

WEST COAST LESSEE ASSOCIATION

With increasingly complex ownership structures becoming more common in our farming businesses these days, two common questions are increasingly being asked.

- *When is the first right of refusal triggered? and*
- *What are my obligations regarding sub-leasing?*

While we strongly advise that you seek legal advice when restructuring your business, given that individual cases can vary, the following is a plain language response from Janice Forsyth of Welsh Mc Carthy that will be of help to farmers .

WHAT ARE THE LESSEE'S OBLIGATIONS REGARDING SUB-LEASING?

After searching through the Maori land act 1955 the only thing I can find relating to sub- leasing of land is the following:

The lessee must have consent of the lessor in writing before they can assign or sublet the land provided however such consent shall not be unreasonably or arbitrarily withheld in the case of a reputable assignee, subtenant or under-lessee.

The balance of provisions applying to subleasing is the same as it is for any other lease.

WHEN IS A FIRST RIGHT OF REFUSAL TRIGGERED?

1. When the lessee, or the executor for the lessee, proposes to assign the lessee's interest for valuable consideration to third party.
2. When the lessee proposes to assign the lessee's interest for other then valuable consideration to third party.
3. When the executor for of a deceased lessee proposes to assign the lessee's interest for other then valuable consideration (pursuant to a will or intestacy) to third party.

In the three scenarios above the first right of refusal is not triggered if you are assigning the lessee's interest to a specified assignee.

A specified assignee means any one or more of the following persons:

- a) if more than one existing lessee, then anyone or more of the existing lessee's;
- b) if the lessee is a trustee and there has been no variation made to the trust deed, a new or additional trustee;
- c) a spouse of an existing lessee;
- d) a child of an existing lessee (or children);
- e) a company with the shareholders being:
 - I. the existing lessee;
 - II. a spouse of an existing lessee;
 - III. a child(ren) of an existing lessee.

- f) A trustee of a trust with the beneficiaries being:
 - I. the existing lessee;
 - II. a spouse of an existing lessee;
 - III. a child(ren) of an existing lessee.
- g) If the existing lessee is a company:
 - I. the existing shareholders;
 - II. the spouse of an existing shareholder;
 - III. a child(ren) of an existing shareholder.
- h) If the existing lessee is a trust:
 - I. the existing beneficiaries;
 - II. a spouse of an existing beneficiary;
 - III. a child(ren) of an existing beneficiary.
- i) A person who purchases the lessee's interest at a public auction by mortgagee sale;
- j) a person who purchases the lessee's interest at a public auction not by mortgagee sale;
- k) a person who purchases the lessee's interest that failed to sell at public auction as per i) and j) above.

An existing specified assignee means:

- a) a company or trust that existed on 21 August 1996;
- b) a beneficiary or shareholder that existed on 21 August 1996;
- c) if the existing specified assignee does not fall into a) or b) above then a person existing at the commencement of the Maori Reserved Land Amendment Act 1997(which commenced on 1 January 1998).

For example:

1. *Mr and Mrs own land jointly. Mr dies and Mrs inherits by survivorship through the will. This does not trigger a first right of refusal.*
2. *If Mr and Mrs own land jointly but have signed a constructive trust declaration to say they own the land in equal shares and then Mr dies, Mrs can inherit by survivorship and it does not trigger a first right of refusal*

but

if she wants to transfer the property into equal shares to reflect the constructive trust e.g. Mrs as to ½ share and Mr's estate is to ½ share then this will trigger a first right of refusal.

3. *A change of beneficiary of a trust or shareholding in a company triggers the first right of refusal unless they are a specified assignee.*

I note that the transfer to a specified assignee is for a one generation transfer only and only if you have had the land prior to 21 August 1996.

I also note that if a lessee dies then the executor must deal with the land within one year of the deceased death OR if the deceased left a life interest to someone in their will then the

deceased's estate must be wound up within one year of that person receiving the life interest's death.