

Fineprint

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Power to the People

INCREASED GOVERNMENT POWER SUPPLY INVESTMENT IMPACTS ON LANDOWNERS

After a number of major power supply disruptions, the government has committed to a long overdue investment in our national electricity grid infrastructure. This article gives a brief overview on the impact for rural landowners, in particular, as a result of this increased investment activity.

Presently Transpower has \$2.3 billion invested in the development of new projects and a pipeline of other projects awaiting Electricity Commission approval. This development is part of a general infrastructure spend that will lift that contribution to the annual GDP from 2% to 3.5% over the next decade.¹

As a result of this increased investment activity by lines companies and generators, there will be significant impacts on rural landowners in particular. When electricity easements are upgraded or created in this development environment, landowners should receive proper recognition of their land rights which, in some cases, will result in agreements that extend beyond the restrictive scope of the Public Works Act 1981.

Upgrade of pre-1992 power 'easements'

Before the enactment of the Electricity Act 1992, the Crown did not always require an

easement agreement with the landowner to use that person's land to install a power line. It could rely on statutory rights that effectively overrode the landowner's right of control for that purpose.

The Electricity Act 1992 allows line companies to carry out upgrades without having to reach any agreement with the affected landowner if the upgrade can occur within the physical boundaries of the existing statutory right. However, there is a case to be settled if the upgrade extends the land boundaries of the easement, for example, installing larger capacity conductors or more extensive guy wires and anchors.

Transpower's current view is that it only needs to pay for the incremental land involved. Contrary to this is the view that the upgrade creates an entirely new easement under the legislation for which the landowner should be fully compensated. Arguably, advisors to Transpower and other utility providers



selectively rely on precedent cases that indirectly (it is purported) reinforce the historic attitude of limited landowner rights as they find valuation solutions that continue to suit their clients.

Yet there are also cases that indirectly support a greater scope to landowner rights and the manner in which these should be respected. These contrary legal positions have yet to be ultimately resolved as a significant enough case has yet to emerge that would justify seeking the ruling of the court specifically on the point. In the meantime however, the lack of legal resolution does give the landowner some leverage to pursue better settlement terms than the lines company/utility provider might initially offer.

Generator project transmission lines

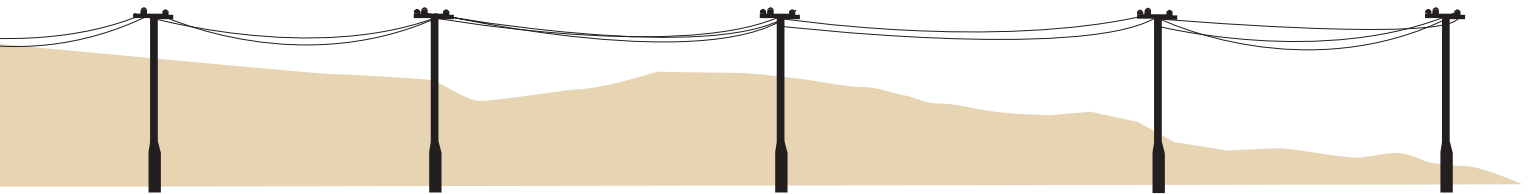
While there is generally a separation between the operations of the lines companies, retailers (including gentailers such as Mighty River Power and Mercury Energy) and generators, projects are emerging where generators are creating their own transmission lines to the grid injection point for their new wind, hydro and geothermal projects. Some are more enlightened in their approach than others. If reasonable recognition is not given to landowner rights, then the generator could face all the adversities and delays of acquiring rights under the Public Works Act. That approach also counts against an enduring and transparent relationship between the line owner and

the landowner, the results of which have recently been seen in the media.

A more enlightened approach in working alongside the landowner can result in agreements that contain provisions for royalties or a premium, business interruption compensation, restoration obligations, codes of conduct, etc which are significantly more extensive than what is contained in a Public Works-style agreement.

Currently lines companies are more regulated than their generator counterparts so their ability to remunerate landowners is somewhat less. However, there has been some recent lobbying by Federated Farmers to the lines companies for annualised payments to be made to affected landowners. This coincides with the change of mood about how landowners should be recognised for the better in the new development environment.

Landowners who may face one of the above scenarios should not sign up to any agreement without seeking legal advice. The effects of that agreement could be far-reaching given the significant life of high voltage transmission lines. As it is typical that such agreements make provision for the payment of the landowner's legal costs, landowners should always take the time to seek full legal advice on any electricity easement agreement that a lines company or generator may put in front of them. ■



Crown Retail Deposit Guarantee

UPDATE

The original Crown Retail Deposit Guarantee Scheme has been extended with additional criteria until 31 December 2011.

A question has arisen whether a discretionary family trust can meet the criteria as an eligible depositor under the guarantee scheme where one of the trustees is a professional such as a lawyer or accountant.

Trustees who are paid for their work as a trustee (ie: professional trustee) are not eligible under the Crown guarantee because they fall within a wide definition of a financial institution. However, trustees who happen to be professionals (such as a lawyer or

accountant) are not automatically ineligible. In certain circumstances, a trustee whose primary job is as an accountant or lawyer, or whose primary job involves providing services in the financial sector, can still be eligible. There is no single test to determine eligibility in the circumstances. The key question in each case will be whether the trustee is being paid to act as trustee. A trustee who receives a fee for working as a trustee of the relevant trust is ineligible.

Trustees should check the specific status of their trust with their professional advisers. For further details, see www.treasury.govt.nz/economy/guarantee/retail/qanda/trusts ■

Gift duty to be Abolished from October 2011

The government has announced its intention to abolish gift duty from 1 October 2011. The Minister of Revenue, the Hon Peter Dunne says the removal of gift duty will be included in legislation to be introduced in November.

"The limited protection that gift duty offers does not outweigh the significant

compliance costs, estimated at approximately \$70 million per year that gift duty imposes on the private sector," said Mr Dunne.

Currently, the maximum amount one person may gift annually without attracting gift duty is \$27,000 and \$54,000 for couples.

Gift duty was established to prevent people avoid estate duty. Despite estate duty being revoked in 1992, gift duty was retained to

help thwart people giving away major assets in order to (amongst other things) evade tax, avoid exposure to creditors and the rest home subsidy.

Mr Dunne has said that the protection that gift duty offers in the areas of income tax, creditors and social assistance has only ever been incidental and very limited. ■



Going into Business Together

MAKING A NEW RELATIONSHIP WORK

Getting together in business is not dissimilar from entering a romantic relationship – apart from the lack of romance that is. A new business relationship carries the promise of better things than could be achieved alone. This article will help guide new ‘partners’ to take a holistic approach to the new relationship and use the energy flowing in the early days to set out the terms of the new relationship so it can endure for the long term.

In the heady days of setting up a new business it is easy to focus on the positive aspects of the new relationship and pay less attention to the actual business framework.

The first decision to be made should be your business structure. The most common of these involving more than one person/entity is a partnership or limited liability company, although also used are trusts, limited partnerships and joint ventures.

For the purposes of this article our focus is on partnerships and limited liability companies, although the messages can apply to all structures.

Doing the paperwork

Common to both a partnership and limited liability company is the ability to record how each party in the venture is to behave – to each other. In a partnership there is a partnership agreement; in a company it is a combination of the constitution and shareholders’ agreement.

“Setting up in business with a partner is very like a personal relationship.”

The matters to be covered can be as varied as the parties wish. It can be a nuts and bolts document dealing with the minute details

of how the entity is to be run including day-to-day responsibilities, or it can take a broad brush approach dealing with major matters such as how decisions are to be made and what happens if one party wants to leave.

Matters which you may wish to include are:

- Arrangements for owner-funding. Financial problems are a common reason for friction in business relationships. You need to consider:
 - Each party contributes equally?
 - Contributions rank equally in any winding up?
 - Contributions can only be demanded (in the case of loans) with the consent of all parties? (This can avoid the departing party holding the business to ransom by demanding repayment of loans.)
- How are decisions to be made?
 - One person one vote/proxy voting/ unanimous/by majority?
 - A strong emphasis on consensus/good faith?
- Exit strategy and/or new blood
 - How are the shares to be valued?
 - Is there to be a minimum or maximum period with no changes in the parties?
 - What liabilities/benefits accrue to departing/new parties?
 - Do shares have to be offered first to existing owners?

- How are disputes to be resolved? Experience shows that bringing disputing parties together to discuss the issues face-to-face is a painful but often productive process. For this reason you may want to include a compulsory mediation provision.

The document should be in plain English so everybody understands it; it’s your document after all.

Do I really need this?

If you have faith that there will be enough goodwill and understanding from all parties to see you through even the most difficult situation you may think that there will be no need to have any written record detailing how the relationship is to be conducted. This is an easy trap to fall into, especially early on in a relationship, when you all presume you have the same expectations. Difficulties can arise when it transpires that is not the case.

If, however, you believe it prudent to agree right at the beginning on the ground rules for future conduct it makes sense to record that agreement in writing. Having a written record of how the relationship is to be conducted will help to resolve issues. If your business has a comprehensive shareholders’ agreement/constitution/partnership agreement at least there is an indisputable reference point to rely on.

Setting up in business with a partner is very like a personal relationship. Making sure you have similar expectations and everything is in writing will help ensure you get the best from the relationship, you run a profitable enterprise and you have fun doing it. ■

Financial Advisers Act 2008 Update

UNDERGOES VITAL AMENDMENTS

Further amendments have been made to the two main pieces of legislation regulating financial advisers and financial services providers. These were introduced by the Financial Services Providers Pre-Implementation Adjustments Act 2010.

Advice on land

The acquisition/disposition of an estate or interest in land as a Category 1 product has been re-defined as the acquisition/disposition of a land investment product; this will be defined in soon-to-be published regulations. This is a positive outcome as it will now not require a number of professions advising on the sale and purchase of land generally to be classified as financial advisers.

Previously all equity securities were Category 1 products; the amendments have now classified co-operative company shares as a Category 2 financial product. Hence those advising on a Category 2 financial product need not be authorised, but must be registered and belong to an approved dispute resolution scheme before 1 April 2011.

Investment planning service

The financial adviser service definition is amended to include an Investment planning service and not the broader definition of a financial planning service.

Incidental and exempted services

A wider exemption has been granted to incidental services, if a financial service is provided as an incidental part of another business that is not otherwise a financial adviser service. This incidental advice must be to facilitate or be ancillary to the other business.

The exempted professions now include registered legal executives.

Employers providing a service to an employee in connection with a financial product made available through the employee's workplace are now exempted.

Eligible investors

There is a new definition of eligible investor. A client must certify in writing that they have sufficient knowledge, skills or experience in financial matters to assess the value and risks of financial products and the merits of the services, and he or she understands the consequences of certifying themselves as an eligible investor.

All financial advisers must be registered (www.fspr.govt.nz) and belong to an approved dispute resolution scheme by 31 March 2011. Financial advisers advising on Category 1 products must be authorised by the Securities Commission before 1 July 2011 and be registered before 1 April 2011. ■

Volunteer and event sectors get boost with new website

A new website has been launched that aims to boost the capability and capacity of the events sector, and make it easier for Kiwis to volunteer.

VolunteerNet connects you with event-based volunteering opportunities. Working a bit like an internet dating service, you register as a volunteer and search for event opportunities that match your skills and experience. Event organisers can register and search for volunteers who have the skills and experience they require.

Although the upcoming 2011 Rugby World Cup was the catalyst for VolunteerNet, this website is not just about sport. VolunteerNet caters for events of all shapes

and sizes including local community events, art and cultural festivals, fundraising drives and special interest events such as environmental, educational and faith-orientated events.

VolunteerNet has been developed by New Zealand Major Events, a unit within the Ministry of Economic Development. www.volunteernet.org.nz



New rules make juror service more flexible

The government has introduced more flexible rules for people who have been summoned for jury service. Since 4 October, potential jurors may apply to defer their jury service to a more convenient time that suits their availability and lifestyle. The deferral must be done within 12 months of the original summons date.

Minister of Justice, Simon Power said, "We need to make it as easy as possible for people to take part in this important civic duty. Making the system more flexible is expected to improve overall juror attendance and reduce the number of excusals granted."

For more juror information look at www.justice.govt.nz/services/jury-service



Where do I go for my Holidays?

GUIDELINES FOR DIVORCED OR SEPARATED PARENTS

With the summer break fast approaching, everyone will be making plans for their holidays. Separated and divorced parents, in particular, should now be making arrangements for their children to enjoy Christmas and the summer with each of them.

Children of separated or divorced parents often become anxious about the arrangements made for them over Christmas and the summer holidays. Good planning, early on, will make the entire process easier and more manageable for everyone.

It is up to both parents to work out an arrangement that best suits the needs of the children, and also fits in with their own plans for the holiday break. In particular, the parent with whom the children are not living (the non-custodial parent) needs to ensure there are access plans over the Christmas break. Many parents find that using an 'alternate' system works well.

For those of you who would like some guidance on organising alternate access for the children over Christmas and New Year, the following may be helpful:

- One parent (say, the Dad) has Christmas Day and New Year's Day 2011 with the children. In the following year (2011-2012) the children stay with their mother, or
- Christmas Day 2010 with Mum, and New Year's Day 2011 with Dad, or
- Share both days equally: Christmas morning with Mum and the afternoon with Dad, then the same arrangement for New Year's Day.

If there is no agreement on holiday time, do contact us early. Sorting out access during the holidays in good time can save worry, time and money. It may prevent a small problem getting bigger and more expensive to fix if left to the last minute.

It should be noted that a non-custodial parent (who does not have the day-to-day care) can

have access rights enforced, but cannot be forced to exercise their access rights. It is also fair to say that as children get older, their wishes and views take on more importance. For example, it is difficult (and probably counter-productive) to force a teenager to spend a day with a parent if they don't want to.

If an access order exists and one parent prevents and/or hinders access without good reason, s78 of the Care of Children Act 2004 provides for the imposition of a fine and/or imprisonment. Section 73 enables the Family Court to issue a warrant to enforce access. These warrants are invariably difficult to enforce as they are often applied for at the last minute and the effect on the children involved may work against them being granted. This again reiterates the importance of early planning for access visits.

Managing the relationship

Some parents develop a closer and better relationship with their children after separating. The most valuable thing parents can give their children is time.

For access to work well, the move from one home to another must go smoothly and calmly. If one parent finds meeting the other difficult, it may be best to arrange for a friend or relative to act as a go-between, and collect and return the children. Another alternative is for the children to be collected after school and dropped back at school the following morning or after the weekend.

The summer holidays should be a magical time for children. Separated and divorced parents should sort out access times early on to avoid disappointment to their lovely children. ■

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Postscript

Major employment law changes ahead

The Select Committee reported back to Parliament on the Employment Relations Amendment Bill No 2 and the Holidays Amendment Bill in early November 2010 with only minor amendments.

This legislation will have 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.

The *Employment Relations Amendment Bill No 2* will amend the Employment Relations Act 2000 in a number of areas, the most significant of which we list below:

- Extending the current 90-day trial period 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)
- Implementing a code of employment practice around disciplinary and dismissal procedures
- Broadening the test for justification in personal grievance cases from what a reasonable employer *would* have done to what a reasonable *could* have done
- Prescribing minimum requirements of a fair and reasonable process for the court or Employment Relations Authority (ERA) to consider
- Allowing the ERA to dismiss claims deemed to be vexatious or frivolous, and to penalise parties for obstruction or delay
- Promoting mediation by providing mediation services for early problem resolution without representation, requiring that priority be given in the ERA to mediated cases, and prescribing provisions for mediators to make a recommendation for dispute resolution
- Removing reinstatement as a primary remedy in personal grievances, and
- Providing that union access to workplaces is conditional on the consent of the employer (which is not to be unreasonably withheld), and allowing employers to communicate directly with employees in good faith during collective bargaining.

The *Holidays Act Amendment Bill* will change the Holidays Act 2003 as follows:

- Allowing the 'cashing in' of an employee's fourth week of annual leave
- Allowing the observance of public holidays on another working day by agreement
- Allowing payment for a public holiday, alternative holiday, sick leave or bereavement leave during a close-down period if it 'would otherwise have been a working day' (note, this change comes into effect prior to Christmas)
- Changing the relevant daily pay calculation and defining 'discretionary payments'
- Allowing an employer to request a medical certificate earlier than the current three consecutive days, provided the employer pays for it
- Both Bills double the maximum threshold for penalties to \$10,000 for an individual and to \$20,000 for a company or body corporate.

The *Employment Relations (Film Production Work) Amendment Bill* (Hobbit Bill) was passed under urgency on 29 October 2010. The Bill amends the Employment Relations Act 2000 so that workers involved with film production work will be independent contractors rather than employees, unless they choose to be employees by entering into an agreement that provides that they are employees. ■



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