

Rural eSpeaking

M A C T O D D
L A W Y E R S

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Also in Wanaka and Cromwell

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Welcome to the Summer edition of *Rural eSpeaking*. We hope you 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.



Water Services Act 2021

How does this affect the rural sector?

Although the government's proposed Three Waters Reform Programme has been very much centre-stage recently, there is an important new statute regarding water that will impact on the rural community. This is the Water Services Act 2021 that came into force on 15 November 2021.

The purpose of the legislation is to ensure that drinking water suppliers provide safe drinking water to consumers. We discuss how this affects the rural sector.

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'Nuisance' is still relevant in court

No fault is necessary

Many of us are familiar with the tort of negligence – an act or omission by one party that causes loss to another party. Inherent in a negligence claim is the concept of 'fault'.

A recent case illustrates why nuisance, a tort similar to negligence except that fault is not necessary, is still relevant.

The case serves as a warning that even where you are not at fault, if you do something on your land that alters its natural state and somebody else's land (or operation) is affected, you could be liable.

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2021 resident visa pathway for migrant workers

A new pathway for migrant workers to gain a one-off residency visa was introduced on 29 September 2021.

Covid on the farm

We give guidance on Covid prevention plans, what to include and what to do if someone in your family or on your farm tests positive.

Vaccinations and employee rights

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Water Services Act 2021

How does this affect the rural sector?

Water has been very much in the news lately, particularly with the government's proposed Three Waters Reform Programme. The Three Waters Reform generally deals with the transfer of water infrastructure (drinking water, wastewater and stormwater) to four new water service delivery entities.

What hasn't been in the news as much is a very important piece of legislation with regard to water that will impact on the rural community: the Water Services Act 2021. This came into force on 15 November 2021. The purpose of this legislation is to ensure that 'drinking water suppliers' provide safe drinking water to consumers. Previously, responsibility for drinking water was dealt with under the Health Act 1956 but, as a result of the water contamination issues in Havelock North in 2016 and the subsequent inquiries that resulted from that, it was determined that the supply of safe drinking water was so critical that it needed its own legislation and regulator – Taumata Arowai.

What is a 'drinking water supply'?

A 'drinking water supply' means the infrastructure and processes used to abstract, store, treat or transport drinking water for supply to consumers or to another drinking water supply. It includes the point of supply, any endpoint treatment device and any backflow prevention device, but does not include a temporary drinking water supply or a domestic self-supply.

Who is a 'drinking water supplier'?

The Act defines a supplier as a person who supplies drinking water through a drinking water supply but does not include a 'domestic self-supplier'. Therefore, the legislation applies to private water schemes as well as any public water supply.

A 'domestic self-supplier' means 'a stand-alone domestic dwelling that has its own supply of drinking water'. So a single farm house with its own water supply will be exempt from complying with the legislation. A large farm, however, that might supply several houses and other buildings such as woolsheds or milking sheds that have staff rooms with kitchens from the same source through a private water system, would be subject to the provisions of the Act.

Similarly there are a significant number of rural water schemes where one water source supplies several properties (particularly where there have been lifestyle-type subdivisions). Sometimes these schemes are administered by virtue of the easements that were created in the subdivision. Occasionally, however, they are administered by companies that own the water infrastructure with all the landowners being shareholders in the company and shares being transferred at the same time as the land.

Drinking water suppliers must have a plan

If the Act applies to your situation, you are required to have a multi-barrier approach to water safety including:

- + Preventing hazards from entering the water



- + Removing particles and hazardous chemicals
- + Killing or inactivating pathogens by disinfection, and
- + Maintaining the quality of water distribution systems.

Each supplier must have a water safety plan that must include elements of international best practice, be proportionate to the scale of the water supply, and be subject to risk-based auditing and monitoring by Taumata Arowai.

What to do next?

The legislation requires a drinking water supplier to register its water supply. The registration must include certain information such as the legal name and contact details of the owner, the location of the supply, the area the

drinking water supplies, the estimated number of consumers, a description of the water supply and any other information required by Taumata Arowai. As usual, the application must be accompanied by the fee or levy prescribed by regulations made under the Act.

Water suppliers registered with the Ministry of Health prior to 15 November 2021 will automatically have their registration migrated to the Taumata Arowai register.

Next you must prepare a drinking water safety plan to be lodged with Taumata Arowai. You also must implement the plan and ensure that the drinking water supply is operated in accordance with the plan. You can comply with your operational obligations by employing or engaging a third party to do this for you.

'Nuisance' is still relevant in court

No fault is necessary

Many of us are familiar with the tort of negligence – an act or omission by one party that causes loss to another party. Inherent in a negligence claim is the concept of 'fault'. A recent case¹ illustrates why nuisance, a tort similar to negligence except that fault is not necessary, is still relevant.

Forest trees causing nuisance

Nottingham Forest Trustee Limited (NFT) owned land on which it had planted a commercial forest. Over a period from December 2010 to August 2016 *pinus radiata* trees growing in the forest, which had been planted many years earlier, fell onto two electricity lines owned and operated by Unison Networks. Unison's customers experienced power outages while repairs were carried out, and Unison incurred costs as it repaired the damage.

Unison sued NFT both in negligence and in nuisance and sought damages to cover the cost of repairs and also an injunction to prevent future falls of trees.

Background

Unison's electricity lines crossed over the land while it was a sheep and beef farm, and the power lines were present when NFT acquired the land and planted the forest. In planting the forest, NFT left a corridor under each of the lines approximately 30 metres wide where it didn't plant trees. The nearest tree to the power line at any point was about 15 metres away.

Over time, however, the trees on the edge of the corridor grew to a height that was greater than the distance from the line. *Pinus radiata* can grow to 30 metres high. In the High Court proceedings the judge found that by 2010 the trees planted on the edge of the corridor had grown taller than the full distance between those trees and the lines. In those circumstances, there was what the High Court judge described as "a very good chance" that the lines would be hit and damage caused if a tree fell; that started to happen from about December 2010 and again in July 2011. In 2013, a tree fell in a storm causing \$20,000 worth of damage to a structure on the line and there were further outages as a result of tree falls in April 2012 and November 2014. In Unison's view, NFT was liable for the recurring damage (this was in 2015) and wrote to NFT asking that the trees be cleared to prevent further damage. This was resisted by NFT, unless Unison agreed to pay compensation for the loss of the trees.

More tree falls in September 2015 and August 2016 resulted in further damage, with Unison writing to NFT again claiming significant repair costs. This was once again resisted by NFT. NFT's response was basically that growing trees was a natural use of land; liability for tree falls required fault in tree management and as NFT had complied with the regulatory regime and conducted regular inspections and so on, NFT was not at fault.

Indeed the *negligence* claim was quickly dismissed by the High Court as Unison



was unable to prove any particular fault on the part of NFT. Unison was, however, successful in its *nuisance* claim which in essence means if proven 'strict liability' follows, there is no need to establish fault. Both parties appealed the findings against them. The Court of Appeal upheld the High Court's original decision.

About nuisance

A nuisance is defined as 'any ongoing or current activity or state of affairs that causes a substantial and unreasonable interference with a plaintiff's land or their use or enjoyment of that land.' Unison obviously didn't own any land in the vicinity. It simply owned the power lines that ran over the land. The court, however, held that since a statutory right constituted an interest in land and as the owner of utility works it has the exclusive right to occupy the portion of the soil where the works lie to the exclusion of all others and as such the right was greater than a right given by virtue of easement or licence.

Further, the court said, even if an interest in the land couldn't be proven, as a matter of policy the existence and importance of works must mean that Unison had sufficient interest to found an action in

nuisance. In particular, the court found that NFT created a state of affairs that caused unreasonable and continuing interference with the lines, and was therefore strictly liable even if NFT took reasonable precautions.

What is important to establish in nuisance is to show that a landowner has changed the state of affairs on their land which then causes a loss or damage to either other land or someone with an interest in other land. In this particular case, the change was the planting of the forest where lines already existed on a sheep and beef farm.

A similar case would be, for example, where a landowner interfered with a waterway that resulted in flooding downstream. If the landowner hadn't interfered or changed the path of the waterway and flooding occurred downstream, there could be no liability under nuisance because that was a natural state of affairs, but by interfering with that natural state of affairs, a nuisance is created.

This case serves as a warning that even where you are not at fault, if you do something on your land that alters its natural state and somebody else's land (or operation) is affected, you could be liable. +

1 Nottingham Forest Trustee Limited (NFT) v Unison Networks Limited (Unison) [2021] NZCA 227

Over the fence

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2021 resident visa pathway for migrant workers

A new pathway for migrant workers to gain residency was introduced on 29 September 2021 by Immigration Minister, the Hon Kris Faafoi. This is a one-off resident visa that is targeted for up to 165,000 migrants – including around 9,000 primary industry workers.

In order to comply, a worker must have been in New Zealand on 29 September 2021 and be already subject to an eligible visa or have an application for an eligible visa submitted to Immigration New Zealand by this date. They must also meet one of the following three grounds:

1. 'Settled' worker: lived in New Zealand for at least the past three years
2. 'Skilled' worker: earn the median wage (\$27 per hour) or above, or
3. 'Scarce' worker: their role is on a [scarce role list](#).

Since 1 December 2021 migrants who have already applied for residency under certain applications will be eligible to apply under any of the above three categories; these applicants will be notified by Immigration New Zealand. From 1 March 2022 all other eligible migrants can apply.

The pathway is particularly targeted at the primary sector to reflect the difficulties in recruiting workers due to Covid.

It is important to note that this is not a permanent resident visa. An eligibility checker is available on Immigration New Zealand's website [here](#). Applications will be prioritised and, as a result, Skilled Migrant Expressions of Interest will be frozen until 31 July 2022 when the 2021 resident visa pathway closes.

Covid on the farm

Prevention plans

With the ever-changing nature of Covid, prevention plans are key to keep the virus off your farm. When developing a prevention plan, it's important to communicate and involve all parties. This includes discussions with your staff, contractors and suppliers so everyone can understand the risks involved and the procedures in place to negate them.

Communication should not stop when a plan is formed, it should be regularly revisited and adjusted if required. It is important to have a plan that reflects the new traffic light system that began on 3 December 2021.

What to include

The plan needs to consider both the people involved and animal welfare. It is important to consider ways to minimise contact between individuals, both within your workplace and with people outside

of your workplace. Cleaning procedures, physical distancing, and the physical and mental health of your employees must all be considered when implementing a prevention plan.

What if Covid gets onto the farm?

If one of your workers, a member of their immediate family, or you or your family test positive for Covid or are considered a close contact there should be procedures in place so that your farming operations can continue. This includes ensuring livestock and crops are still cared for should any of your team members be required to self-isolate in a quarantine facility. This is why splitting shifts and creating work bubbles could be beneficial. The Ministry for Primary Industries is available to help co-ordinate services to provide for your animals' welfare should that be needed.

All farmers must notify their suppliers and contractors should someone on your farm test positive.

Vaccinations and employee rights

In late November the Covid-19 Response (Vaccinations) Legislation Act was passed; this has significant implications on the rights of employees. Employees can now be subject to vaccine mandates by either working in an employment sector required to be vaccinated against Covid by government orders, or working for a business or farm that introduces a company policy mandating vaccination.

Employers must follow certain procedures when introducing a vaccine mandate. You must consider a number of factors when determining what roles require a

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Water Services Act 2021

If you are already registered as a drinking water supplier, you must have your plan registered before **15 November 2022**.

If you are an existing supplier and not currently registered, you have until **15 November 2025** to register and until **15 November 2028** to submit your plan.

If you are a new supplier, supplying water for the first time after **15 November 2021**, you must register as a drinking water supplier and register your plan before you operate your supply.

For more detailed information, Taumata Arowai has what you need [here](#).

The Act has teeth

What all this means in practical terms is more compliance, more cost and more responsibility in relation to water supply. There are penalties for failing to comply with the Act, including some criminal offences such as recklessness or negligence in the supply of unsafe drinking water or allowing contamination of the drinking water.

As you can see, the Act has teeth and it is now incumbent on both public and private suppliers to comply with the new regime – or face the consequences.

If you need help in working your way through this new legislation, please don't hesitate to contact us. +

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Over the fence

vaccinated employee. These are expected to include the risk of exposure, transmission, proximity and whether the risk can be mitigated. For some rural sector businesses, interaction with customers and with other staff members is limited and therefore the risk is minimal; this may differ vastly to another business. Therefore the risk associated with a role will be dependent on its responsibilities and the nature of the business itself.

Workers whose role requires vaccination, and who choose not to have the vaccination, still have rights. Employers must exhaust all other avenues before termination including considering redeployment elsewhere. If it is no longer possible to carry out work without being vaccinated, a minimum of four weeks' paid notice is required.

If one of your unvaccinated employees decides during this time to get vaccinated the notice will then be cancelled, unless it would unreasonably disrupt your workplace. Your employee will not be prevented from the standard entitlements granted on termination if they decide to remain unvaccinated and is able to bring a personal grievance against the business.

The situation around Covid matters is ever-changing; therefore we recommend that you check the government's Covid websites regularly or talk with us. +

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