori land
- + The transfer or variation of a lease or licence, and the variation of the terms of any other disposition of Māori land or of any interest in Māori land
- + An agreement to the taking under the Public Works Act 1981 of Māori land or any interest in Māori land, and
- + The granting, renewal, variation, transfer, assignment, or mortgage of a forestry right over Māori land.

However, alienation does not include:

- + A disposition by will of Māori land
- + A disposition of a kind above effected by order of the court
- + A surrender of a lease or licence in respect of Māori land
- + The granting, for a term of not more than three years (including any term or terms of renewal), of a lease or licence over or in respect of Māori land, or

- + A disposition by way of sale by a mortgagee pursuant to a power expressed or implied in any instrument of mortgage.

Many different rules apply

Different rules apply regarding the alienation of Māori land; all are dependent on the status of the land and how it is owned.

Māori customary land is defined in the Act as *'land that is held by Māori in accordance with tikanga Māori and shall have the status of customary land'*.

Under section 145 of the Act, Māori customary land cannot be alienated or disposed of by will or vested or acquired under an Act. However, this doesn't prevent a change in the owners in accordance with tikanga Māori. Nor can it stop a change in status of Māori customary land to Māori freehold land (there is a process for this) or the creation, cancellation, or variation of an easement, or laying out of a roadway, over Māori customary land.

Section 146 of the Act states that no person can alienate Māori freehold land otherwise than in accordance with the Act. 'Māori freehold land' is land which has been determined as such by the Māori Land Court by freehold order. Māori freehold land can be owned by individuals, through Māori incorporations or through trusts; this land can be alienated but there is a formal process under the legislation:

- + Section 150A sets out the requirements for alienation by a trust
- + Section 150B sets out the requirements for alienation by a Māori incorporation, and
- + Section 150C sets out the requirements for alienation by individuals or land owned jointly or in common by individuals.

Māori land that is owned by Māori incorporations tend to be larger blocks that are economic in their own right. This contrasts with Māori land owned by trusts and (particularly) owned by groups of individuals in common that are often smaller and not economic in their own right. Often several blocks can be found adjacent to each other, but with similar, but not the same common ownership. Agglomerating these blocks into an economic unit can be challenging and an understanding of what are fairly complex rules and procedures is necessary. However, as we can see from the preamble referred to above, the aim of the Te Ture Whenua Māori Act 1993 is not only to retain land in Māori ownership, but to *'facilitate the ... development and utilisation of that land for the benefit of its owners...'* To that end, alienation, particularly by way of lease, to an appropriate lessee is a useful mechanism for achieving some of the Act's aims.

If you have an interest in Māori land that could be leased or sold, or if you are looking to lease Māori land to use as part of your farming operation, getting advice from a lawyer who is experienced in Māori land law and wāhi tapu is vital. Please don't hesitate to be in touch with us if you are in this situation. +

Over the fence

Climate Change Commission: carbon farming

On 31 May, the Climate Change Commission provided Parliament with its final advice on the New Zealand Emissions Trading Scheme before the government sets the first of three emissions budgets later this year. In this advice there was significant consideration on land use and the impacts of afforestation.

The Commission recommended the Emissions Trading Scheme be amended to manage exotic afforestation and provide assistance for local government in mitigating the local impacts of afforestation.



If the government implements the Commission's recommendation, carbon farming returns for planting exotic trees, such as *Pinus*, will decrease, while the carbon farming returns for planting native forest blocks will either remain constant or increase.

With a large proportion of carbon sinks across New Zealand planted in *Pinus*, this will have an impact on both existing forestry blocks and blocks that will be planted in the future. The Commission has instead shifted its focus to reduce gross carbon dioxide which is largely produced by burning fossil fuels.

We will watch how the Commission's recommendations progress during the year, and will provide more information as it comes to hand.

Dairy worker border exception process

In order to address an acute shortage of experienced dairy sector workers, in June the Minister of Agriculture approved a Class Border Exception for 200 migrant dairy farm workers, along with their families, to enter New Zealand. There were 150 positions available for herd managers or assistant farm managers and 50 farm assistants. In addition, 50 general practice vets (and their families) were granted exemptions to enter New Zealand.

An assistant farm manager must earn over \$92,000pa and have at least two to four years' work experience; herd managers

must earn above \$79,500pa. Farm assistants must earn above the median wage which is classified as \$27.00/hour and roles must be in regions that have acute shortages of dairy sector workers.

All workers must come into New Zealand before April 2022. Employers must make a commitment to pay the costs for Managed Isolation and Quarantine (MIQ) and pay their worker's salary whilst they are in MIQ. It is estimated that the workers will be on the farm approximately 17 weeks from the initial application.

What is a 'state of emergency'?

In late May, the mayors in mid-Canterbury declared a local state of emergency due to the significant flooding affecting the region. Then, in mid-July, a local state of emergency was declared in the Westport area. Many people are curious about what this entails and to understand the powers given to the authorities in a local state of emergency. We explain...

The Civil Defence Emergency Management Act 2002 defines a local state of emergency as a declaration by an authorised person, such as a mayor or the Minister of Civil Defence, that an emergency has or is likely to occur within an area. A local state of emergency lasts for a minimum period of seven days from the date and time of the declaration.

The local civil defence group (which includes emergency services, police and volunteers) is then deployed who may, for example, set up first aid posts, provide shelter to those affected and assist with the rescue of people in danger. In a nutshell, a local state of emergency allows the authorities to protect people and the community.

Most importantly, the leader of the civil defence group has the power to enforce the evacuation of an area, authorise entering a premise to save lives and enforce road closures; all of these were implemented when Ashburton's stock banks were at risk of breaching the township and Westport was flooded. +

