

Methamphetamine contamination of residential property in New Zealand: the property law and insurance law implications

A study of the legal and policy issues arising from the contamination of residential building by methamphetamine, with a focus on problems for insurance and property law. The study includes international comparisons and consideration of whether and if so how legislation might be enacted (or existing legislation amended) to deal with the effects of unlawful methamphetamine consumption and production in buildings in New Zealand.

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Abstract

Methamphetamine is not a new drug, nor is chemical contamination in residential property a new phenomenon. Rental accommodation, particularly social housing, is one of the main target areas for those looking to consume or manufacture methamphetamine, although hotel rooms, rental vehicles, and commercial properties are not immune.

Knowledge of the direct and indirect effects of chemical byproducts left behind in properties following consumption or manufacture is becoming clearer. With increased information available on the harmful effects of illegal substance residue and better testing technology available, the issue and its prevalence in New Zealand is now widely accepted. Over the last few years, New Zealand media has emphasised the extent of the problem. However, until recently, there has been very little policy, regulation and case law available as guidance for property owners.¹

The risk of methamphetamine contamination should be of concern to everyone. This is because anyone may potentially be affected. Tenants rent previously contaminated homes, exposing family, guests and possessions to drug residue. Landlords face the possibility of having to go to great expense to decontaminate and remediate methamphetamine damage. Mortgagees lend against properties which may be contaminated and subsequently reduced in value. Insurers need to assess the risk and set premiums and restrictions accordingly. Business-owners in many different industries face the possibility of employment issues where cleaners are exposed to contaminated rental vehicles and rooms. Real estate agents are tasked with marketing and selling potentially contaminated properties. And residents across the country must face the economic effects and stigma of living next door to a “drug house”. In

¹ This thesis is about residential landlords and tenants in contrast to commercial landlords and tenants. All references to landlords and tenants are to those with residential tenancies unless otherwise stated.

addition, the drug burdens society with associated healthcare and criminal justice costs. The effects of methamphetamine permeate New Zealand society.

The wide array of issues and means by which people may be affected highlight the need for further research to consider the problem in New Zealand and how it might be best addressed. A better understanding of the issue is required to inform analysis of New Zealand's current responses to the problem of methamphetamine contamination in residential property by government and other agencies. As the problem is not unique to New Zealand, the adequacy of our legislation and policies, in light of comparisons with international legislation and developments, require analysis and recommendation for advancement.

There is an increasing prevalence in the housing market of reliance on rental accommodation.² Landlords are required to provide tenants with a safe and healthy home. To achieve this, they need to meet requirements set out by various laws and bylaws.³ However, with an increase in demand and, at least in Christchurch post-quake, a reduction in supply landlords are arguably in a stronger position to offer substandard housing to desperate tenants.

It is important that our insurance policies, testing standards, regulations and laws are tailored to specifically target the issue and that they are not made to "fit" under other more general categories. This is to prevent: uncertainty; expense in decontamination where it is not required; liability of landlords where they are unsure; and the possibility of exposing tenants to the health risks of methamphetamine and chemical residue.

Although much of New Zealand's insurance law stems from the common law from as early as 1908 our legislature has intervened. It is clear that the legislation has not maintained pace with the evolving property and insurance issues, predominantly in residential tenancies. There

² "Residential Tenancies after *Holler v Osaki*" (2017) 17 BCB 40.1

³ "Laws and Bylaws" (2018 Tenancy Services) <www.tenancy.govt.nz/maintenance-and-inspections/laws-and-bylaws/>.

is currently no specific legislation in New Zealand addressing the problems faced by those encountering the effects of methamphetamine contamination. The Residential Tenancies Amendment Bill (No 2) is currently under review and will, if enacted, provide further clarification not only in respect of methamphetamine contamination but in terms of many forms of contamination.

This thesis aims to gather information from New Zealand's main finance providers, insurers, social housing provider, councils and regional council's such as Environment Canterbury to discover whether our standards, best practice and legislation are adequate to deal with the effects of methamphetamine on property. In light of this information, and a review of overseas legislation and initiatives in this area, our current and proposed authorities in respect of dealing with the issues stemming from methamphetamine contamination will be evaluated and options to further develop this area will be proposed. The purpose of this research is to record the problems that arise from methamphetamine in our society in an insurance and property law context. It is hoped that in highlighting the predicament of residential landlords and tenants in New Zealand, lessons can be learned, and change brought about to alleviate the problems faced by these parties in a world where illicit substance use is ever increasing and causing destruction.

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Challenge Finance Limited v State Insurance General Manager [1982] 1 NZLR 762 (CA).

Collins v Professionals Hutt City Ltd DC Wellington CIV-2009-085-001431, 24 February 2010.

Diamond Real Estate v Allan [2017] NZDC 833.

Holler and Rouse v Osaki and Anor [2016] NZCA 130.

Nand v Tower Insurance [2016] NZHC 1455.

NZI Bank Limited v Philpott [1990] 2 NZLR 403 (CA).

Maulder v National Insurance Co. of New Zealand Limited [1993] 2 NZLR 351 (HC).

Police v Thompson [1966] NZLR 813 (CA).

R v Fatu [2006] 2 NZLR 72 (CA).

Welsh v Housing New Zealand Ltd (High Court, Wellington AP 35/2000, 9 March 2001).

Westpac Banking Corporation v MM Kembla New Zealand Ltd [2001] 2 NZLR 298 (CA).

Sheehan v Watson [2010] NZCA 454, [2011] 1 NZLR 314.

Smith v Accessible Properties New Zealand Ltd [2018] NZHC 1010.

Turner v Metropolitan Life Assurance Co of New Zealand Ltd [1988] NZHC 171; (1988) 5 ANZ Ins Cas 60–861.

Ziki Investments (Properties) Ltd v McDonald [2008] 3 NZLR 417.

2 United States of America

Buell Industries Incorporated v Greater New York Mutual Insurance Company SC Conn No. 16464 (26 February 2002).

Downs v National Casualty Co., 146 Conn. 490, 494–95, 152 A.2d 316 (1959).

Kelly v Figueiredo, 223 Conn. 31, 37, 610 A.2d 1296 (1992).

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Introduction

Methamphetamine is the most commonly used drug in New Zealand.⁴ It is a powerful, highly addictive stimulant that affects the central nervous system. Methamphetamine is illegal in New Zealand and has the ability to cause direct harm through consumption, both from the manufacturing process and in its second-hand form. It is difficult to tell exactly how many people actively consume and manufacture methamphetamine, either in New Zealand or internationally. Without an accurate measure of the issue in New Zealand there is difficulty understanding the breath and extent of the activities currently being carried out in residential property. This makes control of the issue, both in legislating in respect of the activity and in the development of robust policy complex and more difficult. Various media articles report that numbers involved in the activity are considered vast, in epidemic proportions and appear to be rising internationally.

Knowledge of methamphetamine and its contamination of residential property in New Zealand is not new. However, it has been caught by the media and subsequently brought to the attention of landlords, insurers, real estate agents, finance providers and prospective purchasers. Having better knowledge of methamphetamine contamination does not solve the issue. However, an improved knowledge provides prospective purchasers with opportunities to ensure that suitable clauses are inserted into Sale and Purchase Agreements. It would also provide opportunities for insurers to limit their liability and to seek baseline chemical contamination tests prior to providing cover for a property if there are suspicions. A better knowledge of methamphetamine contamination provides landlords with the opportunity to

⁴ New Zealand Police “Wastewater Pilot Programme” August 2018 at <www.police.govt.nz>.

obtain testing and ensure they thoroughly check prospective tenants before trusting them to look after such large assets.

This research has considered various aspects of methamphetamine contamination of residential property via case law. However, the issue has featured more frequently in decisions of the New Zealand Tenancy Tribunal. This is considered likely due to people who do not wish to damage their own homes, but instead prefer to create clandestine laboratories in rented residential accommodation. Aware that chemical contamination is harmful to health and that clandestine laboratories are often located on residential property, many landlords and prospective property purchasers are choosing to obtain baseline methamphetamine tests. It is recommended that baseline tests are obtained upon the commencement and exiting of each tenancy and prior to purchasing a new property, the history of which they may not be familiar. Although the cost of baseline testing appears to act as a deterrent to many, it is arguably a small cost in the long term should chemical contamination be discovered.

Research Issues and Questions

Against this background, a rigorous legal analysis will be beneficial to all parties involved. For this reason, this thesis will examine the legal implications of methamphetamine contamination in residential property in New Zealand. The issues can be broadly addressed with three questions.

The first question is: *Why is methamphetamine a complex issue from an insurance perspective?* While the consumption and manufacturing of methamphetamine is often considered to be more of a health and social issue, the chemical contamination left behind overlaps and intertwines greatly with property and insurance law. There is not a significant

amount of specific research on the effects of methamphetamine contamination with respect to human health. Further, conflicting media reports and the possibility of “cowboy meth testers” scaremongering for financial gain has created doubt and scope for insurers to decline legitimate insurance claims. There has been a call by the Insurance and Savings Ombudsman for greater consistency in the outcome of claims made. An AMI insurance policy, underwritten by IAG, is used as an example throughout the thesis. However, the principles discussed and established are applicable amongst many other policies of a similar nature. The thesis considers the damage caused as any one of the following, gradual damage and deterioration, methamphetamine as a “defect” or a “latent defect”, or as “sudden damage”. The complexity of the issue is surrounded by ensuring that landlords have initially made full and proper disclosure and that they have met their obligations in accordance with the insurance policy. An examination of the relevant case law in this area reveals the limited liability of tenants and rights of subrogation. The nature of this issue is that it flows into further claims and issues as described in the abstract. This has the potential to create inconsistency in the claims made and calls for greater guidance, information and investigation. Answering this first question involves an examination of New Zealand Tenancy Tribunal decisions, case law and an analysis of insurance policy documents. These are explored throughout the thesis.

The second question is: *What legislation and guidance does New Zealand currently have in respect of methamphetamine contamination and what amendments could be made to improve and develop this area of property and insurance law?* The general principles of insurance law in New Zealand, the Property Law Act 2007, and the Residential Tenancies Act 1986 are discussed. The thesis considers the Residential Amendments Bill (No. 2) and the varying sources of criticisms and commentary surrounding it. Hansard debates provide useful background information on the Bill. The impact of widening the scope of the Bill from

specific methamphetamine contamination to broader and more general chemical contamination is discussed and recommended.

The final question is: *What can be done to mitigate loss?* This question is complicated by the varying and diverse ways in which loss is suffered. Losses may take the form of finance providers losing money following mortgagee sales; consumers losing equity in property and assets due to contamination; tenants' privacy being minimised due to increased testing and their loss of security in permanent housing due to the potential shorter eviction periods where contamination is discovered; or losses suffered by landlords due to stigma and the challenges to obtain damages or insurance recoverability. In 2017 the Ministry of Health's methamphetamine standard was well analysed and developed. Although this standard is not law, it provides useful guidance to the Tenancy Tribunal and insurers when considering an insurance claim. It is anticipated, and to date it has been seen, that the standard will be referred to in decisions of the judiciary and tribunals. It offers a starting point and guidance where there is currently not a lot else to follow. In terms of mitigating loss, the possibility of more routine baseline testing is discussed, as is the position of Housing New Zealand Corporation and a selection of New Zealand's main finance providers.

Thesis Overview

These three thesis questions will be examined and analysed in further detail over thirteen chapters, proceeding from a social analysis of methamphetamine manufacture and use to its effects on property. The current legislation around insurance is analysed, before a series of solutions are derived.

Chapter one begins the thesis by describing the history of methamphetamine and the effects that it has on the human body. It then considers the creation of clandestine laboratories and “makeshift” methamphetamine laboratories. Given that the focus of this thesis is on the property and insurance law implications of methamphetamine, the location of clandestine laboratories is essential because they are commonly discovered in residential property.

Chapter two situates New Zealand’s methamphetamine problem in an international context through comparison with American and Australian trends. After describing the prevalence of methamphetamine use in New Zealand, analysis of the law in the United States is undertaken. However, because many states have enacted specific state laws and regulations to best suit their individual circumstances, only key developments will be discussed. This will be supplemented by analysis of Australian law. The chapter will conclude with a brief consideration of how media sources depict methamphetamine manufacture and use.

Chapter three considers the implications of methamphetamine contamination for insurance. Insurers in New Zealand have been seen to either avoid cover for damage caused by methamphetamine contamination or to significantly limit liability for remediation and cleansing following its discovery in residential property. The chapter considers the nature of the loss caused, what is expected of landlords and property owners in protecting their assets, and how insurers have responded with reference to an AMI Insurance Policy.

Drawing on the discussion in chapter three, chapter four investigates the possibility of chemical contamination being considered “gradual damage and deterioration” or “sudden damage” or a “latent defect” and the significance of this from an insurance perspective. The view of the Ombudsman is considered as is the stance of IAG. From an insurance and property

law perspective the nature of the damage is significant in terms of the structuring of an insurance claim and the grounds an insurer may have for avoiding an insurance policy.

Chapter five considers the recent and relevant case law in this area, such as *Holler and Rouse v Osaki and Anor*, *Tekoa Trust v Stewart*, *Brazier Property Investments Limited v Penitani* and *Linklater v Dickison*. These decisions have been essential in allowing the writer to decipher key legal principles and to apply them to an area of law which has frequently featured in the Tenancy Tribunal in recent years but much less so in the New Zealand courts. This part of the thesis considers important public policy implications and the award of exemplary damages.

Having examined recent case law, chapter six considers general insurance law principles, New Zealand's current legislation and pending legislative developments. New Zealand has two fundamental statutes which guide and govern in this area of the law: the Property Law Act 2007, and the Residential Tenancies Act 1986. The legislation creates responsibilities which, although not aimed specifically at chemical or methamphetamine contamination, are relevant. For example, the duty of the landlord under s45(a) of the Residential Tenancies Act 1986 is to provide the premises in a reasonable state of cleanliness. Various case law is considered and it is suggested that contaminated areas are considered "unclean", which therefore causes the landlord to be in breach of its duties under the legislation. Having considered the legislation currently enacted in New Zealand, the Residential Tenancies Amendment Bill (No 2) is analysed. This Bill is well drafted and proposes short notice provisions for the termination of the tenancy where testing evidences methamphetamine contamination. Finally, the chapter considers a practice note issued in 2016 that provides guidance on the issue. This practice note and various tenancy tribunal decisions are discussed

because they have proven useful in offering insight into the issues faced in reality, how they are being dealt with, and what is required to ensure greater consistency in the decision making. Various decisions emphasise the key issues currently experienced by landlords and tenants and offer support in respect of the writer's suggestions. Following discussions with various tribunal adjudicators, it seems there is uncertainty as to whether the Tenancy Tribunal wishes to update its practice note and set precedent or whether they wish to wait and follow.

Chapter eight analyses how decisions of the Tenancy Tribunal have affected cleansing standards. Tribunal decisions have shown that if the level of contamination does not exceed the New Zealand standard, it is very unlikely that an insurer will cover the cost of cleansing the property and bringing the level back to nil. For this reason, the standard in New Zealand, its history, and a comparison of other chemical contamination standards is undertaken. The chapter considers New Zealand's standard, NZS 8510, which was updated in 2017 and supersedes the former Ministry of Health Guidelines. The United States has worked to standardise its levels across States and is, in many areas, consistent with NZS 8510. The standard provides a useful guideline to insurers when considering claims, helps to achieve consistency in disputes and provides a starting point from a health perspective. The standard is criticised for being too conservative and for being no more than guidance.

Chapter nine considers dealing with contamination from an agent's perspective. The issue of methamphetamine contamination in residential property is not isolated to the situation of tenant and landlord but is especially evident in conveyancing. Homeowners often do not discover contamination until they move into a property. Therefore, it is important that prospective purchasers are not misled and that the health and safety of the agent, the public and prospective purchasers is prioritised. From the writer's investigations, methamphetamine

contamination appears more common in properties being sold by mortgagee auction. As an example, the chapter considers the case of *Murphy v Real Estate Agents Authority* which involved the sale of a chemically contaminated property. The agent's duties to the public and prospective purchasers are outlined in this case and it shows an extension of the issue into other areas of the law.

With the rules of marketing potentially contaminated property established, chapter ten turns to the due diligence process undertaken by prospective purchasers and the searching of databases such as Environment Canterbury's Listed Land Use Register. Methamphetamine manufacturing within residential property has been shown to leave chemical and drug residues, both in houses and in adjacent soil that are detrimental to human health. Due to the risk of significant soil contamination, this thesis considers insurance cover for soil contamination and the responses of Environment Canterbury to the writer's survey. As an example, and to provide a practical perspective, a chemically contaminated property, 56 McGregors Road, Christchurch, was investigated and discussed. To understand how this insurance will be provided, the chapter considers discussions with four significant finance providers in New Zealand. The Banks are interviewed and their policies, documents and comments analysed. It is clear from these investigations that some banks are far more prepared and proactive than others.

Having considered how insurance is provided, at this point, the focus of the thesis shifts in chapter eleven to making insurance claims. There are at least two areas in which a property owner is likely to struggle for success in making a claim. The first is for the replacement of chattels and soft furnishings. The issue insureds often face is the difficulty in accurately testing such chattels and soft furnishings for chemical contamination. The second is claiming

“stigma damages”. The Tenancy Tribunal stated in *Gibson Barron Realty v Naicker* that unless all traces of methamphetamine residue are removed, a stigma would likely be attached to the premises which would then affect the landlord’s ability to obtain new tenants. This statement is also considered to hold true in respect of the sale of the property if it is known by purchasers to have been used for the consumption, or specifically the manufacturing, of methamphetamine.

A significant amount of New Zealand’s residential rental accommodation is managed by Housing New Zealand Corporation. In addition to being New Zealand’s biggest landlord, Housing New Zealand often deals with lower socio-economic tenants. Chapter twelve considers the issue of methamphetamine contamination in this context, considering the duties of the landlord and the tenants, the ability to recover for damage caused by the tenants and how the issue and loss may be mitigated bearing in mind the importance of economy and tenant privacy.

Towards the end of the thesis, recommendations for effective reform are considered in chapter thirteen. Many options are considered, assessed on how they appear to be working in comparative jurisdictions. It is considered that there is no one solution that will solve all the related property and insurance law aspects of methamphetamine contamination in residential property. However, with better information and guidance obtained through the media and with the development of NZS 8510, government agencies are in a position to communicate and record information, landlords and prospective purchasers should be better informed and undertaking baseline testing of property, and insurers should develop clear policy and guidance on when a claim will be accepted and what is expected of landlords. If an insurer’s

liability is to be limited and excesses raised, this needs to be clear from the outset of the insurance policy.

* * *

The issue of methamphetamine contamination is vast and appears to be growing. It is hoped, but considered “wishful thinking” by many, that the issue will reduce in the future. However, if so, it is anticipated that the principles and discussion in this thesis may be applicable to other forms of chemical contamination as the trend in drug use and manufacturing may shift over time. Due to the significant financial implications of chemical contamination and calls for greater consistency in the area, this issue is one that was begging for investigation and consideration. Utilising existing legislation and developing guidance is complicated in an area with such a wide array of overlapping areas of law. The issue involves legal, political, environmental and ethical discussions and decisions that seek consideration within an insurance and property law context.

Chapter One – The Methamphetamine Problem

“Amphetamine and methamphetamine are two closely related synthetic substances that act as stimulants of the central nervous system. They can be ingested, snorted or injected, and methamphetamine, particularly in its crystalline form, can be smoked.”⁵

Introduction

This thesis begins by reviewing the development of methamphetamine, defining the substance and investigating why it is a problem in New Zealand. While many hard drugs are brought into New Zealand, methamphetamine is manufactured domestically, meaning that its production contaminates New Zealand property. In order to understand the problem, this chapter will begin by investigating the development of methamphetamine from within the amphetamine family. The chapter will then discuss the nature of methamphetamine production, and damage commonly done to the properties where the drug is mainly manufactured. This discussion offers vital context for considering the broader social and legal problems caused by methamphetamine.

A. Amphetamine

The history of methamphetamine begins with amphetamine, a similar chemical first synthesized by German chemist L. Edlemano in 1887.⁶ At this time the stimulant effects were not noticed and health professionals were unaware of the addiction risk.⁷ Amphetamines are

⁵ European Monitoring Centre for Drugs and Addiction “Problem amphetamine and methamphetamine use in Europe” Belgium, 2010 at [7].

⁶ The Ranch “Methamphetamine in the United States” (3 January 2018) <www.recoveryranch.com>.

⁷ University of Maryland: Centre for Substance Abuse Research “Amphetamines” <www.cesar.umd.edu/cesar/drugs/amphetamines.asp>.

synthetic psychoactive drugs that stimulate the central nervous system.⁸ The group of amphetamines includes amphetamine, dextroamphetamine, and methamphetamine.⁹ Similar drugs which imitate the effects of amphetamines containing legal substances such as caffeine, ephedrine, and phenylpropanolamine are illegally sold as “speed” and “uppers”. Amphetamine-type stimulants, such as methylamphetamine, are the second most widely used illicit drug in the world, following cannabis.¹⁰ The availability of heroin on the black market is linked to a reduction in the use of amphetamines in most western European countries, with some drug users switching over to heroin. However, amphetamines have retained their popularity in Scandinavian countries and were still available as prescription drugs in Czechoslovakia in the 1970s. Nevertheless, reduced availability encouraged home-based manufacturing of amphetamines in clandestine laboratories; in particular, methamphetamine.¹¹

B. Methamphetamine

A derivative of amphetamine, methamphetamine, was created in 1919. Although part of the amphetamine family, methamphetamine has especially defined effects on the body’s central nervous system.¹² In 1950 methamphetamine was prescribed for the treatment of health disorders, such as nasal congestion, depression, obesity, narcolepsy, alcoholism and attention-deficit hyperactivity disorder. However, it soon became apparent that after the initial high wore off, consumers suffered withdrawal symptoms and consequent health problems following the consumption of the drug. In 1970 the United States government took action and

⁸ MedlinePlus “Amphetamines” (8 November 2004) <www.medlineplus.nlm.nih.gov>.

⁹ Drug Enforcement Administration “Methamphetamine” <www.dea.gov>.

¹⁰ Australian Crime Commission “The Australian Methylamphetamine Market – The National Picture” March 2015 <www.acic.gov.au> at [6].

¹¹ Above n 5 at [7].

¹² National Institute on Drug Abuse “Methamphetamine Abuse and Addiction” (January 2002) <www.drugabuse.gov>.

made methylphenidate and amphetamine illegal by recording them in Schedule II of the Controlled Substances Act.¹³

Methamphetamine is a powerful psychoactive stimulant which has the potential to cause hostility, obsessive behaviour, hallucinations, and episodes of paranoid psychosis resembling schizophrenia.¹⁴ It is estimated to be one of the most widely consumed synthetic stimulants worldwide. New Zealand is considered to have “a unique problem with methamphetamine”¹⁵ with prevalence rates high by international standards, and in line with the prevalence of use in North America, east and south east Asia, South Africa, and Australia.¹⁶ The high prevalence rates are considered to be linked to the ease of availability of precursor substances, such as pseudoephedrine and reagents, domestic chemicals which are then easily manufactured into methamphetamine.¹⁷ The Policy Advisory Group report that “methamphetamine in New Zealand is sourced from domestic clandestine laboratories, with levels of importation of manufactured crystal methamphetamine considered to be comparatively small.”¹⁸

The effects of methamphetamine extend far beyond the harm done to the user. Wider public health harms, stemming from the manufacturing of methamphetamine, include environmental damage from the dumping of toxic pollutants into our wastewater systems. In addition, and crucial to this essay, the Policy Advisory Group state: “the volatile organic compounds generated during manufacture stay in the compound’s porous substances such as fabrics and

¹³ Above n 5 at [9].

¹⁴ Gawin, F., & Ellinwood, E. (1988). Cocaine and other stimulants: actions, abuse and treatment. *New England Journal of Medicine*, 318, 1173-1182.

¹⁵ Department of the Prime Minister and Cabinet *Tackling Methamphetamine: An Action Plan* (2009) <www.drugfoundation.org.nz> at [2].

¹⁶ Above n 15 at [5].

¹⁷ Above n 15 at [5].

¹⁸ Above n 15 at [5].

carpets, and if sites are not cleaned up, can cause long-term health problems for residents”.¹⁹ Because soft, porous materials cannot be easily tested it is difficult to prove if and to what extent they are contaminated. This, as will be discussed, often presents issues for an insured attempting to recover for contamination damage under their insurance policy.

The Criminal Proceeds (Recovery) Act came into effect in December 2009. By 2012, New Zealand Police had investigated an estimated \$208 million worth of assets suspected to have been obtained through, or derived from, criminal activity. Of the estimated \$208 million investigated, approximately \$136 million was attributed to drug offending, of which \$57.4 million was estimated to relate specifically to methamphetamine offending.²⁰ In 2008 it was recorded that there were a significant number of clandestine laboratories dismantled by New Zealand Police. Specifically, 43 clandestine laboratories were investigated, and 133 clandestine laboratories were dismantled.²¹ All of these sites likely to be contaminated as a result of methamphetamine manufacturing.

C. Clandestine laboratories and the creation of methamphetamine

A clandestine laboratory is a temporary or “makeshift” laboratory which is used for the manufacture of prohibited substances such as explosives, drugs or biological or chemical weapons. The United States Drug Enforcement Administration defines a clandestine laboratory as “an illicit operation consisting of a sufficient combination of apparatus and chemicals that either has or could be used in the manufacture or synthesis of controlled substances”. However, it is most simply defined as a place where preparation of illegal

¹⁹ Department of the Prime Minister and Cabinet *Tackling Methamphetamine: Indicators and Progress Report* (October 2012) at [9].

²⁰ Above n 19 at [31].

²¹ Above n 19 at [25].

substances occurs. The focus of this thesis will be methamphetamine producing clandestine laboratories, which may be referred to as “meth labs”.

The locations of meth labs are of great significance to this thesis given the possibility for contamination to occur in a wide range of settings. Contamination is not restricted to a domestic, residential property, because meth labs may be erected in wide range of settings, causing the need for Insurers, Police and Councils to be vigilant and aware. Naturally, given that the activity in meth labs is illegal, they are often designed for concealing the activity with great disregard for safety. It is common for meth labs to be set up in a way that allows for fast dismantling and easy transportation to avoid detection by law enforcement agencies. Meth labs are often found in residential property, as well as in vehicles (especially campervans), motel and hotel rooms, caravans and mobile homes, and even public toilets.²² A meth lab was discovered in 2006 in a vehicle during a routine traffic stop.²³ This methamphetamine production site was relatively small, mobile and evidences the varied location and diversity of meth labs nationwide.

Usually methamphetamine “cooks” have little or no formal education in chemistry. The cook often handles ignitable, toxic chemicals. The handling of such chemicals, combined with the lack of education and presence of many precursors, reagents and solvents likely to be present in the meth lab is likely to create a dangerous environment. New Zealand’s 2002 Police Minister, George Hawkins, stated that “clandestine laboratories produce unstable and volatile chemicals with fire or explosion” and that “in the US most clandestine laboratories are

²² K Swetlow “Children at Clandestine Methamphetamine Labs: Helping Meth’s Youngest Victims. Office for Victims of Crime” (2003) U.S. Department of Justice. <www.ovc.gov>.

²³ Alun Newton “2006 Clandestine Drug Laboratory (Clan Lab) Report” (April 2007) <www.police.govt.nz>.

discovered due to fire and many have exploded, causing death and injury not just to those in the laboratory but also posing harm to anyone in the vicinity”.²⁴

While the supply of methamphetamine in New Zealand appears to be plentiful, the number of confirmed meth labs seems to be decreasing. In 2016, 74 meth labs were detected. 50 of the 74 detected meth labs were discovered in residential rental accommodation, and four were Housing New Zealand Corporation properties.²⁵ The confirmed number of meth labs detected does not prove that there are fewer clandestine laboratories around, but may simply mean that less are being discovered by Police. It has been estimated that in recent years around one percent of the population has used the drug.²⁶ As an illicit activity, the actual use and manufacture of methamphetamine in New Zealand is difficult to quantify. However, the above statistics show that there is a significant quantity of methamphetamine use and manufacturing occurring nationwide. Due to the dangerous environment created by meth labs, it is essential that neighbours’ complaints to Police and Councils are treated with real concern and that property policy and communication between Government agencies is occurring to keep communities safe.

D. Evidence of chemical contamination in property

A study was conducted to determine the chemical exposures associated with the manufacture of methamphetamine. This study consisted of sampling at an actual meth lab whilst it was being dismantled by police and sampling at controlled “cooks” in property to subsequently be destroyed.

²⁴ Police Minister George Hawkins “Government to reclassify methamphetamine as class A” (17 December 2002) <www.beehive.govt.nz>.

²⁵ National Drug Intelligence Bureau. “Illicit drug assessment” (2017). Wellington.

²⁶ Ministry of Health. “Amphetamine use 2015/16: New Zealand Health Survey” (15 December 2016) <www.health.govt.nz>.

Sampling from the actual meth lab revealed that most suspected laboratories had significant amounts of methamphetamine surface contamination throughout the suspected “cook” area. Levels of hydrocarbons, phosphine, iodine, and inorganic acids were considered remarkable. Sampling from the controlled “cooks” revealed high concentrations of phosphine, iodine, anhydrous ammonia, and hydrogen chloride during the “cooking” process. The study reports that an “aerosol” of methamphetamine was also created during the process resulting in surface contamination within the structure as well as contamination on the clothing of the individuals participating in the “cooking” process.²⁷ This methamphetamine “aerosol” formed during the cooking process resulted in a layer of harmful methamphetamine on surfaces inside the property, chattels and the individuals present.

Summary

As well as being highly dangerous and addictive, Methamphetamine poses an additional risk in New Zealand society. As a drug which is domestically manufactured, methamphetamine is produced in domestic laboratories which cause risks to occupants. This risk is aggravated by the lack of chemical expertise and training among the manufacturers. Methamphetamine contamination can spread quickly amongst different areas of the meth lab and onto the personal chattels and clothing of those present. Beyond these items, the residue can not only contaminate the fabric of the building, but the surrounding soil and wastewater. When contamination is this severe, risks to residents need to be addressed with adequate protection.

Subsequent chapters of this thesis will consider a wide range of legal and policy issues arising from the contamination of residential buildings in New Zealand by methamphetamine,

²⁷ J Martyny, S Arbuckle, C McCammon, E Esswein, N Erb & M van Dyke *Chemical concentrations and contamination associated with clandestine methamphetamine laboratories* (The Journal of Chemical Health and Safety, Volume 14, Issue 4, July – August 2007, 15 February 2007) at [40-52].

especially the ramifications for insurance and property law. In order to understand both the issue of contamination and potential solutions, this thesis will now consider the presence of methamphetamine in New Zealand and overseas.

Chapter Two – National and International Contexts

Introduction

The United Nations Treaty “Convention on Psychotropic Substances of 1971” controls synthetic psychoactive substances internationally. This Treaty was signed by New Zealand on 13 September 1971, United States of America on 21 February 1971, and Australia on 23 December 1971.²⁸ It lists them in four Schedules requiring different levels of control. Amphetamine and methamphetamine may be found listed in Schedule II. Schedule II contains substances that are likely to be abused, that constitute a substantial risk to public health and which have low therapeutic usefulness. In the European Union, these substances are classified as illicit drugs in all Member States.²⁹

While it would be fascinating to survey more countries and their own legislation, it is beyond the scope of this thesis. Therefore, this chapter will limit itself to New Zealand and the two most relevant signatory countries. The bulk of this chapter will consider first New Zealand, examining law in our own country. The chapter will then shift to the laws in the United States, considering the law in the most important power to sign the Treaty. Finally, as a fellow signatory of the Treaty and close neighbour, Australia will be considered briefly to provide local context.

A. Methamphetamine in New Zealand

The manufacture or possession of methamphetamine is unlawful pursuant to the Misuse of Drugs Act 1975 and is an imprisonable offence. Historically, methamphetamine was, in New

²⁸ United Nations Treaty Collection “Narcotic Drugs and Psychotropic Substances” Convention on psychotropic substances, Vienna, 21 February 1971. <<https://treaties.un.org/>>.

²⁹ Above n 5 at [7].

Zealand, classified as a Class B drug.³⁰ New Zealand Legislation, the Misuse of Drugs Act 1975 now records methamphetamine (2-methylamino-1-phenylpropane) as a Class A drug.³¹ The Act records that a Class A drug is that which poses a very high risk of harm to society or individuals.³² The change of classifications from Class B to Class A was intended to allow for harsher penalties for those caught making or possessing methamphetamine and to ensure that police have greater powers of intervention when they suspect the drug is being used, sold or manufactured.

Methamphetamine use first emerged in the general population of New Zealand in the late 1990s before appearing to reach a peak in 2006,³³ with 211 meth labs discovered that year.³⁴ Official meth lab recording began in the year 1996. A single meth lab was “dismantled” in 1996, however the number of meth labs dismantled and recorded has significantly increased with around 200 meth labs being located each year since 2003.

The New Zealand Health survey conducted in 2015/2016 found that 1% of New Zealanders aged between 16 and 64 years reported using amphetamines over the previous year.³⁵ However, the United Nations Office on Drugs and Crime considers the quantity of meth labs detected by our law enforcement agencies to be an imperfect measure of total methamphetamine production because it is difficult to tell how many meth labs remain undetected and to measure the production of both detected and undetected meth labs in New Zealand.³⁶

³⁰ Ministry of Health, “Amphetamine use 2015/16: New Zealand Health Survey”.

³¹ Misuse of Drugs Act 1975, Sch 1, cl 1 “Class A controlled drugs”.

³² Misuse of Drugs Act 1975, s 3A “Classification of drugs”.

³³ C Wilkins, K Bhatta & S Casswell, *The emergence of amphetamine use in New Zealand: findings from the 1998 and 2001 national drug surveys* (New Zealand Medical Journal 115(1166), 2002) at [256-263].

³⁴ C Wilkins, R Griffiths & P Sweetser *Recent Trends in Illegal Drug Use in New Zealand, 2006-2009: Findings from the 2006, 2007, 2008 and 2009 Illicit Drug Monitoring System (IDMS)* (2010).

³⁵ Ministry of Health, “Amphetamine use 2015/16: New Zealand Health Survey”.

³⁶ C Wilkins, J Prasad, K Parker K, K Wong & M Rychert *Recent Trends in Illegal Drug Use in New Zealand, 2006-2015: Findings from the 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014 and 2015 Illicit Drug Monitoring System (IDMS)* (Massey University, April 2017).

B. Methamphetamine in the United States

*“America's public enemy number one in the United States is drug abuse” –
President Richard Nixon, 17 June 1971.³⁷*

The methamphetamine problem in the United States is thought to have originated in California and the Southwest but has now spread considerably and is not contained to these areas.³⁸ The Controlled Substances Act (“CSA”) became law in the United States by Richard Nixon on 27 October 1970. The CSA is the federal United States drug policy pursuant to which the importation, possession, consumption and supply of listed narcotics, stimulants, depressants, hallucinogens, anabolic steroids and other chemicals are regulated.³⁹ The CSA contains five schedules that are used to classify drugs in accordance with their abuse potential, potential for addiction and their medical application in the United States. Methamphetamine may be found in Schedule Two under the names of Desoxyn and Desoxyn Gradumet.⁴⁰ Schedule Two consists of drugs that have a high potential for abuse; that have a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions; and where abuse of the drug may lead to severe psychological or physical dependence.⁴¹ It is noted that Aminorex, which has been sold as methamphetamine is recorded in Schedule One.⁴²

³⁷Richard Nixon: "Remarks About an Intensified Program for Drug Abuse Prevention and Control,," 17 June 1971. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. <www.presidency.ucsb.edu/>.

³⁸ The Ranch: *A History of Methamphetamine in the United States* 3 January 2018 <www.recoveryranch.com>.

³⁹ L Anderson, *CSA Schedules* 18 May 2018 <www.drugs.com/csa-schedule.html>.

⁴⁰ Drugs.com *Schedule 2 (II) Drugs* <www.drugs.com/schedule-2-drugs.html>.

⁴¹ Above n 39.

⁴² DEA *Controlled Substances – Alphabetical Order* <www.deadiversion.usdoj.gov/schedules/orangebook/c_cs_alpha.pdf>.

In the United States the Drug Enforcement Agency reported more than 47,000 meth lab incidents between 2003–2005. The Committee on Science and Technology stated that the Administration’s efforts were not appropriate in scope in terms of the magnitude and urgency of the problem.⁴³

On 16 November 2005 a Bill was introduced in response to Congress’ findings that:

- (1) methamphetamine use and production is growing rapidly throughout the United States;
- (2) some materials and chemical residues remaining from the production of methamphetamine pose novel environmental problems in locations in which meth labs have been closed;
- (3) there has been little standardisation of measures for determining when the site of a former meth lab has been successfully remediated;
- (4)(A) initial clean up actions are generally limited to the removal of hazardous substances and contaminated materials that pose an immediate threat to public health or the environment; and
- (B) it is not uncommon for significant levels of contamination to be found throughout residential structures in which methamphetamine has been manufactured, partially because of a lack of knowledge of how to achieve an effective clean up;
- (5)(A) data on methamphetamine laboratory-related contaminants of concern are very limited;
- (B) uniform clean-up standards do not exist; and

⁴³ The Committee on Science and Technology, to whom was referred the bill (H.R. 365) to provide for a research program for remediation of closed methamphetamine production laboratories, and for other purposes, having considered the same, reported favourably thereon without amendment and recommended that the bill do pass. S. 2019 (109th): Methamphetamine Remediation Research Act of 2005 <www.govtrack.us/congress/bills/109>.

- (C) procedures for sampling and analysis of contaminants need to be researched and developed; and
- (6) many States are struggling with establishing assessment and remediation guidelines and programs to address the rapidly expanding number of methamphetamine laboratories being closed each year.⁴⁴

To become law, this Bill, introduced in the 109th Congress, needed to have been passed by the House of Representatives and the Senate in identical form and to then be signed by the President. This bill was not enacted by the end of the Congress and was, therefore, cleared from the books.

On 7 February 2007 a similar Bill was introduced to provide for a research program for remediation of closed methamphetamine production laboratories.⁴⁵ On 21 December 2007 the Methamphetamine Remediation Research Act 2007 (H.R. 365) was enacted.⁴⁶ In this legislation Congress recorded that methamphetamine use and production was growing rapidly throughout the United States and, as above, the materials and chemical residues remaining from the manufacturing process pose novel environmental problems in former meth lab sites.⁴⁷ The environmental problems posed are discussed further below in this thesis.

A more recent review of the statistics shows that almost 35,000 meth lab incidents have been recorded by the Drug Enforcement Agency between 2012 and 2014.⁴⁸ Although this is slightly

⁴⁴ S. 2019 (109th): Methamphetamine Remediation Research Act of 2005
<www.govtrack.us/congress/bills/109/s2019/text/is>.

⁴⁵ S. 635 – 110th Congress: Methamphetamine Remediation Research Act of 2007”
<www.gpo.gov/fdsys/pkg/BILLS-110hr365enr/pdf/BILLS-110hr365enr.pdf>. The purpose of the Bill was described as the establishment of a “Federal research program to support the development of voluntary guidelines to help states address the residual consequence of former methamphetamine laboratories”.

⁴⁶ Senate 635, 110th Congress “Methamphetamine Remediation Research Act of 2007”
<www.govtrack.us/congress/bills/110/s635>.

⁴⁷ Above n 45.

⁴⁸ Methamphetamine Lab Incidents, 2004 – 2014 <www.dea.gov/resource-center/meth-lab-maps.shtml>.

lower than the quantity of labs recorded between 2002 and 2005, it shows that the problem is far from going away.

C. Methamphetamine in Australia

“Methamphetamine would be our number one problem in terms of the drug that would be causing us the most grief” – Andrew Scipione, former New South Wales Police Commissioner.

Methamphetamine is thought to have first arrived in Australia in the 1990s. According to the 2013 National Drug Strategy Household Survey Australia has the highest use of methamphetamine in the English-speaking world.⁴⁹ Similar to New Zealand and the United States, methamphetamine is an illicit substance that is prohibited in Australia. The prohibitionist approach has been adopted because elected representatives have concluded that the harms caused by certain drugs are so great as to require prohibition of the possession, use and supply of those drugs and the enforcement of that prohibition by means of the criminal law.⁵⁰

“The growth in Labs in Australia is not slowing down. For the hundreds of detected labs, there will be many thousands more labs that may never be identified and will continue to operate until eventually abandoned leaving property owners with the clean up.”⁵¹

⁴⁹ Sharon Verghis “We Are Ticking Time Bombs: Inside Australia’s Meth Crisis” 4 May 2017 <<http://time.com/4737800/meth-australia-ice-crystal-methamphetamine-methylamphetamine/>>.

⁵⁰ New South Wales Bar Association “Drug Law Reform” November 2014 at [5].

⁵¹ Australian Meth Inspectors “Why Check?” <www.australianmethinspectors.com.au/why-check> 2017.

Summary

New Zealand's struggles with methamphetamine do not occur in isolation. The harmful effects of the drug are recognised internationally, with the United Nations Treaty "Convention on Psychotropic Substances of 1971" listing methamphetamine as a Schedule II drug, one that has little medicinal value and has a high likelihood of abuse. New Zealand, the United States and Australia all signed this legislation and have commented on the growing significance of the problem.

While methamphetamine is considered to be dangerous by all three countries surveyed, there is no clear end in sight for its devastating impact. New Zealand, Australian and American lawmakers and media all comment on the growth of the drug. Decreases in the discovery of labs do not indicate any decline in production – it merely shows that manufacturers have become more skilled in evading justice. Until new strategies and technologies become available, methamphetamine remains part of the landscape, and its presence poses a risk to public housing. The main protection against the effects of the drug lie in insurance that guarantees the safe use of housing for landlords, tenants and other parties involved. It is these insurance frameworks that are now examined.

Chapter Three – Frameworks for Insurance

Introduction

This part of the thesis considers the issue of the loss caused by contamination through the recreational use or manufacturing of methamphetamine being considered by insurers as “deliberately caused loss”. The recreational use and manufacturing of methamphetamine requires deliberate action. The question, however, of whether contamination caused as a result of consuming or manufacturing methamphetamine is a loss for which recovery may be sought, is, arguably, dependant on the circumstances and a range of contributing factors. These are valuable considerations from an insurance perspective.

This chapter looks at the basic principles of New Zealand insurance law around damage. These principles are then examined in the example of IAG and AMI insurance, showing how they are applied in practice.

A. Insuring against knowing conduct and offences

An examination of this area reveals that an insured may not recover under an insurance policy for loss caused as a result of deliberate action. The terms of an insurance policy do not generally cover such loss, and as a matter of public policy, recovery in these circumstances is often precluded. A fundamental principle of New Zealand insurance law is that an insured may not recover under an insurance policy for loss which the insured has deliberately caused.⁵² It was held by Hammond J in *Back v National Insurance Co of New Zealand Ltd*⁵³ that an insured cannot bring about the event on which the insurance policy is payable by an

⁵² Tim Stephens “Insurance against knowing conduct and offences” Webb & Rowe (ed) *Insurance Law: Practice, Policy & Principles* (The Centre for Commercial and Corporate Law Incorporated, Christchurch, 2004) at [161].

⁵³ *Back v National Insurance Co of New Zealand Ltd* [1996] 3 NZLR 363.

intentional act and then recover under the policy.⁵⁴ In support of this principle, Eichelbaum CJ held in *Maulder National Insurance Company of New Zealand Ltd*⁵⁵ that an insured is unable to recover for a loss which he or she deliberately caused, stating an insured “does not require the assistance of any specific exclusion to that effect”.⁵⁶

B. Insurance policies from New Zealand’s main providers

The thesis will now analyse an insurance policy from a substantial New Zealand insurance provider and consider steps taken by various insurers to date to protect themselves and to ensure they are not liable, or that liability is restricted, for loss of this kind.

(a) IAG Insurance

IAG is the parent company of a general insurance group with controlled operations in New Zealand, Australia and Asia. Its businesses underwrite more than \$12 billion of premium per annum, selling New Zealand insurance under many leading brands, including: NZI, State, AMI and Lumley Insurance.⁵⁷

In March 2017, New Zealand’s largest general Insurer, IAG, announced major changes to its policies to be more prescriptive around what it will cover in the context of methamphetamine contamination.⁵⁸ IAG has now made clear changes to its insurance policy wording in response to the identification of the growing methamphetamine issue which saw IAG receiving around

⁵⁴ [374].

⁵⁵ *Maulder National Insurance Company of New Zealand Ltd* [1993] 2 NZLR 351.

⁵⁶ Above n 55 at [354].

⁵⁷ “Introducing IAG” (2 July 2018) IAG <www.iag.co.nz>.

⁵⁸ “IAG provides home insurance guide on meth contamination and its insurance consequences” <www.iag.co.nz/News/Pages/IAG-provides-home-insurance-guide-on-meth-contamination.aspx> March 2017.

60 claims per month and spending around \$14 million dollars on methamphetamine contamination in 2016/2017.⁵⁹

(b) The construction of an insurance policy

In considering the structure of an insurance policy, various policies from different providers were obtained and reviewed.

The first policy to consider is that of the policy wording of AMI Insurance backed by IAG “Market Value Rental Property Insurance” (“the AMI Policy”). From an initial glance at the AMI policy questions began to arise.⁶⁰ The Policy provides for “optional covers” one of which being “theft or deliberate damage by tenants”. Could damage by methamphetamine contamination be included as an optional cover and if so, would this be contrary to public policy? A discussion in respect of public policy and a consideration of whether or not the damage is deliberate follows in this thesis.

The AMI Policy records a responsibility of the landlord as “doing what you can to protect your rental house against loss or damage”.⁶¹ The question then arises as to how far this duty extends. It is assumed that this duty would extend to meeting the “landlord’s obligations” as described within the policy.⁶² However, the wording of the policy is not clear in respect of any other expectations AMI may have.

The AMI policy considered fixtures and permanent fittings to be included, with examples of the kitchen stove and kitchen oven, whether permanently attached or not, being included

⁵⁹ Jenee Tibshareny “When and under what conditions different insurance companies will provide cover for meth contamination to your home or rental property”. <www.interest.co.nz/insurance/86468/when-and-under-what-conditions-different-insurance-companies-will-provide-cover-meth> 29 March 2017.

⁶⁰ “Market Rental Property Insurance – Policy Wording” AMI <www.ami.co.nz/PDFs/AMI_market-value-rental-property-PW.pdf>.

⁶¹ Above n 60 at [2].

⁶² Above n 60 at [16].

under the policy. In the scenario of the rental property being used as a meth lab, fixtures would be most likely be contaminated given their expected use in the cooking and manufacturing process. The AMI Policy states that AMI will not pay for repairing or replacing floor coverings that are not in the room(s) where the loss or damage happened. The issue with this is that if meth were manufactured in one room of the property, contamination could spread to other rooms within the dwelling. However, it appears that the Insurer would only be willing to pay for the replacement of the floor coverings in the room from which the damage originated. It may also be difficult to establish where in the property the damage originated. It is suggested that the strength of the results of a methamphetamine contamination test may indicate where manufacturing has occurred. However, if contamination has occurred via consumption alone there is the possibility for the damage to originate in many different rooms within the dwelling. Arguments concerning ‘gradual damage’ are discussed below at chapter four.

The AMI Insurance Policy excludes cover for “restoring land”. This is likely to be of concern to a landlord given the risk for contamination to the property to occur via the disposal of by-product, particularly chemicals used in the manufacturing process, to land or into the drainage system.

Summary

Insurance laws in New Zealand are based on the assumption that the landlord has full awareness of what occurs on their property. The same is true for insurance providers, based on the two examples provided above. On the one hand, the laws do recognise that the landlord is entitled to compensation in the event of serious damage caused by disasters and rogue tenants. On the other hand, the concept of ‘gradual damage’ makes this protection more tenuous. The exceptions made for gradual damage are intended to prevent claims for wear

and tear. However, the repeated manufacture of methamphetamine also gradually damages property, eroding protections due to a landlord. Therefore, a landlord may believe itself to be insured against the general risk for methamphetamine contamination and, upon detection of contamination, then be unable to seek cover in respect of the damage caused to the land because of this exclusion. These damages can be severe. The effects of methamphetamine contamination on land and the role of Environment Canterbury's Listed Land Use Register is discussed below.

Chapter Four – Gradual Damage and Deterioration

Introduction

As we have seen in the previous chapter, there is significant risk if a landlord fails to detect the methamphetamine contamination soon after it is consumed or manufactured in the property for the first time. This is because contamination may progressively damage the property as the residue levels increase with each subsequent use or cook. Then, upon eventual discovery by the landlord the chemical contamination may be considered gradual damage by the Insurer. Residential properties are rarely tested without a trigger, such as an incident, an investigation by Police, or illness suffered by the residents. If a home owner is to test their property and the results are positive the next step is likely to be the making of an insurance claim. An estimate of costs was given at the New Zealand Land and Property Law forum in 2017 as follows:

1. Screening for methamphetamine: \$200 – \$500
2. Comprehensive testing and preparation of scope of works: \$1500 - \$2500
3. Chemical cleaning: \$7500 - \$20000
4. Removal and replacement of contaminated linings: \$10000 - \$35000
5. Structural remediation: >\$50000⁶³

As the cost to the Insurer, if the Insured is successful in their claim, is likely to be high, policy issues often arise in respect of how the damage was caused, whether or not the policy may be avoided based on the contamination being considered ‘gradual damage’, and who caused the damage.

⁶³ Dr. Nick Powell. Land and Property Law Forum 2017 “Methamphetamine contamination in NZ houses – an overview for the property sector”. 30 November 2017.

The AMI Policy being considered in chapter three raises the issue of insurance covering hidden gradual damage and deterioration. The specific AMI Policy, which is being used as an example, states that the Insured is covered for reasonable costs to repair any hidden gradual deterioration. However, it is noted that the most AMI will pay out to an Insured for this type of claim, under the AMI Policy considered, is \$1,500. The Insured must also pay an excess should methamphetamine contamination be considered *gradual damage or deterioration*. This would likely leave a large shortfall in terms of the decontamination and repair costs to be covered by the property owner.

With the AMI Policy in mind, the writer wishes to consider the possibility of methamphetamine contamination being considered by an Insurer as gradual damage and deterioration. Because most insurance policies are designed to cover sudden, unexpected and unintended losses, a large proportion of disputed insurance claims involve gradual damage.⁶⁴ Gradual damage is often excluded from residential insurance policies to prevent Insureds' from claiming for cover in respect of general wear and tear.⁶⁵ Although there is no set definition as to what is considered *gradual*, damage is considered gradual by insurers if it has occurred slowly.⁶⁶

This chapter examines the view of the Insurance and Savings Ombudsman ("Ombudsman"). The Ombudsman addressed the possibility of methamphetamine contamination as gradual damage, where an Insurer had declined a claim on the grounds the damage was both gradual in nature and the result of malicious activity.⁶⁷ It was held by the Ombudsman that a single

⁶⁴ Ben Rickard, Built In "Does insurance cover gradual damage?" < <https://builtininsurance.co.nz/insurance-cover-gradual-damage/> > accessed 19 May 2018.

⁶⁵ Rob Stock "Insurance complaints continue to rise" *Stuff* (online ed, New Zealand, 21 September 2017).

⁶⁶ Chris Kiddey "Gradual Damage: What it is, what it isn't and what makes an acceptable claim". 7 October 2015 by IAG Home Insurance < <https://iagnz.com/2015/10/07/gradual-damage-what-it-is-what-it-isnt-and-what-makes-an-acceptable-claim/> >.

⁶⁷ John Grant "Ombudsman overrules insurers on P lab contamination in rental property" 23 June 2010 < www.interest.co.nz/insurance/49885/ombudsman-overrules-insurers-p-lab-contamination-rental-property >.

manufacture of methamphetamine could cause contamination and therefore the gradual damage clause in the insurance policy could not be relied upon to exclude cover and to deny a claim. It was agreed that whilst several manufacturing sessions would cause further damage to the property, by increasing the level of methamphetamine residue and chemical contamination, contamination from a single manufacture was sufficient on its own. For this reason, it was considered wrong of the Insurer to use the gradual damage clause and to subsequently decline a claim. Further, the Ombudsman considered that whilst the activity of the tenant was illegal in the manufacturing of methamphetamine, it was not malicious, and the Ombudsman held that as a result the claim could not be declined on the basis of malicious damage.

A. The view of the Ombudsman

Following on from the above example in more detail, the issue of gradual damage was addressed by the Ombudsman in May 2008. In May 2008 a situation arose where a person purchased a property on the condition that the Vendor be permitted to live at the premises for approximately two months whilst the Purchaser was overseas. In July 2008 the Purchaser returned to New Zealand. The Purchaser then experienced issues with the former Vendor, and current tenant, in that it would not vacate and caused damage to the property. Finally, in August 2008 the tenant vacated the property. The Purchaser commenced renovations so that she could live in it and subsequently became ill. It then became apparent that the tenant had been arrested for the manufacture of methamphetamine and testing revealed that the property was in fact chemically contaminated. In September 2008 the Purchaser approached her insurance provider to see whether or not she may be able to make a claim in respect of damage caused to the house by the tenant, but particularly in relation to decontaminating the property. The Purchaser's Insurer declined to assist and the matter rested until September 2009. In 2009

the Purchaser again drew the matter to her Insurer's attention and was, again, declined due to the Policy excluding liability for pollution or contamination, excluding cover for loss or damage caused by intentional or malicious acts; and excluded cover for any loss or damage arising from any event unless it occurred during the period of cover. Of relevance here was the possibility that the contamination may have occurred whilst owned by the tenant. In October 2009 the Purchaser argued with her Insurer that the damage was "chemical contamination" and she established that the damage did occur post-settlement of her purchasing the property. The Purchaser's Insurer then argued that it could not assist because the contamination was considered by it to be "gradual damage". The Purchaser's Insurer declined the claim because it believed the damage arose from a gradual process of deterioration, in which more than one episode of "cooking" had caused the damage. However, for the Insurer to rely on the gradual damage exclusion to entitle it to decline the claim, it had to prove on the balance of probabilities that the damage was caused by a gradual process of deterioration, requiring more than one episode of "cooking" methamphetamine. The ISO Case Manager communicated with a highly qualified expert in the field of clandestine drug laboratory contamination testing and remediation. The expert confirmed that it was a real possibility that the contamination could have been caused by one "episode" of "cooking" as well as multiple episodes of cooking. Although the damage could have been caused over a period of time by various cooking episodes, the Case Manager did not believe that the Insurer had proved, on the balance of probabilities, that this was the case. Therefore, the Case Manager did not believe the Insurer could rely on the gradual damage exclusion to decline the claim.⁶⁸ The Ombudsman investigated and held that one single cooking of methamphetamine could contaminate a property. This finding by the Ombudsman undermined the insurer's

⁶⁸ Insurance & Savings Ombudsman *Complaint No: 116979* (2010)
<<https://ifsosite.secure.force.com/CaseNote?CaseID=116979>>.

gradual damage exclusion. There was no indication that the methamphetamine was manufactured maliciously or with the intention of causing damage to the property. The Case Manager found that although the manufacture of methamphetamine is illegal it is not considered “malicious”.⁶⁹ The complaint was settled but the Ombudsman asked insurers to consider how they wanted to cover meth lab contamination.

B. Methamphetamine contamination and “sudden damage”

In contrast to the above discussion in respect of exclusion due to *gradual damage*, the Ombudsman considered a complaint where an insurance policy required *sudden damage*. In May 2017 a situation arose in respect of a rental property in Palmerston North owned by a Trust. The Trust made a claim to its Insurer after discovering that its rental property had been contaminated by methamphetamine at levels higher than those recorded in the Ministry of Health’s guidelines. The Insurer declined the Trust’s claim on the basis that the damage was not *sudden* damage as required by the insurance policy.⁷⁰

Complaints to the Insurance and Financial Services Ombudsman Scheme have continued to rise. 2017 statistics show that the Ombudsman investigated 314 complaints, up from 270 in 2016 and that it received 3227 complaint enquiries, up from 3193 in the previous year.⁷¹ Many of these complaints and enquiries involved methamphetamine contamination. This demonstrates that there is uncertainty in the area and that the policy and guidelines currently in place are insufficient to satisfy many landlords, tenants, and property owners.

C. IAG’s Guide to methamphetamine contamination

⁶⁹ Insurance & Savings Ombudsman *Complaint No: 116979* (2010).

⁷⁰ Insurance & Savings Ombudsman *Complaint No: 00204954* (2017)

<<https://ifsosite.secure.force.com/CaseNote?CaseID=00204954>>.

⁷¹ Above n 65.

IAG has released a guide to methamphetamine contamination.⁷² This guide intends to clarify the position for Insureds. The guide confirms that home cover only applies where the Insured has been continuously insured with IAG and contamination first occurred during this time. If contamination existed prior to insuring with IAG, no contamination cover is provided.⁷³ Given this exclusion it may be worthwhile for purchasers to test a property they propose purchasing prior to confirming the Agreement for Sale and Purchase should they wish to accept insurance cover with IAG. The risk is that if they do not and contamination is subsequently discovered, they are unlikely to be covered. Further, if changing insurance companies, it may be worth obtaining a baseline test so that if any contamination is discovered in the future it is clear that such damage was caused whilst insured with IAG or the current insurance provider.

D. IAG and the level of methamphetamine and chemical residue remediation

The IAG guide to methamphetamine contamination states that your home policy cover pays to decontaminate to below the currently recognised standard. That means that some level of contamination may remain, but at a level that is deemed safe. This situation was considered in the case of *Gibson Barron Realty Ltd v Naicker* where a property was contaminated during the course of a tenancy.⁷⁴ The landlord claimed the costs for decontamination of areas of the house that had levels of methamphetamine residue below the New Zealand Standard for Testing and decontamination of methamphetamine contaminated properties.⁷⁵ This standard sets the level for safe habitation at 1.5mcg/100m². The issue to be determined by the Tribunal was whether costs could be awarded for cleansing areas of the house that had been

⁷² IAG “Your guide to methamphetamine contamination”
<www.iag.co.nz/News/Documents/IAG%20Meth%20Booklet.pdf>.

⁷³ Above n 72 at [12].

⁷⁴ *Gibson Barron Realty Ltd v Naicker*. Tenancy Tribunal NZTT, 21/2/2018, 4109692, Lee Adjudicator.

⁷⁵ NZ Standard for Testing and decontamination of methamphetamine contaminated properties (NZS 8510:2017).

contaminated by the tenants but with levels of contamination below the threshold set by the standard for safe habitation. Before the commencement of the tenancy, the landlord had obtained a baseline test which had established that there was no detectable level of methamphetamine residue present within the dwelling. At the conclusion of the tenancy bedrooms one and three were tested and showed methamphetamine levels of 2.9 and 1.68 respectively. It has been previously established by the Tenancy Tribunal that “a property is damaged, not safe for habitation, and not reasonably clean,” if there is any methamphetamine residue above the standard.⁷⁶ As bedrooms one and three exceeded the minimum threshold set by the standard the landlord’s Insurer covered the remediation costs and the landlord was successful in receiving the recovery of the insurance excess from the tenants. However, there were traces of methamphetamine present in the living room (0.04), bedroom two (0.23), the bathroom (0.04), garage (0.11) and the toilet (0.82). The landlord identified a breach of s40(2)(b) of the Residential Tenancies Act 1986 and submitted that it felt it was unsafe to re-tenant the premises with any detectable traces of methamphetamine present in the property. A main, and valid, concern of the landlord’s appears to be the difficulty in proving a future tenant’s responsibility for any further potential methamphetamine contamination given that with the current traces of methamphetamine present the landlord could not provide the premises with a nil residue at the commencement of the new tenancy.

E. Methamphetamine contamination as a “latent defect”

*A latent defect is a fault in the property that could not have been discovered by a reasonably thorough inspection before the sale.*⁷⁷

⁷⁶ *Riverlands Real Estate Limited v Nuku* 15/2826/HN, Hamilton, 7 April 2016: *Visagie*; *HNZC v Teepe* 15/4385/MK; *Ahu v HNZC* 15/2298/AK and 15/2537/AK; and *Professionals Whakatane Limited v Cameron* 4083711, 30 June 2017.

⁷⁷ Wikipedia “Latent Defect” <https://en.wikipedia.org/wiki/Latent_defect> 12 May 2017.

A landlord is obligated to maintain a residential rental property in a reasonable state of repair having regard to the character of the premises, pursuant to s45(1)(b) of the Residential Tenancies Act 1986, however this obligation is not absolute.⁷⁸ A landlord is not expected to foresee a latent defect before it causes damage.⁷⁹ This finding is important in terms of an insurance claim. If methamphetamine contamination is considered a latent defect it is arguable that should damage ensue to the tenant's possessions as a result of the contamination, then the landlord was not expected to foresee such damage occurring and should not be liable for compensating the tenant.

In a recent Tenancy Tribunal decision, the adjudicator considered the possibility of methamphetamine contamination as a *latent defect*.⁸⁰ In this case the landlord's Solicitor submitted that the presence of methamphetamine residue within the house was a latent defect. The adjudicator, M Benvie, did not agree, reasoning that: "A latent defect is one that exists but has not yet developed or become manifest – it may be hidden or concealed. In the context of a building, a leaking pipe concealed behind a wall or the decay of timber framing behind a wall are obvious latent defects – they are hidden and will not become manifest until the adjoining wall itself suffers damage." The adjudicator went on in his judgment to hold that the methamphetamine residue found in the rental premises was not visible but it was not concealed or hidden in any way. The methamphetamine residue was on the outside of the surfaces within the house and could be readily detected with surface testing at any time during the tenancy.⁸¹

⁷⁸ *Malik v Crockers Property Management Limited* [2018] NZTT 4137003; *Barfoot & Thompson Ltd v Casey* DC Auckland, CIV-2005-004-001762, 7 November 2007, citing *Body Corporate 126001 v Chan* [1998] DCR 270).

⁷⁹ *Barfoot & Thompson Ltd v Casey* DC Auckland, CIV-2005-004-001762, 7 November 2007, citing *Body Corporate 126001 v Chan* [1998] DCR 270).

⁸⁰ *Hughes v BCRE Ltd – Pukekohe trading as Harcourts & McEwen* [18 August 2016] NZTT Pukekohe at [27].

⁸¹ Above n 80 at [28].

In summary and reflection on the Adjudicator’s position above, the writer considers a possible issue with the ability of a landlord to carry out a baseline meth test during a tenancy. An analysis of Housing New Zealand Corporation policy shows that it is only able to test if the tenant agrees to the test being performed. Alternatively, to take a sample from the dwelling during a tenancy the landlord or property manager may need to obtain an order of the tribunal. It is important to respect the privacy of the tenants throughout the duration of their tenancy. So, although the residue may have been on the surface ready for discovery with a test could the landlord really in reality have performed the surface testing.

F. Methamphetamine contamination as a “defect”

A defect was defined by the Tenancy Tribunal as a “failure or inadequacy of a dwelling, a landlord’s fixture or fittings such that it compromises the health and safety of the tenant.”⁸² Items that are of a cosmetic nature, rather than those relating to Health and Safety, do not amount to a defect under the Residential Tenancies Act 1986.⁸³ The issue of methamphetamine as a “defect” was further discussed and considered in the case of *Barfoot v REAA and Giles*.⁸⁴ The Real Estate Agents Authority, in this case, submitted that methamphetamine contamination is a defect for the purposes of Rule 10.7 of the Real Estate Agents Act.⁸⁵ It was argued on behalf of the Real Estate Agents Authority that “while methamphetamine contamination is not a structural issue in the strict sense, it is a physical problem with the property that requires a physical remedy.”⁸⁶ It was further submitted that methamphetamine contamination is “predominately caused by fumes entering the walls and ceiling of a property which, she submits, is a physical effect on the property which has real

⁸² *Te Kira v Shivanand* [2018] NZTT Hamilton 4138745 at [28].

⁸³ Above n 82 at [29].

⁸⁴ *Barfoot v REAA and Giles* [2016] NZREADT 22 at [42] – [45].

⁸⁵ Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012.

⁸⁶ *Barfoot v REAA and Giles* at [42] – [45].

and serious consequences for people exposed to the contaminated surfaces” and that “due to the physical effects of contamination, extensive cleaning and, in some cases, extensive remodelling is required. Sometimes, rooms require not just removal of the paint from the walls but the removal of walls and ceilings as well, due to the extent of the effect from the fumes.”⁸⁷

In the case of *Fitzgerald v Real Estate Agent Authority*⁸⁸ it was accepted that a boundary line on a property could be an underlying defect for the purposes of Rule 6.5 of the 2009 Rules (the predecessor of the current Rule 10.7). With this in mind, it was suggested in the case of *Barfoot v REAA and Giles* by the Real Estate Agents Authority that a property’s boundary line is not a structural defect that would fit within the interpretation proposed by the appellant agent. It was suggested consistent to also include methamphetamine contamination which, like a boundary line, is not a structural issue but does pose a real and legitimate concern to potential purchasers, and may potentially have more of an effect, particularly in terms of health consequences, than unknown boundary lines. It was submitted that “methamphetamine contamination (when it exists) is a present problem with the property that affects it in a real and physical way.”⁸⁹ In *Barfoot v REAA and Giles* it was held that the existence of methamphetamine traces at a property was a defect which could be regarded as “hidden” or “underlying” in terms of Rule 10.7. Because of this, it was held that a real estate agent must either “obtain a clearance that the level is harmless or ensure that a customer is informed of the position so that the customer can seek expert advice of the risk if the customer chooses to do so. Under Rule 10.8 a licensee must not continue to act for a vendor who requires knowledge of a harmful level of methamphetamine to be withheld.”⁹⁰

⁸⁷ Above n 86 at [45].

⁸⁸ *Fitzgerald v Real Estate Agent Authority* [2014] NZREADT 43.

⁸⁹ *Barfoot v REAA and Giles* NZREADT 22 at [45].

⁹⁰ Above n 89 at [55].

Real estate agent chief executive, Kevin Lampen-Smith, has recently confirmed the Authority's consideration of methamphetamine contamination as a defect in residential property. He has said that methamphetamine contamination of "15 micrograms per 100cm² or above is now considered a property defect and must be disclosed to potential buyers. Confirmed results below this amount are not obliged to be disclosed, unless they are specifically asked for."⁹¹

If there is no defect, then there is no obligation to repair.⁹² Therefore it makes sense that methamphetamine contamination be considered a defect so that a legal obligation is created requiring the remedy of such defect. It would appear unfair on a vendor or landlord to consider methamphetamine contamination a latent defect as, arguably, it is easily discoverable by either a baseline test at the commencement of a tenancy, or as part of the pre-purchase due diligence investigations a prudent purchaser would be expected to undertake. However, if a vendor were aware of the contamination and attempted to conceal it, by say painting over the affected areas whilst knowing that the chemical residue would likely seep through the paint in time, this may be considered a "latent defect" for which a claim may be brought.

G. Methamphetamine contamination and the landlord's obligations

The AMI Policy, introduced in chapter three, states that "there is no cover for any deliberate damage caused directly or indirectly by you" and further excludes cover for "contamination". Despite this, the Policy has a section in respect of "Unlawful Substances" where it states that:

⁹¹ Ksenia Stepanova "Real estate agents must disclose meth contamination, says REA" 11 June 2018 at <www.nzadviseronline.co.nz/news/real-estate-agents-must-disclose-meth-contamination-says-rea-250981.aspx>.

⁹² Above n 82 at [30].

“You are not covered for loss or damage, expense or liability in connection with the manufacture, storage, or distribution at the rental house, of any controlled drug as defined in the Misuse of Drugs Act 1975 **unless** you or a person who manages the tenancy on your behalf has met the landlord’s obligations”.

Provided the landlord has met all their obligations the landlord may be entitled to cover of up to \$25,000 for any loss or damage resulting from chemical contamination, or the total sum insured for loss or damage resulting from fire or explosion.

Most insurance policies covering rental properties now limit damage caused by the manufacture of methamphetamine to \$25,000. Research and reality dictate that in many cases this is never going to be anywhere near enough to cover the costs of remediation.⁹³

The landlord’s obligations, described in the AMI Policy, include:

1. Exercising reasonable care in the selection of tenants by at least obtaining satisfactory written or verbal references.

This obligation raises issues itself as the term “reasonable care” may alone be disputed. Further, the test appears subjective and if “verbal references” are obtained the possibility for the landlord to provide evidence to the insurer of having met this obligation is diminished. The landlord may be unable to prove that they had actually obtained a satisfactory verbal reference before tenanting the property. Although this clause is intended to be a safeguard on the part of the Insurer, as an Insurer can’t apply an exclusion if the Insured can show the breach

⁹³ Andrew Hooker “Andrew Hooker says insurers are backing away from covering meth damage in the same way they backed away from covering terrorism after 9/11 and weather-tightness damage after the leaky homes saga” 7 July 2016 <www.interest.co.nz/opinion/82478/andrew-hooker-says-insurers-are-backing-away-covering-meth-damage-same-way-they-backed> accessed 2 February 2018.

would not have made a difference to the outcome of the situation this responsibility of the landlord is arguably unlikely to have much impact on any claim made.

2. Collect at least one week's rent in advance.

A key consideration in respect of this obligation of the landlord is the quantity of the rent. Does it matter to the Insurer how much the property is rented out at? If the rent were very low the property may tend to attract lower income tenants. Data from Housing New Zealand, which is known for providing housing to low income tenants, showed that 688 of its properties tested positive for methamphetamine contamination between 1 June 2015 and 27 May 2017. This was a 200% increase compared to the 229 houses which tested positive in the previous financial year.⁹⁴ A cheap rental property may tend to attract a lower socio-economic class of people which could, stereotypically, be considered more likely to attract tenants with drug dependencies and habits. The New South Wales Bar Association has commented on socioeconomic background, stating that “people from disadvantaged backgrounds are more likely to use illicit drugs”.⁹⁵ Interestingly, however, a study has indicated that drug users who lived in unsubsidised housing with higher rent tended to engage in heavier drug use than those who lived in subsidised housing with lower rents. The study reported that drug users with higher rents were not so motivated to control their drug abuse, since they felt they couldn't continue to pay rent and believed they would

⁹⁴ Laura Walters “Q+A: What you need to know about methamphetamine contamination” *Stuff* (online ed, New Zealand, 10 June 2016) <www.stuff.co.nz>.

⁹⁵ New South Wales Bar Association “Drug Law Reform” November 2014 at [12].

be evicted anyway.⁹⁶ The conclusion from this is that the rental value of the property should not be a key consideration to an Insurer as both tenants in low rental accommodation and tenants occupying expensive, unsubsidised, rental housing may both be as likely to contaminate the property. If the rent were cheap the tenants may be encouraged to care for the property so as to avoid eviction and, based on the study recorded above, if occupying a high-rental property, the tenants may be less inclined to care for the dwelling given the risk of being unable to afford to pay rent and their inevitable eviction from the property anyway.

After considering the above points noted in respect of the AMI Insurance Policy, the Policy seems ambiguous as the landlord may fulfil their obligations as a responsible landlord but fail to detect the methamphetamine contamination. Should the landlord fail to detect the contamination it may progressively damage the property and upon discovery by the landlord be considered gradual damage by the Insurer.

H. Methamphetamine contamination as “deliberate damage”

This part of the thesis will proceed by considering the interpretation of insurance policies in the context of methamphetamine contamination where an insured is seeking to recover for loss deliberately or recklessly caused. It will then consider the application of public policy by

⁹⁶ Charles Waldegrave and Michael Urbanova “Social and Economic Impacts of Housing Tenure” A report prepared for the New Zealand Housing Foundation, November 2016
<www.familycentre.org.nz/Publications/PDF's/Social_and_Economic_Impacts_of_Housing_Tenure.pdf> at page 7, accessed 12 May 2018. Dickson-Gomez, J., Hilario, H., Convey, M., Corbett, A. M., Weeks, M., & Martinez, M. (2009). The relationship between housing status and HIV risk among active drug users: a qualitative analysis. *Substance Use & Misuse*, 44(2), 139-162.

the New Zealand judiciary resulting in the unenforceability of insurance policies in cases of loss of this kind.

I. Baseline methamphetamine testing

A consideration worth further analysis and discussion is whether or not an insurer should require a baseline methamphetamine test prior to the insuring of the property, and on a tenant's possession and exiting of a rental property. The term "baseline test" is frequently used among various methamphetamine testing agencies. Baseline testing appears to have originated from the United States, where the method has been used for many years⁹⁷. It is a composite group sampling technique that takes many samples from different rooms to ascertain whether or not there is any methamphetamine residue present on the hard surfaces. With the baseline test result a property owner may then assess the severity of the issue and how to proceed in terms of decontamination and remediation.

Arguably, an insurer providing rental insurance is aware of the risk of methamphetamine contamination and should require, at minimum, a baseline test of the property prior to confirmation of the landlord's insurance policy.

A baseline methamphetamine test should be required by a purchaser buying a new property and by a landlord before the commencement of a new tenancy. If an insurer does not require baseline testing, they are, arguably, courting the risk. That is to say, the insurer is appreciating the risk involved in the insuring of residential properties, in modern times where the manufacturing and consuming of methamphetamine is prevalent and hard to detect, and specifically runs the risk by not ensuring appropriate steps and precautions are taken. The fundamental principle being applied here was well described in *Candler v London &*

⁹⁷ "Baseline – for those who want to know the basics" (2016) MethSolutions <www.methsolutions.co.nz>.

*Lancashire Guarantee & Accident Co of Canada*⁹⁸. In *Candler*, the insured climbed out onto the top of a wall surrounding a balcony thirteen storeys above the ground in an attempt to show his courage and subsequently fell to his death. Mr Candler's wife then tried to recover under his life insurance policies. It was held by Grant J that the insured's death, in this case, was not caused by accident or by accidental means because Mr Candler had been "courting the risk of falling".⁹⁹ With the underlying principle now clearly described, a case in which the facts are somewhat more relatable is that of *A F & G Robinson v Evan Bros Pty Ltd*.¹⁰⁰ In *Robinson* noxious fumes were emitted by the insured's brickworks factory onto neighbouring land, causing damage to the crops being grown. The insured sought to recover under its public liability policy for loss arising from "accidental damage". It was held by Starke J that the insurer knew of the risk of damage arising from the emission of the noxious fumes and made the intentional choice to run that risk. Starke J held that the damage was not accidental, describing it as a "calculated risk" and a "gamble [that] failed to pay off".¹⁰¹

Summary

There appears some room, in this particular area, to dispute the nature of the loss. Although deliberate action is required to consume or manufacture methamphetamine, instances may potentially arise where it is unclear who actually caused the loss. To expand on this, situations are commonly arising where tenants are found to be living in contaminated properties. However, it is difficult to identify conclusively when the loss was in fact caused.

This thesis proposes that while the insurer is not directly causing the loss, they should have appreciated the likelihood of this sort of loss occurring, and should be obligated to either

⁹⁸ *Candler v London & Lancashire Guarantee & Accident Co of Canada* (1963) 40 DLR (2d) at [408].

⁹⁹ Above n 98 at [422].

¹⁰⁰ *A F & G Robinson v Evan Bros Pty Ltd* [1969] VR 885.

¹⁰¹ Above n 100 at [897].

specifically exclude cover for loss caused by illegal substance contamination, or to provide cover in the described circumstances.

Introduction

Up until April 2016 careless damage caused to rental premises by residential tenants, regardless of whether the damage was careless or intentional, was the responsibility of the tenant. The tenant was liable for full costs of remediating the damage and their liability remained the same despite the landlord's insurance cover. The decision in *Holler and Rouse v Osaki and Anor*, a relatively recent decision of the Court of Appeal, changed the law.¹⁰² It was ultimately held in *Holler v Osaki* that if the landlord is insured, the landlord cannot then require the tenant to make good the cost of remediating accidental damage to the rental premises. Following the judgment in *Holler v Osaki*, concerns as to the extent to which the exoneration of the tenant from liability applied were raised. Many landlords felt that the decision in *Holler v Osaki* reduced the incentives of tenants to take care of the rental premises, and could lead to increased landlord insurance premiums, since the landlord's insurer would need to cover damage in most circumstances.¹⁰³ The developments to the law are further discussed in this chapter in *Tekoa Trust v Stewart*¹⁰⁴ and *Brazier Property Investments Ltd v Penitani*.¹⁰⁵ The issue has recently come to light again in the High Court case of *Linklater v Dickison*.¹⁰⁶

A. *Holler v Osaki*

The background to the case of *Holler v Osaki* is that Mr Holler and Ms Rouse owned a house insured by AMI Insurance Ltd. The owners entered into a residential tenancy agreement with

¹⁰² *Holler and Rouse v Osaki and Anor* [2016] NZCA 130.

¹⁰³ T Gibbons “*Brazier Property Investments Ltd v Penitani* [2017] NZDC 1291” (2017) 17 BCB 401.

¹⁰⁴ *Tekoa Trust v Stewart* [2016] NZDC 25578.

¹⁰⁵ *Brazier Property Investments Ltd v Penitani* [2017] NZDC 1291.

¹⁰⁶ *Linklater v Dickison* [2017] NZHC 2813.

Mr Osaki pursuant to which Mr Osaki resided in the house with his wife and children. In March of 2009, Mrs Osaki left a pot of oil on high heat and unattended for five minutes. A fire broke out causing substantial damage to the property owned by Mr Holler and Ms Rouse.

The Court of Appeals decision in *Holler v Osaki*¹⁰⁷ means that residential tenants are immune from a claim by the landlord where the rental property suffers loss or damage caused negligently or carelessly by the tenant, or a person present with the permission of the tenant, to the extent provided for in sections 268 and 269 of the Property Law Act.¹⁰⁸ The ruling has meant that landlords are unable to recover the costs of damage, including the excess fee on their insurance policy.

In any claim by a landlord for damage, the landlord must first establish, on the balance of probabilities, that the damage occurred during the tenancy and that the damage exceeds fair wear and tear. If the landlord is able to prove the two elements described above, then the onus reverts back to the tenant to show that the damage was not caused intentionally or carelessly, either by the tenant or by any person at the premises with the tenant's permission. The Court of Appeal decision *Holler and Rouse v Osaki*¹⁰⁹ has clarified that sections 268 and 269 of the Property Law Act 2007 apply to residential tenancies. The effect of these sections is that, if a landlord is insured, a tenant is not liable for damage covered by that insurance unless the damage was intentional or was a result of actions by the tenant or tenant's guests that constitute an imprisonable offence. However, if insurance money is irrecoverable because of the act or omission of the tenant or tenant's guest then the tenant may also be held liable.¹¹⁰

(a). The implication of *Holler v Osaki* on an Insurer's right of subrogation

¹⁰⁷ *Holler and Rouse v Osaki* CA654/2014 [2016] NZCA 130.

¹⁰⁸ Property Law Act 2007, s 271.

¹⁰⁹ Above n 107.

¹¹⁰ *Estate Futures Limited & Pastoral Realty Limited v McIlroy & Davenport* [1 June 2018] Hamilton.

This part of the thesis considers the ability of an insurer to recover from a tenant where baseline testing carried was carried out at the commencement of a tenancy and the identity of the offender is clearly established on the evidence.

In *Holler v Osaki* the Landlords claimed under their insurance policy with AMI and they were covered for the cost of the repairs amounting to \$216,413.28. AMI then exercised its right of subrogation in the insurance policy. Unless the case of *Holler v Osaki* is successfully appealed, insurance companies may no longer enjoy the right to claim against tenants that caused damage via their rights of subrogation. Insurance companies may now revert to their landlord customers to recover this loss via increases in insurance premiums. Insurance companies may impose requirements on landlords to undertake more vigorous due diligence in checking their tenants more thoroughly. Insurers may also limit the number of tenants that may occupy the property for the insurance to be valid, as more tenants residing in the property may increase the chance of damage occurring. The right of subrogation has scarcely proved worthwhile for insurers in the context of pursuing residential tenants as the tenants often do not often have the funds available to satisfy a claim. Because of this, the low rate of return is arguably already factored into the insurance premiums charged.

C. *Tekoa Trust v Stewart*

The application of *Holler v Osaki* was considered in the Tenancy Tribunal decision of *Tekoa Trust v Stewart*.¹¹¹ This case involved a property located in Foxton which was tenanted by Amanda Stewart. Amanda Stewart rented the property from David and Cicille Russ as trustees of the Tekoa Trust. The tenancy commenced on 4 August 2015 and ended on 23 February 2016. Both the landlord and the tenant sought orders from the Tenancy Tribunal. The tenant

¹¹¹ *Tekoa Trust v Stewart* [23 August 2016] NZTT Palmerston North.

sought an order that her bond be refunded to her and compensation of \$1,000 as she believed that the property was not adequately maintained throughout the tenancy. The landlord sought rent arrears, cleaning costs and damages.¹¹²

The question of what, if any, damage is the tenant liable for is considered in this case following the *Holler v Osaki* decision. The Tenancy Tribunal adjudicator stated that:

“Landlords must first establish that damage has occurred during the tenancy. The onus then shifts to the tenants who must prove that the damage was not due to a deliberate or careless act done by them or their guests. If the tenants cannot prove that the damage was not caused carelessly or deliberately by them or their guests that is not the end of the matter. The Court of Appeal decision *Holler & Rouse v Osaki* [2016] NZCA 130 provides that tenants are immune from a claim made by a landlord where the rental property suffers loss or damage caused intentionally or carelessly by the tenant or the tenant’s guest to the extent provided in ss 268 and 269 of the Property Law Act 2007. This means that tenants will be immune where: a. the damage was caused by fire, flood, explosion, lightening, storm, earthquake or volcanic activity the tenant will not be liable, whether or not the landlord is insured (s 269(1)(a) PLA); or b. the damage was caused by the occurrence of any other peril which the landlord is insured for, or has agreed with the tenant to be insured for (s 268(1)(b) PLA). This immunity applies unless the landlord is able to establish on the evidence that the damage was: a. intentional pursuant to s 269 (3) (a) of the Property Law Act 2007; or b. that it constitutes an imprisonable offence pursuant to s 269 (3) (b) of the Property Law Act; or c. that any insurance money that would have

¹¹² *Estate Futures Limited & Pastoral Realty Limited v McIlroy & Davenport* at [2].

been recoverable is not recoverable because of the tenant's, or their guest's, act or omission pursuant to s 269 (3) (c) of the Property Law Act.”¹¹³

The residential tenancy agreement specified that no pets were allowed at the premises. Despite this the tenant allowed her dogs to urinate inside the rental property. The damage caused by the animals' urination inside the house resulted in the carpets requiring replacement. The Tribunal Adjudicator in this case accepted that it was the tenant's pets urinating in the property during the tenancy that caused the damage, and that this damage was beyond fair wear and tear. It was accepted that the tenant had breached the Residential tenancy agreement by allowing her dogs inside the house. However, the adjudicator was unable to establish that the damage was intentional and, for this reason, did not require the tenant to pay for the new carpets or the lost rental income. It was established that the landlord had an insurance policy in place that covered this damage. If the landlord has insurance, the tenant does not have to pay for the damage caused. In this case, David Russ on behalf of the landlord, Tekoa Trust, said “the way the damage would have been assessed by his insurance company would have left him with a vast excess which made a claim pointless.”¹¹⁴ The Tekoa Trust appealed the decision to the Palmerston North District Court on the basis that the Tenancy Tribunal had incorrectly applied the law. The Tekoa Trust argued that the tenant's actions did not constitute an accidental or careless act but was clearly both an intentional and deliberate act, and the damage should be held to be an intentional act. David Smith J ruled in favour of the Tekoa Trust, finding that the Tribunal Adjudicator's interpretation of the Property Law Act, along with their understanding of the Osaki decision, meant the extent of the damage in the case was not examined fully. Further David Smith J held that the Tenancy Adjudicator was

¹¹³ *Tekoa Trust v Stewart* at [3].

¹¹⁴ Miriam Bell “Tenant damage ruling overturned - Landlords.co.nz” (10 February 2017) Landlords for Kiwi Property Investors <<https://www.landlords.co.nz/article/6014/tenant-damage-ruling-overturned>>.

incorrect in finding that the damage caused by the tenant allowing her dogs to urinate on the carpets was not intentional.

D. *Tekoa Trust v Tuahore*

On 12 April 2018 a similar case to that discussed above came before the Tenancy Tribunal. In this case the same landlord, David and Cicille Russ as trustees of the Tekoa Trust, rented a property in Foxton to Sharleen Tauhore. Similar to the case of *Tekoa Trust v Stewart* the carpet throughout the house was filthy and heavily stained upon Sharleen's exiting the property.¹¹⁵ Efforts were made to clean the carpets but the lounge and hallway were particularly bad and it had to be replaced. David Russ is reported in the decision as saying that "there was an overwhelming smell of animal urine in the house and the carpets were also ingrained with food and dirt".¹¹⁶ A tenant is liable for the costs of remediation if it is found that the damage was caused intentionally. The adjudicator found that each of the items of damage were an example of where an action is taken and is allowed to continue by the tenant where it is virtually certain damage will result.

It is noted that in this decision part of the damage recorded is the removal of two smoke alarms and eight light bulbs. The removal of lightbulbs is often a sign of methamphetamine use, because lightbulbs are an easy and popular homemade smoking device.¹¹⁷ Often methamphetamine users will empty the inner working parts and use the glass bulb as a smoking device.¹¹⁸ With this in mind, the Tekoa Trust, acting as a prudent landlord, perhaps should have considered engaging a methamphetamine testing company to undertake a

¹¹⁵ Above n 111.

¹¹⁶ *Tekoa Trust – Russ v Tauhore* [12 April 2018] NZTT Palmerston North at [2].

¹¹⁷ Admin "Meth or P contamination in rental properties" (20 July 2016) Matt Jensen Insurance Brokers Ltd <<http://mjib.co.nz/meth-p-contamination-rental-properties/>>.

¹¹⁸ "Tools of the Trade: How to spot meth paraphernalia" (2018) <www.projectknow.com/tools-of-the-trade-how-to-spot-meth-paraphernalia/>.

baseline test prior to the commencement of the next tenancy to ensure that it is not contracting to provide a tenant with clean, safe premises, as required under s 45 of the Residential Tenancies Act, when possibly not in a position to do so.

E. *Brazier Property Investments Ltd v Penitani*

*Brazier Property Investment Ltd v Penitani*¹¹⁹ is a decision of the New Zealand District Court, which together with a re-hearing of the Tenancy Tribunal case, considers damage by a tenant. This case refines the definition of when a tenant may be considered to either intentionally or carelessly damage the rental premises. This case utilised the rule established by the Court of Appeal decision in *Holler & Rouse v Osaki* [2016] NZCA 130. In *Brazier Property Investment Ltd v Penitani* the landlord had insurance cover for the damage suffered and it was held that the damage occurred carelessly by the tenant. The tenant therefore had the benefit of the landlord's insurance cover pursuant to s 142(2) of the Residential Tenancies Act 1986 and ss 268 and 269 of the Property Law Act 2007. Section 40(4) of the Residential Tenancies Act states that where damage has occurred which is beyond fair wear and tear, the onus is on the tenant to prove that the damage did not occur in breach of s 40(2)(a) which includes "intentional" damage. The Tenancy Tribunal Practice Note similarly affirms that the landlord must prove that the damage is, on the balance of probabilities, more than fair wear and tear. The responsibility then falls on the tenant to prove that the damage was not intentionally caused by them or their guests.¹²⁰ Where damage is found to be careless, the landlord is required to disclose whether or not their insurance covers the particular damage sustained to the rental property. The question then is whether the exemption provisions of s 268 of the Property Law Act 2007 apply in "the occurrence of any other peril against the risk of which

¹¹⁹ *Brazier Property Investment Ltd v Penitani* [2017] NZDC 1291 (25 January 2017).

¹²⁰ Above n 119 at [17].

the lessor is insured against or has covenanted with the lessee to be insured".¹²¹ In this case, despite the landlord having insurance, the insurer declined to cover remediation or replacement of the damage caused carelessly by the tenant to the carpets as the insurer considered the damage to be *gradual damage*.

F. *Linklater v Dickison*

A recent High Court decision has confirmed that an insurance excess is not recoverable from a tenant.¹²² This is because s 269(1)(a) of the Property Law Act 2007 specifically states that a landlord must not require a tenant "to meet the cost of making good the destruction or damage" where there is insurance for that damage.

A recent case demonstrating the principle is that is *Linklater v Dickison*.¹²³ The facts of this case are as follows: Ms Linklater owned a residential property in Christchurch and rented it to a group of young students. The tenancy commenced on 18 February 2016. The tenancy was intended to be for the duration of one year. However, the tenancy ended early after the property sustained damage. Ms Linklater had an insurance policy in place and was successful in making a claim and receiving a settlement for some of the damage. Ms Linklater then made a claim to the Tenancy Tribunal, where she was partially successful in her claims, before appealing the decision to the District Court and subsequently the High Court of Christchurch.¹²⁴

On appeal to the District Court Ms Linklater claimed she should have been awarded compensation of:

¹²¹ Above n 119 at [19].

¹²² *Linklater v Dickison* [2017] NZHC 2813.

¹²³ Above n 122 at [122].

¹²⁴ Above n 122 at [5].

- \$1,100 for the insurance excess she had paid for the two damaged carpets;
- \$1,200 for the cost of replacement of other carpets in two bedrooms in the property;
- for damaged hearth tiles; and
- an increase in the award of \$100 exemplary damages in respect of the lock.

District Court Judge Gilbert held that the Tenancy Tribunal was correct in ruling that Ms Linklater was not entitled to recover either the excess insurance or the cost of replacement carpets because of s 269(1)(a) of the Property Law Act 2007¹²⁵ and the Court of Appeal's decision in *Holler v Osaki*.¹²⁶ Judge Gilbert dismissed Ms Linklater's claim for damage caused to hearth tiles. He accepted the evidence of a tenant who was a builder that the tiles had cracked because they had been laid, at least in part, on a timber floor with some flexibility in it. Gilbert J noted that, in the hearing before him, Ms Linklater accepted that the tiles may have had hairline cracks prior to the commencement of the tenancy and she accepted that it was possible that the original job may not have been up to scratch¹²⁷.

The Tenancy Tribunal had awarded Ms Linklater exemplary damages of \$100 for alterations that were deliberately made to a lock at the property. Gilbert J held the award of exemplary damages in respect of the lock to a door had been discretionary. The Tribunal had considered relevant criteria and arrived at a figure that was within bounds, and therefore chose not to interfere with it.¹²⁸

As discussed above, the Court of Appeal in *Holler v Osaki* ruled that residential tenants are immune from a claim by the landlord where the rental premises suffer loss of damage caused carelessly by the tenant or the tenant's guests where the landlord is insured for such damage.

¹²⁵ Property Law Act 2007.

¹²⁶ *Holler v Osaki* NZCA 130, [2016] 2 NZLR 811 (CA).

¹²⁷ Above n 122 at [9].

¹²⁸ Above n 122 at [10].

Ms Linklater appealed to the High Court. The High Court heard the appeal in accordance with its jurisdiction under s 119(1) of the Residential Tenancies Act 1986. Section 119(1) provides that an appeal can be made where someone is dissatisfied with the decision of the District Court as being an erroneous in point of law.

In her appeal to the High Court of Christchurch, heard by Nation J, Ms Linklater, in distinguishing the *Holler v Osaki* decision, put forward the following errors of law:

- a) First, she submitted that the District Court Judge was mistaken in holding that the judgment of the Court of Appeal in *Holler v Osaki* should apply where damage was caused by the recklessness of tenants and/or when the tenants, in breach of their obligations under the Tenancy Agreement, had made it difficult for the landlord to pursue an insurance claim through not notifying the landlord of damage which had been done. She said that the tenants, in breach of their lease, had intentionally either smoked inside the premises or allowed others to do so causing damage and the tenants had not shown they took reasonable steps to prevent such people from being on the premises. Ms Linklater sought to distinguish *Holler v Osaki*, arguing that the rule should not apply where damage was caused not by a single event as in *Holler v Osaki* but on unspecified dates and over an extended period;¹²⁹
- b) Second, that there was an error in holding that the landlord was insured to the extent of the insurance excess for the damage to the carpets; and
- c) Third, that s 85(2) of the Residential Tenancies Act, as discussed in more detail below, required the Tenancy Tribunal to determine the case based on fairness, rather than on the strict rule in *Holler v Osaki*.

¹²⁹ Above n 106 at [16].

G. *Public Policy Considerations and the Awarding of Exemplary Damages*

This issue, then flows onto key public policy considerations in this area. In the Tenancy Tribunal case of *Mendez-Gray v Jennens & Realty Link Taupo*¹³⁰ the Adjudicator held, in response to the applicant's claim for exemplary damages, that the Tribunal should consider the intention of the landlord. In this case it was held, given that the landlord should have known of a real risk of methamphetamine contamination at the commencement of the tenancy, that a significant award of exemplary damages may be made. This finding was made by the Adjudicator on the policy ground of deterrence of landlords ignoring evidence of methamphetamine manufacture. It was held that a "landlord leasing out residential premises for another's family to live in cannot be wilfully blind to warning signs of methamphetamine contamination".¹³¹

The applicable legislation in respect of exemplary damages may be found in s 109(3) and Schedule 1A of the Residential Tenancies Act.¹³² Section 109(3) of the Act sets out the factors to be considered following a claim to the Tenancy Tribunal for exemplary damages and Schedule 1A sets out the maximum award of exemplary damages available.

In *Estate Futures Limited v McIlroy & Davenport*¹³³, the landlord applied for exemplary damages on the grounds that the tenant introduced methamphetamine into the premises. In accordance with ss 40(2)(b) and 40(3A)(c) of the Residential Tenancies Act 1986, it is an unlawful act for a tenant to use premises, or permit premises to be used, for any unlawful purpose.¹³⁴ Not all breaches of the Act are declared to be unlawful acts and exemplary damages are reserved for actions which Parliament has decided are particularly serious.

¹³⁰ *Mendez-Gray v Jennens* [18 August 2016] NZTT Rotorua.

¹³¹ Above n 130 at [26].

¹³² Residential Tenancies Act 1986 No 120 (as at 05 December 2017).

¹³³ *Estate Futures Limited v McIlroy & Davenport* [1 June 2018] NZTT Davenport.

¹³⁴ See also *Barfoot & Thompson Limited* and *Roach v Christie* [2018] Pukekohe 4137572 at [4].

Section 109 sets out certain matters the Tribunal must take into consideration before awarding exemplary damages. The adjudicator must be satisfied that the act of using methamphetamine was intentional and that it is just to order exemplary damages having regard to (a) the tenant's intent, (b) the effect of the unlawful act, and (c) the interests of the landlord and (d) the public interest.¹³⁵ In *Estate Futures Limited v McIlroy & Davenport* the adjudicator was satisfied that the premises had been intentionally used for an unlawful purpose either by the tenants, or the tenant's guests.¹³⁶ The landlord said at the hearing that it took until 4 April 2018 before a clearance certificate that the premises were decontaminated was issued. Contractors undertaking decontamination and remediation work could only begin after this date. The property had not been in a condition to allow re-tenancing and the landlord was significantly inconvenienced. The adjudicator accepts that there is currently some debate about the impact of methamphetamine residue. However, at the time that the premises were tested and this hearing held, the landlord, insurer and the Tribunal were guided by the accepted independent standard NZS 8510. In this case the adjudicator ordered that the tenants pay the amount of \$500.00 in exemplary damages.

A further Tenancy Tribunal decision highlighting the need for the landlord, or the landlord's agent, to act on evidence of methamphetamine contamination is that of *Hughes v BCRE Ltd v McEwen*.¹³⁷ In this case the applicant commenced a tenancy of the property at 100 Lees Gully Road on 14 September 2012. Approximately one week into the tenancy the applicant discovered methamphetamine related rubbish and four glass pipes used for smoking methamphetamine buried in the garden. The applicant notified the agent responsible for managing the tenancy. The agent took no steps and told the applicant that it was her responsibility. It is at this stage that the agent, or the owner of the property, should have

¹³⁵ Residential Tenancies Act 1986, s 109(3, s) 1A.

¹³⁶ Above n 133.

¹³⁷ *Hughes v BCRE Ltd – Pukekohe trading as Harcourts & McEwen* [18 August 2016] NZTT Pukekohe.

obtained an indicative or baseline methamphetamine test to ensure that the property was free from chemical contamination. However, it appears that at no stage was a methamphetamine test obtained by the property manager or landlord during the course of the tenancy. In November 2015 a potential purchaser of the property arranged for the premises to be tested by Meth Check NZ Ltd for methamphetamine residue. The property tested positive for methamphetamine contamination. The applicant sought compensation of \$12,000 on the grounds of the landlord not properly disclosing the property was a “P-Lab” prior to renting the property to the tenant. During the second hearing the amount claimed was increased to \$50,000. The \$50,000 sum was made up of moving costs, replacement of furniture and the concept of the landlord being justly enriched by enjoying the benefit of rental income derived from a property that was uninhabitable.

Summary

The decision in *Holler and Rouse v Osaki and Anor* has had a decisive effect on the obligations of landlords and tenants which may be applied in the context of contamination. Whereas tenants were previously able to be held responsible for remediation of a property, the landlord’s insurer, if the landlord has one, is now unable to exercise its right of subrogation and is likely to be responsible for repairs. This means that insurers can now insist that landlords check tenants more thoroughly to minimise the risk of damage. *Tekoa Trust v Stewart* confirmed this decision, making the additional ruling that if there were doubts over the responsibility of the tenant, then the landlord’s insurer was still liable. The implication of the cases discussed is that if methamphetamine contamination is discovered, remediation costs will most likely fall on the insurer. Whether the insurer complies, however, is far from certain, given precedents in insurance law for designating methamphetamine contamination as ‘gradual damage’ and outside of insurance policies. *Brazier Property Investments Ltd v*

Penitani, Linklater v Dickison and other cases confirms this risk, showing that the landlord is in the difficult position of proving that the damage is more than fair wear and tear.

The implications of these cases place the landlord in a difficult position. As has been argued above, insurance companies often insist that contamination is ‘gradual damage’ outside their cover. However, a single use or cook of methamphetamine may leave residue which poses a significant risk to inhabitants of a property. The overall result is that landlords may face the costs of testing and remediation for properties if they cannot attribute the damage to a specific tenancy. Otherwise, the damage can be designated as ‘gradual’ and left to the landlord to remediate at their own expense.

The current situation means that landlords are often left unprotected. In order to understand how their situation may be improved, we now turn to considering the basic principles of insurance and tenancy law for a closer examination of a landlord’s rights and obligations.

Chapter Six – Current Insurance Law and Legislative Developments

Introduction

Insurance is a loss recovery mechanism that works by spreading risk.¹³⁸ Traditionally, the parties of a contract formulate their own obligations. The role of the law in respect of the contract has been to determine whether or not it exists and if so to interpret and subsequently enforce it.¹³⁹

In the twentieth century, legislation imposing controls on residential tenancies was enacted in various jurisdictions. Cheshire, in writing about the English legislation, described the reasons for this as follows:

“The forces of supply and demand, if left unchecked, would give landlords a bargaining superiority over their tenants which modern ideas of social justice have been unwilling to accept. In consequence, ever since the First World War, legislation has been used to redress the balance in favour of the tenant. Restrictions have been imposed upon the amount of rent chargeable and the landlord’s common law right to recover possession. With changes in government the tide of protection has ebbed and flowed, most particularly in relation to residential tenancies, where the policy in favour of social protection has most commonly been seen to outweigh the policy of freedom of contract. But the need for protection of some kind is today generally accepted and it is highly unlikely

¹³⁸ H Holderness “Nature and Formation of Insurance Contract” in *Commercial Law in New Zealand* (online looseleaf ed, LexisNexis) at 27.1.1.

¹³⁹ *Commercial Law in New Zealand* (online looseleaf ed, LexisNexis) at 2.2.

that landlord and tenant will ever be restored to their nineteenth-century freedom of contract.”¹⁴⁰

Although it is difficult to identify all sources of insurance law, much of it may be found in common law.¹⁴¹ In 1908 Parliament began to intervene with common law in the area of insurance law by enacting two statutes based on existing pieces of legislation, the Marine Insurance Act and the Life Insurance Act.¹⁴²

The basis of insurance law is contract law. The provisions of general contractual statutes apply to insurance contracts. For example, s 8(1)(b) of the Contractual Remedies Act 1979, applies where the contract is silent as to cancellation.¹⁴³ The Contractual Mistakes Act 1977 is a second example of a general contract statute that can apply to insurance contracts.¹⁴⁴

This chapter begins by viewing the two fundamental statutes that guide and govern insurance law principles: the Property Law Act 2007, and the Residential Tenancies Act 1986. These Acts are relevant because they cover rules around cleanliness: for a house to be clean, it must surely be free from contamination. The chapter pays special attention to s 45(a) of the Residential Tenancies Act 1986, which requires the landlord to provide the premises in a reasonable state of cleanliness. From these precedents, the writer argues that a contaminated area fits existing criteria for being “unclean”. Building on these precedents, the chapter then analyses the Residential Tenancies Amendment Bill (No 2), which proposes short notice provisions for the termination of the tenancy where testing evidences methamphetamine contamination. Additional insights are provided by a 2016 a practice note, which offers additional insights and guidance.

¹⁴⁰ Cheshire and Burn [1968] Public Law 135 at 150.

¹⁴¹ Above n 138 at [27.1.2].

¹⁴² Marine Insurance Act 1908; Life Insurance Act 1908.

¹⁴³ *Turner v Metropolitan Life Assurance Co of New Zealand Ltd* [1988] NZHC 171; (1988) 5 ANZ Ins Cas 60–861.

¹⁴⁴ Above n 138 at [27.1.2].

A. Background to the applicable New Zealand legislation

The general purpose of tenancy legislation tends to focus on restoring the unequal bargaining power between landlords and tenants. It has attempted to do this by controlling the quantum of rent and limiting the common law rights of landlords to evict their tenants.

Our legislative history concerning the governing of relationships between landlords and tenants of residential premises may be traced back to the War Legislation Amendment Act 1916. The purpose of this legislation was to control increases in rent and the termination of tenancies during the First World War.

(a) Property Law Act 2007

The Property Law Act 1952 was repealed on 1 January 2008 by s 366(c) of the Property Law Act 2007. The Law Commission made the following observation on the nature of the former property law legislation: “The Property Law Act 1952 contains a collection of miscellaneous rules relating to property of all kinds, including land. It is not a code, more a repository for legislative supplements to or corrections of judge-made law. Where it has been thought that the rules of common law or equity had fallen short of producing a sensible solution to a problem concerning the creation, disposition or control of property interests, legislative attention has been given to the problem by way of a section in the Property Law Act or one of its predecessors.”¹⁴⁵ When considering the introduction of the new Property Law Act 2007 its relationship with other pieces of legislation was considered. It was thought important that if a provision in the Property Law Act 2007 and a provision of any other Act conflicted, the

¹⁴⁵ The Property Law Act 1952 (NZLC PP16 1991) at [1].

provision in the other Act prevails except as otherwise expressly provided. Section 8(4) specially gives effect to this intention, stating: “If a provision of this Act is inconsistent with a provision in another enactment, the provision in the other enactment prevails.”¹⁴⁶

Of relevance to this thesis are ss 268, 269 and 270 as discussed above in *Holler v Osaki*:

Section 268 of the Property Law Act 2007 prescribes the applications of ss 269 and 270 stating:

(1) Sections 269 and 270 apply if, on or after 1 January 2008, leased premises, or the whole or any part of the land on which the leased premises are situated, are destroyed or damaged by 1 or more of the following events:

- (a) fire, flood, explosion, lightning, storm, earthquake, or volcanic activity;
- (b) the occurrence of any other peril against the risk of which the lessor is insured or has covenanted with the lessee to be insured.

(2) Section 269 applies even though an event that gives rise to the destruction or damage is caused or contributed to by the negligence of the lessee or the lessee’s agent.

(3) In this section and sections 269 and 270, *lessee’s agent* means a person for whose acts or omissions the lessee is responsible.

Section 269 of the Property Law Act 2007 is in respect of exoneration of the lessee of the lessor is insured, stating:

- (1) If this section applies, the lessor must not require the lessee—
 - (a) to meet the cost of making good the destruction or damage; or
 - (b) to indemnify the lessor against the cost of making good the destruction or damage; or
 - (c) to pay damages in respect of the destruction or damage.

¹⁴⁶ Property Law Act 2007, s 8(4).

(2) If this section applies, the lessor must indemnify the lessee against the cost of carrying out any works to make good the destruction or damage if the lessee is obliged by the terms of any agreement to carry out those works.

(3) Subsection (1) does not excuse the lessee from any liability to which the lessee would otherwise be subject, and the lessor does not have to indemnify the lessee under subsection (2), if, and to the extent that, —

(a) the destruction or damage was intentionally done or caused by the lessee or the lessee's agent; or

(b) the destruction or damage was the result of an act or omission by the lessee or the lessee's agent that—

(i) occurred on or about the leased premises or on or about the whole or any part of the land on which the premises are situated; and

(ii) constitutes an imprisonable offence; or

(c) any insurance moneys that would otherwise have been payable to the lessor for the destruction or damage are irrecoverable because of an act or omission of the lessee or the lessee's agent.

Finally, s 270 of the Property Law Act 2007 deals with the rights of the lessor if insurance for leased premises or land is affected by negligence of lessee or lessee's agent, stating:

(1) If this section applies and the destruction or damage is caused or contributed to by the negligence of the lessee or the lessee's agent, the lessor may—

(a) terminate the lease, on reasonable notice to the lessee, if the lessor's ability to obtain or retain insurance cover on reasonable terms for the leased premises or the land on which the premises are situated has been prejudiced by the destruction or damage; or

(b) recover from the lessee any increased insurance costs incurred by the lessor in relation to the leased premises or the land on which the premises are situated as a result of the

destruction or damage (including, without limitation, any increases in the insurance premium that are, or become, payable by the lessor or, as the case may be, any insurance excess that the lessor may be required to pay in relation to any future claims for destruction or damage of that kind).

(2) This section overrides section 269.

Although the Property Law Act 2007 does contain some general rules relating to leases, excluding residential tenancies, the Act was not intended to interfere with the function of the Residential Tenancies Act 1986 in affording protection to tenants of premises for residential purposes.¹⁴⁷

(b) Residential Tenancies Act 1986

*“Tenancy law is important. It regulates both the tenant's ability to access the basic need of shelter and to satisfy their desire for home, and the landlord's control over their financial investments.”*¹⁴⁸

The current principal statute regulating this area of the law is the Residential Tenancies Act 1986 which came into force on 1 February 1987.¹⁴⁹ This legislation is based on the Residential Tenancies Act 1978-81 (South Australia). The main objectives of our Residential Tenancies Act, which have been described as consumer protection legislation,¹⁵⁰ are:

to restate the law relating to residential tenancies;

¹⁴⁷ Law Commission *A New Property Law Act* (NZLC Report No 29, 1994) at [4].

¹⁴⁸ Mark Bennett *Problems in Residential Tenancy Law revealed by Holler v Osaki* (2017) 48 VUWLR.

¹⁴⁹ Residential Tenancies Act 1986 s1 (2).

¹⁵⁰ Above n 102.

to define the rights and obligations of landlords and tenants of residential properties;

to establish a tribunal to determine disputes arising between landlords and tenants;

and

to establish a fund in which bonds payable by such tenants are to be held.¹⁵¹

When initially introducing the Bill, which would subsequently become the Residential Tenancies Act 1986, Minister of Housing (Hon P B Goff) stated that it would replace the “law of the jungle in tenancy relations with firm, fair, and readily enforceable rules governing the behaviour of both parties. It clearly defines the rights and responsibilities both of landlords and tenants”.¹⁵²

The purpose of the Act was considered in *Anquetil v North Canterbury Nassella Tussock Board* where Holland J stated “There cannot be the slightest doubt that the Residential Tenancies Act was designed substantially to protect tenants and any cases of ambiguity should be interpreted in that light.”¹⁵³ Asher J in *Ziki Investment (Properties) Ltd*, supported by s 85 of the Act, stated: “clear that the drafters of the Act sought to protect both the landlord and the tenant by fair and readily enforceable rules, and not just the tenant. The court should strive to find a solution that is fair to both a reasonable landlord and a reasonable tenant, rather than to the tenant alone.”¹⁵⁴

There are various clauses of the Residential Tenancies Act which are specifically relevant to this thesis. In particular, section 45 of the Residential Tenancies Act¹⁵⁵ is titled “Landlord’s

¹⁵¹ Hinde McMorland & Sim *Land Law in New Zealand* (LexisNexis, Wellington, 2018) at 12.001.

¹⁵² *New Zealand Parliamentary Debates*, 1985, p 6896.

¹⁵³ *Anquetil v North Canterbury Nassella Tussock Board* (High Court, Christchurch, AP 93/89, 30 October 1989. *Ziki Investments (Properties) Ltd v McDonald* [2008] 3 NZLR 417.

¹⁵⁴ at [53] – [54] per Asher J.

¹⁵⁵ Residential Tenancies Act 1986, s 45.

responsibilities” and includes provisions that require the landlord to: (a) provide the premises in a reasonable state of cleanliness, (b) provide and maintain the premises in a reasonable state of repair having regard to the age and character of the premises and during the period which the dwelling is likely to remain habitable and available for residential purposes and (c) comply with all requirements in respect of buildings, health and safety under any enactment so far as they apply to the premises. It was held in *McAlavey v Beachside Boys Property Management Ltd* that s 45(1) of the Act provides that “the landlord shall provide the premises in a reasonable state of cleanliness. The use of the word “shall” incorporates the notion of strict liability. This means that a landlord may be liable for a breach regardless of a lack of knowledge.”¹⁵⁶

B. Providing rental premises in a reasonable state of cleanliness

The responsibility of the landlord to provide premises in a reasonable state of cleanliness was considered in the case of *Gibson Barron Realty Ltd v Naicker*.¹⁵⁷ In this case the landlord sought compensation for contamination of the premises by methamphetamine. Costs were claimed by the landlord for the decontamination of areas of the premises which tested positive for methamphetamine residue below the New Zealand Standard for testing and decontamination of methamphetamine contaminated properties.¹⁵⁸ In this case the landlord’s insurer had covered the remediation of the bedrooms which tested positive for methamphetamine at levels exceeding the NZ Standard of 1.5mcg/100m². In respect of the insurance claim, the landlord sought recovery of the excess paid for the claim. Adjudicator Lee held that the landlord was entitled to recover the insurance excess paid as the contaminated areas were considered “unclean” and damages based on the New Zealand

¹⁵⁶ *McAlavey v Beachside Boys Property Management Ltd* [1 June 2018] NZTT Christchurch at [28].

¹⁵⁷ *Gibson Barron Realty Ltd v Naicker* NZTT 4109692, 21 February 2018.

¹⁵⁸ New Zealand Standard for testing and decontamination of methamphetamine contaminated properties (NZS 8510: 2017)

Standard. The focus of this decision turned to whether the Tribunal could award costs for the remediation of methamphetamine in areas of the premises testing below the level set for safe habitation. As recommended above in respect of baseline testing, the landlord had obtained a test for methamphetamine residue at the commencement of the tenancy. The test was negative, establishing that there was no detectable level of methamphetamine residue in the house. At the conclusion of the tenancy methamphetamine residue was detected within many rooms of the house. The landlord argued that any level of methamphetamine residue occurred because of a breach by the tenants of s 40(2)(b) of the Residential Tenancies Act in permitting the house to be used for an unlawful purpose. The landlord expressed concerns in respect of how they would prove a future incoming tenant was responsible for any further methamphetamine contamination if the landlord could not ensure that there was nil residue at the commencement of the tenancy.

In *Global Rentals and Property Management Limited v Peters*¹⁵⁹ the tribunal considered the argument that any detectable level of methamphetamine is “not clean”. It was ultimately held in this case that an assessment of cleanliness by the Tribunal must be based on objective evidence rather than subjective assessment. In *Gibson v Naickers*¹⁶⁰ it was stated that:

“It would be inherently unworkable for the Tribunal to take any other approach. The NZ Standard has been prepared by experts in the field based on existing scientific studies as to the potential risk to human health, especially for infants and children. The Tribunal must make its decisions based on evidence and not on conjecture as to what amounts to safe living. To do so would otherwise result in

¹⁵⁹ *Global Rentals and Property Management Limited v Peters* NZTT 4109677, 21 December 2017, North Shore.

¹⁶⁰ Above n 74 at [9].

haphazard decision making based on subjective views of individuals rather than experts. Would a mere trace of meth residue at the lowest detectable level of 0.02 mcg/100m² be “unclean”? Where on the spectrum would “unclean” begin? Would traces of other types of chemical residue be considered unclean?”.¹⁶¹

Although Adjudicator Lee makes a valid point, concerns remain about the liability of an incoming tenant for the contamination. For example, a property can be tenanted when below the baseline, and the new tenant contaminates the property to the point of reaching the baseline. Is the new tenant now liable at least for payment of the insurance excess? A further consideration of the writers is if the property were contaminated and then poorly cleansed by the landlord. It is known that if a chemically contaminated surface is painted over it is possible to reduce the level which may be detected immediately after painting. However, it is then possible for the chemical residue to “bleed” through and then when re-tested to produce a stronger positive methamphetamine test result. If the property were let out at say 1.4 mcg/100m² and then re-tested at the conclusion of the tenancy showing a reading in excess of 1.5mcg/100m², is it possible that the tenant could be liable for the damage?

C. Termination of a Tenancy where the Premises are “uninhabitable”

Sections 59 and 59A of the Residential Tenancies Act provides for the termination of a tenancy, on very short notice, where the premises are so seriously damaged as to be “uninhabitable”. In considering the issue of habitability, the Act¹⁶² does not define either “habitable” or uninhabitable” as used in ss 45, 59 and 59A. Although the Act does not state that the premises to be tenanted must be habitable, the view has been expressed that there is

¹⁶¹ Above n 74 at [9].

¹⁶² Above n 132 at ss 45, 59, 59A.

a presumption in the Act as to a basic ‘habitability of rented premises’. Tenancy Tribunal Adjudicator, M Benvie, stated that “such a presumption provides an underpinning or foundation upon which both parties’ obligations in respect of the state of the premises, such as the landlord’s obligations set out in s 45 of the Residential Tenancies Act, stand.”¹⁶³

D. The Residential Tenancies Amendment Bill (No. 2)

The position of the Landlord and Tenant in terminating a tenancy where issues in respect of habitability arise is in the process of being clarified and amended by the Residential Tenancies Amendment Bill (No 2) “the bill”. The bill is described as amending the Residential Tenancies Act 1986 to specifically address issues related to liability for damage to rental premises caused by a tenant, methamphetamine contamination in rental premises, and tenancies over rental premises that are unlawful for residential use.¹⁶⁴ The amendments proposed by the bill are intended to create efficiencies in the way rental property is insured against the risk of careless damage. It is hoped that the proposed amendments will create an incentive for tenants to look after the rental property, but also to provide protection for tenants against excessive risk and costs.¹⁶⁵ Building and Construction Minister Nick Smith introduced the bill and has said that the changes are needed to “ensure tenants have an incentive to take good care of a property, and for the landlord to have appropriate insurance”.¹⁶⁶ As at the date of preparing this thesis the bill is at the stage of the second reading.

The proposed Residential Tenancies Act Amendment Bill (No 2) has been the subject of some criticism due to a perceived breach of tenants’ privacy. On 28 April 2017 Honourable Christopher Finlayson, QC, Attorney-General published a report considering the consistency

¹⁶³ Above n 35.

¹⁶⁴ “Residential Tenancies Amendment Bill (No 2) 258-2 (2017).

¹⁶⁵ Residential Tenancies Amendment Bill (No 2) Explanatory Note, General Policy Statement 258-1.

¹⁶⁶ New Zealand Law Society “Tenancy bill targets meth contamination” (24 May 2017) <www.lawsociety.org.nz/news-and-communications>.

with the New Zealand Bills of Rights Act 1990.¹⁶⁷ This report described methamphetamine use and manufacture as an on-going issue in both social rental housing and the private rental market.¹⁶⁸ It was concluded that the bill was consistent with the Bill of Rights Act 1990. Section 21 of the Bill of Rights Act 1990 affirms that everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise. Examples of this right extending to the protection of a number of values including personal privacy, dignity, and property may be found in case authority.¹⁶⁹ Clause 27 of the bill provides limited powers of entry for landlords for the purpose of testing for the presence of methamphetamine or taking samples for such testing. Although the Residential Tenancies Act does not currently provide specific powers for the testing of methamphetamine contamination, the Act does provide landlords with a right of entry to carry out inspections.¹⁷⁰ Currently the legislation only provides landlords with the option to test for methamphetamine contamination during a routine inspection and only if the testing has been agreed to by the tenant. The power of entry for landlords to test for the presence of methamphetamine, or take samples for such testing, is not considered unreasonable for the purposes of section 21 of the Bill of Rights Act 1990. The right of a landlord to access the property is subject to certain restrictions. In the writer's view, this is not only for the benefit of the landlord in protecting their property but in the interests of the tenant. If the landlord becomes aware of evidence to suggest that the property may have been contaminated by a current or previous tenant, the landlord must take steps to ensure they are providing a clean and habitable dwelling for occupation by the tenant. As a public policy consideration is ensuring landlords are deterred against taking no action to identify whether or not methamphetamine contamination, which

¹⁶⁷ Hon Christopher Finlayson QC, Attorney-General "Consistency with the New Zealand Bill of Rights Act 1990: Residential Tenancies Amendment Bill (No 2)" (28 April 2017) <www.parliament.nz/resource/en-NZ>.

¹⁶⁸ Above n 167.

¹⁶⁹ *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [161] per Blanchard J; *Williams v Attorney-General* [2007] NZCA 52.

¹⁷⁰ Above n 132.

may be harmful to the tenant's health, exists. The proposed amendment to the bill aligns by empowering the landlord to enter the premises and to test whether or not the tenant, in occupation of the property, is in agreement.

In preparing the bill advice from MBIE officials was sought as to whether or not it was appropriate to include a further clause in the bill stating that “the landlord shall ... not provide the premises in a state of high-level contamination”.¹⁷¹ The suggested obligation was intended to address the issue of landlords providing premises which are unsafe for residence due to contamination and would provide redress for tenants in such situations. The Committee considered that this would enable tenants to bring a civil lawsuit against landlords who provide contaminated rental accommodation. The inclusion of the proposed clause would likely result in an obligation on landlords to consistently baseline test for methamphetamine contamination at the commencement of each new tenancy. MBIE considered that whilst many landlords choose to undertake baseline methamphetamine testing, the current provisions strike an appropriate balance. On the one hand, landlords should be encouraged to exercise good judgment in whether or not to test for contamination. On the other hand, landlords should not be subject to potentially expensive and onerous compliance requirements.¹⁷² However, it was ultimately held that the inclusion of this clause would be inappropriate.

Part two of the bill contains amendments relating to methamphetamine and other contaminants in rental property. Amongst other things, the bill provides that:

1. A landlord may enter a premises, on notice and between specified hours of the day, to test for methamphetamine contamination or take samples for testing. A landlord that relies on the legislation and tests the rental property is obliged to

¹⁷¹ “Residential Tenancies Amendment Bill (No 2) Governance and Administration Committee Request for Advice from MBIE officials” (3 April 2018) <www.parliament.nz/resource/en-NZ>.

¹⁷² Above n 60 at [12]. Residential Tenancies Amendment Bill (No 2) (3 April 2018). Governance and Administration Committee Request for Advice from MBIE officials <www.parliament.nz/resource/en-NZ>.

make the results of the test known to the tenant in occupation of the property.

Where testing is carried out in the common facilities of a boarding house, the landlord is obliged to make the test results known to all tenants. The Governance and Administration Committee has suggested that the landlord provide this information in writing together with a copy of the test results.¹⁷³

2. Rights for tenants and landlords to terminate the tenancy in situations where methamphetamine testing undertaken in accordance with regulations shows that the rental property is contaminated.
3. It is an unlawful act for a landlord to provide a rental property at the commencement of the tenancy if the landlord has knowledge that the property, or part of the property, is contaminated with methamphetamine. Clause 26 inserts a new responsibility of the landlord into clause 45. This responsibility is applicable from the commencement of each new tenancy and, as mentioned-above, provides that a landlord must not provide premises to a tenant if the landlord knows that tests carried out in accordance with the regulations have established methamphetamine-contamination and if the landlord has not undertaken appropriate decontamination and remedial work. This alone has the potential to create issues as there would potentially be an incentive for the landlord to refrain from baseline testing prior to the commencement of each tenancy to ensure that they had no real knowledge of methamphetamine contamination in the property prior to the commencement of the tenancy. This would be inconsistent with public policy and would mean that if contamination were discovered the landlord would be unable to identify when the damage

¹⁷³ Residential Tenancies Amendment Bill (No 2) as reported from the Governance and Administration Committee – Commentary dated 16 April 2018 <www.parliament.nz/resource> at [3].

occurred. Clause 38 of the bill amends proposing Schedule 1A. Schedule 1A of the Residential Tenancies Act describes the maximum amounts that the Tribunal may order a person to pay under s 109 in respect of unlawful acts. The bill proposes a maximum level of exemplary damages of \$4000.

Further, the bill proposes that there be a regulation-making power whereby the Governor-General, by Order in Council, may make regulations that:

- i. prescribe a maximum acceptable level of methamphetamine for premises;
- ii. provide guidance on how methamphetamine testing should be carried out; and
- iii. where a property tests positive for methamphetamine contamination, prescribe the decontamination process relevant to the landlord's ability to terminate a boarding house tenancy where any part of the common facilities test positive for contamination.¹⁷⁴

A new section 59B was proposed, although erased at the stage of the second reading. Section 59B was called "Termination in cases of methamphetamine contamination". This section had stated that:

"If tests carried out in accordance with any regulations made under this Act have established that the premises are methamphetamine contaminated,

- (a) if the tenant is not responsible for the methamphetamine contamination, then the rent abates; and
- (b) the landlord may give notice of termination, the period of notice to be not less than seven days; and

¹⁷⁴ Residential Tenancies Amendment Bill (No 2) Explanatory Note, General Policy Statement 258-1.

¹⁷⁴ New Zealand Law Society "Tenancy bill targets meth contamination" at [2-3].

- (c) the tenant may give notice of termination, the period of notice to be not less than two days.”

Similar to the above described proposed section 59B, a further proposed section 66UA called “Rent abatement, and termination of tenancy or tenancies by landlord, in cases of methamphetamine contamination” had also been erased by the second reading of the bill.

The Governance and Administration Committee reviewed the proposed bill and published its report on 16 April 2018. This report has recommended that the bill be passed subject to various amendments. A key amendment is the revision of methamphetamine to “contaminants”. The definition of contaminant is suggested as meaning methamphetamine or any substance prescribed as a contaminant.¹⁷⁵ Although this thesis focuses on methamphetamine, the findings of the thesis can be applicable to covering other forms of contamination. Other toxic substances, such as asbestos, fungal toxins and lead paint also create health risks.¹⁷⁶ The replacement of the word ‘methamphetamine’ with ‘contaminant’ makes the bill relevant beyond methamphetamine contamination alone, ensuring the future practicality of the legislation.

The legislation, quite rightly, will not be limited to the recently released methamphetamine standard, NZS 8510, but it has been recommended that a new section 1A be inserted into 138C. The implication of this amendment¹⁷⁷ is that the Minister will be required to consider any relevant New Zealand Standard before recommending an Order in Council. By avoiding the reference to a specific standard this will ensure the legislation does not require reform should the standard be updated as new information and research becomes available over time. Further, this creates alignment with the removal of specific reference to methamphetamine

¹⁷⁵Residential Tenancies Amendment Bill (No. 2) 2017 (258-2) Hon Phil Twyford “Bills Digests” dated 9 May 2018 <www.parliament.nz>.

¹⁷⁶ Above n 173.

¹⁷⁷ Above n 176.

and creates a requirement for the Minister to have regard to standards applicable to the particular form of contamination present in the property.

Chapter Seven – The New Zealand Tenancy Tribunal and Best Practice

The chapter begins by examining the background of how the Tenancy Tribunal was founded. With this context in place, the chapter then provides an overview of the Tenancy Tribunal Database and considers the advantages and disadvantages of using the database to examine the backgrounds of prospective tenants. With these mechanisms analysed, the chapter can more closely examine interpretations of s 45 of the Residential Tenancies Act 1986, with its requirement that dwellings are provided in a reasonable state of cleanliness. These interpretations can be seen in recent decisions: *Vannisselroy v Tutty*, *Estate Futures Limited v McIllroy & Davenport*, and *McAlavey v Beachside Boys Property Management*.

The Tenancy Tribunal issued a best practice guideline on 26 July 2016, pursuant to s 115 of the Residential Tenancies Act 1986, following the decision in *Holler & Rouse v Osaki*¹⁷⁸. It has been in effect since 1 August 2016 and is described as reflecting the findings of the court in respect of the tenant's right to be exonerated from liability for damages in some situations and incorporates the relevant provisions of Part 4 of the Property Law Act 2007. The application of this practice note is to all Tenancy Tribunal applications where a landlord claims damages compensation from the tenant, for damage done to the rental property during the course of the tenancy, where such damage is more than fair wear and tear. The Practice Note begins by confirming that in any claim for damages by the landlord the landlord must establish that, on the balance of probabilities, the damages occurred during the course of the tenancy and that it exceeds fair wear and tear.¹⁷⁹ As mentioned above, this is why baseline testing between tenancies is important. If a landlord does not test the rental property before

¹⁷⁸ *Holler & Rouse v Osaki* [2016] NZCA 130.

¹⁷⁹ Tenancy Tribunal Practice Note 2016/1, 'Tenant Liability for Damages'.

<<https://www.tenancy.govt.nz/assets/Uploads/Tenancy/Tenancy-Tribunal-Practice-Note-20161-Tenant-Liability-for-Damages.pdf>>.

the damage occurred, it cannot identify exclusively when the methamphetamine contaminated the property, nor can the landlord prove that the damage was caused by the current tenant. Therefore, it is unlikely that a landlord will be successful in bringing a claim to the Tenancy Tribunal. Once the landlord has established, on the balance of probabilities, that the damage was caused by the current tenants then the onus is on the tenant to demonstrate, on the balance of probabilities, that the damage was not intentionally caused by either the tenant or any person in the rental property with the tenant's permission. For example, if the tenant's child was to have a party in the absence of the tenant, methamphetamine was consumed and contamination caused, then the tenant would not be exonerated from liability as the child would be present in the rental property with the permission of the tenant.

In accordance with the Tenancy Tribunal's 2016 Practice Note, following the establishment of the contamination occurring during the course of the current tenancy and by someone other than the tenant or their guest, then it must be established that the damage was careless.¹⁸⁰ Establishing that the damage was unintentional and careless would seem relatively straightforward. However, there may be room for the tenant to argue that they were consuming methamphetamine without consideration for the effects of the by-products causing property contamination and that any damage to the property was unintentional. Damage is considered intentional "where a person intends to cause damage and takes the necessary steps to achieve that purpose. Damage is also intentional where a person does something, or allows a situation to continue, knowing that damage is a virtually certainty."¹⁸¹ Regardless of whether the contamination is caused by consumption or manufacturing, both forms of contamination are well known to be illegal in New Zealand. Ignorance of the law is no defence and it is a breach of the Residential Tenancies Act 1986 for the tenants to use, or permit the premises to be used,

¹⁸⁰ Above n 179.

¹⁸¹ *Tekoa Trust v Stewart* [2016] NZDC 25578.

for any unlawful purpose. To avoid any room for ambiguity, and to highlight the matter to the tenant, the landlord may like to include a clause in the tenancy agreement stating that the tenant agrees not to undertake any illegal activity within the rental premises.

It is possible for contamination to occur without the tenant, or their guest, actually manufacturing or consuming methamphetamine within the rental property. It is possible for contamination to occur by being on the hands of the tenant or their guest. Such contamination is most common in areas such as around door handles and light switches. As a practical example, whilst working in the area of conveyancing a situation arose following where a client was selling their private home. Following many open homes and viewings the property, in Auckland of New Zealand, became the subject of a conditional Agreement for Sale and Purchase. A condition of the Agreement for Sale and Purchase was the negative result of an illegal substance test. A test was carried out and the result was, although showing a very low level, positive. The Agreement was subsequently avoided by the Purchaser. We were told that the test resulting in a positive reading was obtained from a swab taken of a light switch in the property. The Vendor believed that contamination occurred as a result of a potential purchaser viewing the property with methamphetamine residue on their hands that subsequently left traces on the light switch. Such traces are believed to have been picked up by a subsequent methamphetamine test carried out and shown on the test results. A consideration of the recent methamphetamine level standard, which has overtaken the former Ministry of Health guidelines and the inclusion of a clause in an Agreement for Sale and Purchase, as recommended by the Real Estate Institute of New Zealand was undertaken. Similarly, in writing this chapter the importance of testing and the qualifications required for such testing were considered. However, due to word constraints much of this material has been omitted from the thesis.

Following establishment of the damage being caused carelessly by the tenant or other person present with the permission of the tenant, the onus falls back on the landlord to disclose details of its insurance policy. The landlord is obliged to disclose whether or not the rental property is insured for the event from which the damage arose and must provide to the Tenancy Tribunal a copy of the insurance policy and schedule. The Tenancy Tribunal's 2016 Practice Note confirms that if the landlord has an appropriate insurance policy in place covering the damage caused by the event then the tenant is exonerated from liability and will not need to pay for the damage caused by his or her carelessness, or the carelessness of the person that caused the damage whilst present in the rental property with the tenant's permission. The right to exoneration from liability for damages where the landlord is insured is a right under s 142(2) of the Residential Tenancies Act.¹⁸²

In making a claim to the Tenancy Tribunal, the Tribunal's Practice Note confirms that the landlord may not be awarded excess. A residential landlord may not rely on s 271(2)¹⁸³ to require a tenant to pay the excess of any claim a landlord makes against his or her insurance as a term of the tenancy agreement. Section 11 of the Residential Tenancies Act¹⁸⁴ prevents the tenant from contracting out of its rights under the Act.

A. Tenancy Tribunal cases

Part three of the Residential Tenancies Act 1986 established the Tenancy Tribunal. The Tribunal has exclusive originating jurisdiction to determine all disputes arising between landlords and tenants in respect of any tenancy to which the Act applies.¹⁸⁵ Proceedings may be transferred to the District Court if the tribunal is satisfied that the proceedings would be

¹⁸² Above n 132.

¹⁸³ Above n 33.

¹⁸⁴ Residential Tenancies Act 1986 s11.

¹⁸⁵ Above n 85 at s77(1).

more properly determined in that Court.¹⁸⁶ Tenancy agreement provisions which attempt to limit or exclude the jurisdiction of the Tenancy Tribunal are of no effect.¹⁸⁷ In accordance with the Act the Tribunal must exercise its jurisdiction “in a manner that is most likely to ensure the fair and expeditious resolution of disputes between landlords and tenants”.¹⁸⁸ Further, the Tribunal is expected to determine each dispute “according to the general principles of the law relating to the matter and the substantial merits and justice of the case, but shall not be bound to give effect to strict legal rights or obligations or to legal forms and technicalities”.¹⁸⁹

Before going on to consider the interpretation of ss 40 and 142 of the Residential Tenancies Act 1986, the Court of Appeal in *Holler v Osaki*, stated that “section 85 describes how the Tribunal must exercise its jurisdiction, and in doing so, it expressly acknowledges that the Tribunal may have regard to general principles of law not contained within the RTA”.¹⁹⁰ Goodard JJ had similarly previously held in *Welsh v Housing New Zealand Ltd*.¹⁹¹

It seems to us to be very clear that under s 85(2) the Tenancy Tribunal must determine each dispute before it in accordance with the general principles of law relating to the dispute as well as the substantial merits and justice of the case. The provision does not create a licence for the Tenancy Tribunal to impose its views on the substantial merits and justice of the case upon one or other disputant unless its determination is based on general principles of law relating to the dispute. There is nothing in the Act, which, as we have noted, relates to residential tenancies generally, which would possibly entitle a Court to come to

¹⁸⁶ *Sweet v Moody* [1997] DCR 490.

¹⁸⁷ Above n 132 at [s81(1)].

¹⁸⁸ Above n 132 at [s85(1)].

¹⁸⁹ Above n 132 at [s85(2)].

¹⁹⁰ Above n 108 at [22].

¹⁹¹ *Welsh v Housing New Zealand Ltd* (High Court, Wellington AP 35/2000, 9 March 2001) at [29] and [30] per Doogue and Goddard JJ.

the view that a Tenancy Tribunal could make a determination independent of the general principles of law applicable to the dispute. If there is no claim against a landlord or a tenant according to general principles of law, there is no possible basis for an award against a landlord or a tenant under the jurisdiction of the Tenancy Tribunal. If there is such a claim, then the Tenancy Tribunal must take into account the substantial merits and justice of the case. It is a conjunctive requirement, not a disjunctive one. The remainder of section 85(2) may enable the Tenancy Tribunal to waive or mitigate what might otherwise be the consequences of the general principles of law applicable to the dispute. However, there is nothing in section 85(2) of the Act which could enable the Tenancy Tribunal to grant relief to either a landlord or a tenant unless it is relief justified in accordance with general principles of law. If a remedy is justified by the principles of law applicable to the matter, the Tenancy Tribunal will have to consider the merits and justice of the case and whether the strict application of the law gives rise to a fair result, but, if there is no remedy provided for by the law, it is not open to the Tenancy Tribunal to invent one.

B. Using the Tenancy Tribunal database

There are many Tenancy Tribunal cases available for review involving methamphetamine contamination. A search for “methamphetamine” returns a total of 849 decisions.¹⁹² Four of the most recent decisions available were heard on 1 June 2018. This shows how frequently and promptly the tenancy tribunal database is updated. The Tenancy Tribunal database is free and easy to search for cases by the name of the tenant. Therefore, it is recommended that a landlord or property manager search the names of the potential tenant before the

¹⁹² 849 decisions publicly available at <<https://forms.justice.govt.nz/search/TT/>> as at June 2018.

commencement of the tenancy to see whether or not the possible tenant has any history with the Tenancy Tribunal. Tenancy Tribunal cases may also be searched for potential purchasers of property. It is recommended that a Purchaser search the Vendor's name and property address to check for any information, particularly in respect of methamphetamine contamination. It is suggested that this become a policy of property managers and social housing providers, such as Housing New Zealand Corporation, in an attempt to avoid unknowingly renting homes to those with a history of damaging property.

There are, however, downsides to relying upon a search of the Tenancy Tribunal database. From informal discussions with various landlords it is clear that if a tenant has a negative history with the Tenancy Tribunal, they often attempt to conceal their record by commencing a new tenancy in the name of another person, such as a partner, friend or possible flatmate. This is dangerous for the landlord, not knowing exactly who will be living in the property, and for the parties to the tenancy agreement. The common tenancy agreement may be enforced against the parties recorded on the tenancy agreement. If one of the tenants is not a party to the tenancy agreement, then that person will not be responsible to the landlord under the tenancy agreement for the cost of damage caused by themselves or one of the tenants or other persons in the property. The landlord would pursue recovery of any costs relating to damage from the named tenants. This is particularly problematic if a person with a negative history at the tenancy tribunal refrains from becoming party to the tenancy agreement, which most commonly appears to be the situation. It is recommended that a landlord require the signing of the tenancy agreement by all who will reside in the property. This enables the landlord to ensure that the tenants assume shared responsibility, meaning that a tenant is taking on shared responsibility for the whole tenancy. The landlord is likely to benefit from ensuring that the tenants are jointly and severally liable. Where there are multiple tenants named on the tenancy agreement the landlord will be in a position to pursue one tenant, some

tenants or all of the tenants, regardless of who actually caused damage to the property. This provides a landlord with options and the ability to pursue the tenant that is most likely able to pay for the remediation of damage caused throughout the tenancy. It is hoped that the concept of shared responsibility assists with ensuring the tenants take care as they know that they may be held liable for the actions of the others. It is assumed that tenants residing together in a rental property are likely to encourage each other to take greater care of the property and that they will monitor the behaviour of others, such as guests present at the property, to ensure that no damage ensues for which they may be held liable for.

Although there are downfalls, as described above, in terms of the reliability of searching the Tenancy Tribunal database, it is submitted that this is a tool that tenants can use to help prevent themselves from renting previously contaminated premises, and that landlords and property managers may utilise when considering prospective tenants.

C. Section 45 of the Residential Tenancies Act 1986

Under s 45 of the Residential Tenancies Act a landlord is obliged to “provide the premises in a reasonable state of cleanliness”.¹⁹³ According to an Order of the Tenancy Tribunal at Taupo, per Adjudicator D Malcolm, this includes “freedom from contamination with hazardous chemicals”.¹⁹⁴ A brief summary of the facts of this dispute are that the property was tenanted by the applicant on 10 July 2015. The applicant, her husband and two-year-old child all moved into the property at 32B Rimu Street, a property in a more expensive area of Taupo. From conversations with a neighbour the tenant became aware of police previously raiding the property and learnt that a Police Drug team with full protective equipment and decontamination processes had attended at the premises. Following these conversations with

¹⁹³ Above n 132.

¹⁹⁴ Above n 130.

the neighbour the applicant engaged Meth Solutions Limited to undertake a Methamphetamine Indicative Test at 32B Rimu Street. The result of the test positively showed residue of methamphetamine contamination. The landlord did not dispute the test results. A full inspection and detailed sampling of the dwelling was then carried out by New Zealand Sampling and Decontamination Services, a specialist testing company. Eleven samples were taken, of these eleven samples seven were positive at a level in excess of 0.5 micrograms, being the Ministry of Health Standard applicable at the time of testing. The owner of the property, following the recommendation of New Zealand Sampling and Decontamination Services, carried out decontamination and remedial work on the property.

At the time that this property was tested, the relevant Ministry of Health Methamphetamine Guidelines for Remediation of Clandestine Methamphetamine Laboratory Sites (August 2010) were the main source of guidance for tenants and landlords.¹⁹⁵ The level of contamination in some areas at 32B Rimu Street was fourteen times the Ministry of Health's level. Section 78 of the Residential Tenancies Act authorises the Tenancy Tribunal to make any order that the High Court or District Court may make under any enactment or rule of law relating to contracts.¹⁹⁶ The Adjudicator in this claim found that the landlord's breach reduced the benefit of the tenancy agreement substantially. The tenant had contracted with the landlord for a property free of harmful contamination for herself and her family and was considered by the Adjudicator contractually entitled to rely on that being provided. It was ordered that all rent paid be fully refunded to the applicant.

D. Recent Tenancy Tribunal decisions

¹⁹⁵ Ministry of Health. Guidelines for the remediation of clandestine methamphetamine laboratory sites. Wellington: Ministry of Health; 2010.

¹⁹⁶ Above n 132.

At the time of preparing this thesis, the four most recent Tenancy Tribunal decisions, involving methamphetamine contamination, were published on 1 June 2018. These four recent decisions are particularly useful as they all demonstrate different aspects of the issue.

(a) Vannisselroy v Tutty

Vannisselroy v Tutty was the first of the Tenancy Tribunal decisions published on 1 June 2018 involving methamphetamine contamination.¹⁹⁷ In this case the landlord discovered evidence of drug use after the tenancy had ended. Evidence included light bulb removal. As mentioned above in respect of *Tekoa Trust*, this may indicate drug consumption due to the common use of light bulbs in facilitating the smoking of methamphetamine. Visitors to the property advised its reputation as being a “drug house”. As a prudent landlord, Mr Tutty arranged for methamphetamine testing at the property. The property tested positive at levels above 1.5 micrograms per 100 cm² in the toilet only. The property was successfully decontaminated and the landlord sought the cost of the methamphetamine testing. Although Mr Tutty had not obtained a baseline test prior to the commencement of the tenancy, he submitted that when he purchased the property the vendors advised him that the property had been tested for methamphetamine and was negative. That, combined with the evidence of drug activity during Ms Vannisselroy's tenancy, was sufficient to establish that it was more likely than not that the contamination occurred during the tenancy. It was considered reasonable for Mr Tutty to have the property tested for contamination after discovering evidence of drug activity. The cost was a result of the tenant's breach of the Residential Tenancies Act, and therefore she was liable to reimburse the landlord for the cost of the testing.

¹⁹⁷ *Vannisselroy v Tutty* [1 June 2018] NZTT Whangarei.

Vannisselroy v Tutty sets a precedent for the recovery of the cost of testing for chemical contamination where there is suspicion of methamphetamine testing in residential rental premises. The case however, raises the question of whether the cost of the testing would have been recoverable if the property had tested negative, or if the readings were below the current standard. It is assumed that the property tested positive for methamphetamine contamination in other rooms but that only the toilet area exceeded the current standard. *Vannisselroy v Tutty* is a post *Holler v Osaki* decision, which does not discuss the making of any insurance claims. It is expected that remediation of the toilet area was done by the landlord himself. However, if the landlord had insurance and used it to cover the cost of remediating the toilet area, it is wondered why he did not claim for the cost of the excess from the tenant.

In considering this case the issue of stigma arises. It was stated in the tenancy tribunal record that “visitors to the property advised Mr Tutty that it was known as a ‘drug house’.”¹⁹⁸ This is likely to have an impact on the future tenants to whom Mr Tutty would be able to rent the house. Even though the property has been decontaminated, it is likely its reputation as a “drug house” will remain. The stigma associated with contaminated property is considered below.

(b) Estate Futures Limited v McIllroy & Davenport

The second methamphetamine case appearing as at 1 June 2018 on the Tenancy Tribunal database is a reserve decision of 14 May 2018, *Estate Futures Limited v McIllroy & Davenport*.¹⁹⁹ In this case the landlord made an insurance claim for methamphetamine contamination of the premises. A majority of the costs were covered by the landlord’s insurance provider. However, the landlord had suffered the loss of the insurance excess of \$2,500.00. The landlord provided evidence at the hearing which satisfied the adjudicator that

¹⁹⁸ Above n 197 at [2].

¹⁹⁹ Above n 133.

it was more probable than not that the tenants, or the tenant's guests, caused the damage to the premises by methamphetamine contamination:

- a) The premises were tested for methamphetamine residue before the commencement of the tenancy (tested on 4 November 2016). The tests returned a very low positive result of 0.05 micrograms over eight samples (a composite result);
- b) The premises were tested again for methamphetamine during the tenancy (tested on 12 December 2017) and returned a standard screening composite result of 1.56 micrograms over 8 samples;
- c) The landlord confirmed at the hearing that in-depth testing was then conducted at the premises in order to ascertain exactly which areas of the premises required decontamination and so that a remediation plan may be developed.

Although there was a change in methamphetamine standards between the initial testing in 2016 and the establishment of the current standard, the adjudicator was satisfied that the premises were not contaminated at the commencement of the tenancy. Further, the adjudicator was satisfied that it was more probable than not that the tenants intentionally used, or allowed the premises be used, for the manufacture or consumption of methamphetamine during the course of the tenancy, resulting in damage to the property.²⁰⁰ As the damage was caused intentionally and through the commission of an imprisonable offence, the tenants were held liable for the landlord's losses. The adjudicator ordered the tenants to pay the insurance excess of \$2,500.00 in regard to the insurance claim made by the landlord for losses due to methamphetamine contamination.

²⁰⁰ Above n 133 at [24].

Estate Futures Limited v McIlroy & Davenport reiterates the importance of baseline testing prior to the commencement of each tenancy. Baseline testing enables a landlord to prove when the damage was caused, and is significant in terms of making an insurance claim. This case shows the landlord using his insurance cover to pay for the remediation of the contamination damage and being able to recover the cost of the excess directly from the tenants. This appears contrary to New Zealand’s Minister for Housing, Dr Nick Smith’s statement: “The latest court rulings mean landlords cannot recover the costs of this damage where they have insurance, including for their costs such as the excess”.²⁰¹ *Estate Futures Limited v McIlroy & Davenport*, is however, in alignment with the proposed changes to the Residential Tenancies Act, pursuant to the bill. In relation to each careless act or omission of a tenant (or someone for whom the tenant is responsible) that causes destruction or damage to the premises, the bill proposes that the tenant’s liability be limited to the lesser of the landlord’s insurance excess – if applicable – or four weeks’ rent. Where the cost of the damage is less than the landlord’s insurance excess, the tenant would be liable only for this lower cost.

(c) McAlavey v Beachside Boys Property Management

The third case as at 1 June 2018 on the Tenancy Tribunal database was *McAlavey v Beachside Boys Property Management*.²⁰² In this case various orders were sought by both the landlord and tenant. Of interest to this thesis is the landlord’s claim for damage caused by methamphetamine and the tenant’s claim for compensation for methamphetamine contamination.

²⁰¹ Auckland Property Investors Association “Government signalling partial reversal of *Holler v Osaki*” (17 October 2016 at <www.apia.org.nz/ap>).

²⁰² Above n 156.

The tenancy commenced on 30 June 2017 and ended on 29 November 2017. The rental premises had tested positive for methamphetamine contamination in early 2016, prior to the commencement of the tenancy. Decontamination work was undertaken and the rental property was re-tested on 28 June 2017. The second methamphetamine test showed traces of methamphetamine at 0.09 µg/100cm². The rental property was tested a third time on 29 November 2017, the day the tenant vacated the premises. Hills Laboratories analysed the samples taken and found a composite reading of 1.81 µg/100cm². A fourth, more detailed, test was then undertaken by Mr Hawes from Test 4 P NZ Ltd. Samples were taken and analysed from several areas of the rental property. None of the samples tested exceeded the 1.5 µg/100cm² level provided for in the Ministry of Health Guidelines (New Zealand Standard, NZS 8510:2017 Testing and Decontamination of Methamphetamine Contaminated Properties), except a sample taken from a polyurethaned area in the hallway. The sample taken from the hallway recorded methamphetamine levels of 1.61 µg/100cm². The landlord arranged for decontamination of the hallway. A fifth methamphetamine test was then taken, post decontamination, on 18 December 2017. This test showed the methamphetamine level had been reduced to 0.10 µg/ 100cm². The landlord sought an order totalling \$322.00 plus \$1,035.00 being the cost to decontaminate the hallway area. The adjudicator was not satisfied that the landlord had discharged its onus of establishing that the methamphetamine contamination occurred during the tenant's occupation of the rental property. The adjudicator noted that Mr Hawes, of Test 4 P NZ Ltd, in his 10 December report had stated that "polyurethane is well known for soaking up meth like a sponge" and that he had recommended the area be painted with a "superior quality oil-based paint once decontaminated". The area was not painted, as recommended. The adjudicator therefore considered that if the area was just surface cleaned, it may have been possible for methamphetamine contamination in the area to gradually seep through the polyurethane coating resulting in the readings found at the

end of the tenancy.²⁰³ The claim by the landlord for the methamphetamine testing and decontamination costs was dismissed.

Contrary to the landlord's claim, the tenant brought a claim for compensation in respect of methamphetamine contamination. The basis of the tenant's claim was that the landlord knew, or ought to have known, about the methamphetamine contamination prior to her occupation of the premises. The tenant had alerted the landlord to an unusual smell coming from the property. However, the adjudicator did not accept that the landlord, in the circumstances, knew or ought to have suspected the contamination. The landlord's contractual obligation is to comply with s 45 of the Residential Tenancies Act. The tenant entered into the contract with an expectation that such obligation would be met.²⁰⁴ Essentially, the tenant was successful in her claim. The adjudicator considered \$350.00 reasonable to compensate the tenant for the breach by the landlord of s 45(1) of the Residential Tenancies Act. Given the decision of the Tenancy Tribunal Beachside Boys Property Management Limited has been contacted for any comments they might have on this case.²⁰⁵

The fourth case recorded as 1 June 2018 on the Tenancy Tribunal database is that of *Riverlands Real Estate Ltd v Walker-Lee*.²⁰⁶ This case is an example of exemplary damages being awarded and is discussed above.

²⁰³ Above n 201 at [14].

²⁰⁴ Above n 201 [28].

²⁰⁵ The writer spoke directly with director of Beachside Boys Property Management Ltd, Kieren Gray on 21 August 2018. Following a telephone conversation Mr Gray was E-mailed to which the writer has not received a response.

²⁰⁶ *Riverlands Real Estate Ltd v Walker-Lee* [1 June 2018] NZTT Huntly.

Chapter Eight – Methamphetamine Guidelines and the Current New Zealand Standard

Methamphetamine is semi-volatile but difficult to analyse in the air so guidance in respect of surface residue levels have been developed. Concentrations on hard surfaces are measured in micrograms of methamphetamine per 100 square centimetres of surface.²⁰⁷

The chapter begins by considering New Zealand's standard, NZS 8510, which was updated in 2017 and supersedes the former Ministry of Health Guidelines. The chapter then examines the Australian and American guidelines to look for additional context, with which the New Zealand guidelines may be compared.

A. The Ministry of Health's Guidance

The Ministry of Health provided initial guidance in respect of New Zealand's methamphetamine safe habitable guidelines. The guidelines, applicable between 2010 and 2017, made it clear that they were advisory only and did not have any statutory effect. Section 3A of the Health Act provides for the function of the Ministry of Health in respect of public health, stating:

“3A Function of Ministry in relation to public health

Without limiting any other enactment or rule of law, and without limiting any other functions of the Ministry or of any other person or body, the Ministry shall have the function of improving, promoting, and protecting public health.”²⁰⁸

²⁰⁷ Above n 63.

²⁰⁸ Health Act 1956, s 3A

Prior to the introduction of the current standards, the former Ministry of Health guidelines were seen as being consistent with the Ministry's function of protecting public health.²⁰⁹

The former Ministry of Health Methamphetamine Guidelines for Remediation of Clandestine Methamphetamine Laboratory Sites required decontamination and remediation work in premises where surface levels of methamphetamine exceed 0.5 micrograms of methamphetamine per 100cm² area.

The Ministry of Health emphasised that the health of people is not protected when residing in a methamphetamine contaminated dwelling. The guidelines, in relation to occupation of the premises former used as a meth lab, record:

“In an effort to determine a level of methamphetamine at or below which the site remediation process could be considered adequate for the protection of people who would subsequently reoccupy a dwelling, the Ministry of Health has evaluated the current remediation guidelines used overseas, in particular in the United States. The Ministry of Health currently recommends that surface wipes for methamphetamine not exceed a concentration of 0.5 µg/100cm² as the acceptable post-remediation re-occupancy level for a dwelling that has been used as a clan meth lab.”²¹⁰

The danger to public health is further supported by the following two extracts from the Ministry of Health's guidelines:

²⁰⁹ *Hughes v BCRE Ltd – Pukekohe trading as Harcourts & McEwen* [18 August 2016] NZTT Pukekohe at [44].

²¹⁰ Ministry of Health *Guidelines for the Remediation of Clandestine Methamphetamine Laboratory Sites* (August 2010, Wellington) at [32].

“Exposure to the chemicals and by-products of illicit drug manufacture of methamphetamine can cause serious adverse health effects, and in extreme cases, be fatal. Young children are particularly vulnerable, partly because of their lower tolerance to chemical exposure but also because they are more likely to come into contact with contaminated surfaces through crawling and putting objects in their mouths”.²¹¹

“An abandoned laboratory in a domestic residence poses risk to any unwitting future occupants. Adverse health effects have been reported in subsequent occupants of suspected former laboratory sites that have not been adequately remediated (Burgess 1997). Throat irritation, nausea, respiratory difficulties and headaches account for the majority of reported symptoms. In addition, there have been reports of medical staff suffering adverse effects from exposure to patients who were contaminated by clan meth labs which demonstrates the ease of contamination transfer (Irving and Sutherland 2006)”.²¹²

A report, Review of Remediation Standards for Clandestine Methamphetamine Laboratories: Risk Assessment recommendations for a New Zealand Standard, conducted for the Ministry of Health recommended the following levels above which a property is considered to be contaminated and requiring decontamination.²¹³ The recommended levels identified in the 2016 report were: 0.5 µg/100cm² for properties where methamphetamine has been manufactured. 1.5 µg/100cm² for carpeted properties where methamphetamine has been used and 2.0 µg/100cm² for uncarpeted properties where methamphetamine has been used. Consistently, the equivalent Australian guidelines state:

²¹¹ Above n 209 at [71].

²¹² Above n 209 at [72].

²¹³ Prepared by the Institute of Environmental Science and Research for the Ministry of Health, Dated 7 October 2016.

“Methylamphetamine synthesis (or “cooking”) operations will contaminate inside surfaces of buildings with residual methylamphetamine. Studies have also established that smoking methylamphetamine will likewise contaminate the inside surfaces of buildings with methylamphetamine. Regardless, the presence of methylamphetamine on inside surfaces at a level of greater than 0.5 µg per 100cm² is considered unacceptable.”²¹⁴

(a) Standards New Zealand’s guidance

Standards New Zealand provides standards relating to contaminants. It has recently released a new standard, NZS 8510, which supersedes the former Ministry of Health guidelines and provides the new guidance on testing and decontaminating properties contaminated by methamphetamine in New Zealand. The Ministry of Health was represented on the working group that developed the standard.²¹⁵

Standards New Zealand NZS 8510:2017 was adopted as the independent standard for the testing and decontamination of methamphetamine-contaminated properties as from 29 June 2017. This standard adopts a single level of 1.5 µg/100 cm² (1.5 micrograms of methamphetamine per 100 square centimetres of surface area sampled) that high use areas of affected properties should be decontaminated to, regardless of whether the properties were involved in the production or use of methamphetamine. High use areas are defined as those areas that can be easily accessed and are regularly used by adults and children.²¹⁶ This standard extends to ancillary buildings, vehicles, boats, caravans, mobile homes, and other

²¹⁴ Commonwealth of Australia *Clandestine Drug Laboratory Remediation Guidelines* (2011) at [16].

²¹⁵ “Methamphetamine Testing and Remediation Standard (NZS 8510)” (29 June 2017, Ministry of Health) <www.health.govt.nz>.

²¹⁶ Above n 133 at [21-22]. See also above n 206.

structures where people may be present for extended periods of time such as workplaces, hotels, motels and storage facilities.²¹⁷

The standard is not mandatory unless incorporated by reference into legislation and, as mentioned above, currently provides “best practice” guidance only. However, it is considered likely that the judiciary will consider NZS 8510 in its assessment of whether a party to litigation has acted reasonably.²¹⁸

The District Court has confirmed that regardless of when the methamphetamine contamination occurred it is the current level that should be used as a guide.²¹⁹ In *Diamond Real Estate v Allan* the property was contaminated when the Ministry of Health guidelines were current. The methamphetamine test obtained from the premises indicated a positive result, recording a level of 1.4 micrograms of methamphetamine per 100 cubic centimetres in the toilet area. Although when this case was considered by the Court, as an appeal from the Tenancy Tribunal, in 2017 the level had been raised to 1.5 micrograms per 100 cubic centimetres for carpeted properties and 2.0 micrograms per 100 cubic centimetres for uncarpeted properties in cases where methamphetamine had been consumed, but not manufactured at the premises.²²⁰ Ultimately, it was held that any consideration as to whether the premises had been damaged, must be based on the prevailing guidelines applicable at that time.²²¹

B. The Australian equivalent to New Zealand’s methamphetamine standard

²¹⁷ Standards New Zealand “Q&As on NZS 8510:2017 “*Testing and decontamination of methamphetamine-contaminated properties*” <www.standards.govt.nz/> accessed 23 June 2017.

²¹⁸ Lisa Gerrard - Real Estate Institute of New Zealand “Methamphetamine Legal Considerations” August 2017.

²¹⁹ *Diamond Real Estate v Allan* [2017] NZDC 833.

²²⁰ Above n 219 at [5].

²²¹ *Barfoot & Thompson Limited (as agent for Wayne Roach) v Christie* [2018] NZTT Pukekohe 4137572 at [9].

In 2011 the Australian Crime Commission offered national guidance, addressing the issue of methamphetamine contamination, by developing the Clandestine Drug Laboratory Guidelines – 2011. Because there is a variation across Australian jurisdictions in respect of illicit drug manufacturing processes, the guidelines continue to be adapted and implemented by each authority taking account of local risk circumstances and regulatory systems to make them more effective and workable.²²²

C. The History of Methamphetamine guidelines and the current standard in the United States

“The National Association of Counties has identified the meth epidemic as one of the most devastating problems facing communities across the country.”²²³

The Anti-Drug Abuse Act of 1986 was amended and developed as part of the Federal government’s “War on Drugs” initiative, becoming the Anti-Drug Abuse Act 1988. The 1988 legislation²²⁴ sought to provide for greater consequences for those involved with the use and supply of illegal substances.²²⁵ The Act itself describes its purpose as being “to prevent the manufacturing, distribution, and use of illegal drugs, and for other purposes”.²²⁶ Section 2405 of the 1988 legislation created the Joint Federal Task Force, its job being to issue guidelines to help state and local officials directing the clean-up of former methamphetamine laboratory sites.

²²² Enhealth Guidance on: Clandestine Drug Laboratories and Public Health Risk. January 2017

²²³ Prepared statement of Chairman Bart Gordon from the Committee on Science and Technology in Report 110-8 “Methamphetamine Remediation Research Act of 2007” at [15].

²²⁴ Anti-Drug Abuse Act 1988 (Public Law 100-690, 102 Statute 4181).

²²⁵ J Davis “Anti-Drug Abuse Act of 1988” <<https://study.com/academy/lesson/anti-drug-abuse-act-of-1988.html>>.

²²⁶ House of Representatives 5210 – 100th Congress. “Anti-Drug Abuse Act of 1988” <www.govtrack.us/congress/bills/100/hr5210>.

The United States Joint Federal Task Force first approached the issue of the clean-up of methamphetamine laboratory hazards in March 1990 by publishing the “Guidelines for the Clean-up of Clandestine Drug Laboratories”. This manual is known as the “Redbook” and was updated as recently as 2005. The Redbook provides the United States with national guidelines for safely approaching and securing former methamphetamine laboratories and addresses the removal of hazardous chemicals and chemical wastes often located at the former methamphetamine production sites.²²⁷

In the year 2000, over 50 percent of all twelfth graders in the United States admitted the use of an illicit drug at least once prior to their graduation. In 2001 it was reported that drug use in the United States had nearly doubled compared to the previous decade. One study found that 11 percent of young people had used drugs in the previous month in 1991, and 19 percent had done so in 2001.²²⁸ In response, the first National Drug control Strategy was published in 2002 under the Administration of President Bush. The Strategy’s three core objectives were:

- Stopping drug use before it starts;
- Healing America’s drug users; and
- Disrupting the market.²²⁹

The White House Office of National Drug Control Policy published the “Synthetic Drug Control Strategy: A Focus on Methamphetamine and Prescription Drug Abuse to accompany the “National Drug Control Strategy” (Synthetics Strategy) in 2006. The Synthetics Strategy reported that “compared to first responder issues, a more complicated and less understood area of science is the optimal set and sequencing of response actions at former meth lab sites

²²⁷ United States Environment Protection Agency “Voluntary Guidelines for Methamphetamine Laboratory Clean-up” Revised Edition, March 2013

<www.epa.gov/sites/production/files/documents/meth_lab_guidelines.pdf> at [3].

²²⁸ National Drug Control Strategy: February 2006 <www.ncjrs.gov/pdffiles1/ondcp/212940.pdf> at [5].

²²⁹ The White House, President George Bush “The President’s National Drug Control Strategy” <<https://georgewbush-whitehouse.archives.gov/news/releases/2002/02/20020212-2.html>> 12 February 2002.

that may possess residual chemical contamination.”²³⁰ Because of this, the Environment Protection Agency were asked to identify best practices in relation to the decontamination and clean up of former methamphetamine labs.

Congress recorded in the Methamphetamine Remediation Research Act of 2007 that there had been little standardisation of measures for determining when the site of a closed methamphetamine laboratory had been successfully cleansed. The legislation provided for the development of voluntary guidelines by the Environmental Protection Agency in consultation with the National Institute of Standards and Technology. The establishment of these standards were to be based on the currently available scientific knowledge for the remediation of former meth labs.²³¹ In the United States, over twenty states have developed remediation guidelines with decontamination levels set according to “what are believed to be conservative to account for scientific uncertainty while at the same time establishing a guideline that site remediation contractors can meet”.²³²

In accordance with the Methamphetamine Remediation Research Act of 2007 the United States government has prepared voluntary guidelines for methamphetamine laboratory clean up. These guidelines are intended to improve the “national understanding of identifying the point at which former methamphetamine laboratories become clean enough to inhabit again”. As in New Zealand these guidelines are based on best practice. They provide voluntary guidance to State and local governments, remediation contractors, industrial hygienists, policy makers and any others involved in the methamphetamine lab remediation process.²³³

²³⁰ White House Office of National Drug Control Policy. (2006). Synthetic Drug Control Strategy: A Focus on Methamphetamine and Prescription Drug Abuse, at [39].

²³¹ U.S. 110th Congress - Methamphetamine Remediation Research Act of 2007 at [3].

²³² U.S. Environmental Protection Agency. Voluntary guidelines for methamphetamine laboratory clean-up. Washington, DC: EPA, Emergency Management; August 2009.< www.epa.gov/emergency-response/voluntary-guidelines-methamphetamine-laboratory-cleanup>.

²³³ Above n 232.

In December 2007, California's Department of Toxic Substances Control announced that it had calculated a health-based remediation standard for meth of 1.5 µg/100 cm², aligning with what we currently have in New Zealand. In October of 2009 California's Department of Toxic Substances Control signed the standard into state law as a safe level of methamphetamine on an indoor surface. Since 2009, Wyoming has adopted the 1.5 µg/100 cm² remediation standard. Additionally, both Kansas and Minnesota use the value of 1.5 µg/100 cm² as guidance.²³⁴

In August 2008 the National Alliance of Model State Drug Laws developed a Clean-up and Remediation working group in Santa Fe, New Mexico to discuss issues in respect of the clean-up and remediation of properties contaminated by meth labs. The working group members provided feedback on the voluntary guidelines and addressed questions. Consequently, the voluntary guidelines were revised and in response to the feedback from the working group and experts around the country.²³⁵ In March 2013 the guidelines were revised and updated again. At this time twenty-five states required or recommended that meth labs be cleansed to meet prescribed quantitative methamphetamine remediation standards. The 2013 state standards ranged from 0.05 µg/100 cm² to 1.5 µg/100 cm². The most common standard was 0.1 µg/100 cm².²³⁶

The 2016 National Drug Control Strategy describes legislative efforts to reduce the use of illicit of drugs.²³⁷ This Strategy appears more focused on the health aspect of the methamphetamine issue, as opposed to providing any guidance in terms of remediation of residential or commercial property.

²³⁴ Above n 232 at [7]

²³⁵ Above n 232 at [5]

²³⁶ Above n 232 at [6].

²³⁷ The White House, President Barack Obama "Office of National Drug Control Policy." <<https://obamawhitehouse.archives.gov/ondcp/policy-and-research/ndcs>>. No date.

A. Conclusion

In conclusion Congress has shown awareness and dedication to the issue for many years. The United States of America provides useful guidance on how the issue may be addressed. Inconsistencies across various States emphasises the lack of a single clear solution. The persistence of the issue and extent of the issue is obvious from the research. The ongoing revision of guidelines that is seen in America must continue in New Zealand.

Chapter Nine – The Risks in Buying, Selling and Renting Residential Property

Although methamphetamine laboratories may be located almost anywhere, it is well-known that a majority are located within residential premises. The duties of the real estate agent to protect the public from the effects of methamphetamine at a property being marketed was discussed in *Murphy v Real Estate Agents Authority*.²³⁸ In this case Gary Murphy and Property Link Group Ltd faced a charge of misconduct. The background to the case is as follows: Property Link Group Ltd was engaged to sell a property by way of mortgagee auction. On 28 September 2013 the agent, Mr Murphy, held an open home. In response to feedback received from those who viewed the property, he had the property tested for methamphetamine contamination. Mr Murphy was aware that, many years earlier, the deceased owner of the property was a known Headhunters gang member.²³⁹ A methamphetamine test was carried out on 3 October 2015. Although Mr Murphy had his suspicions that the property was contaminated, he did not wait for the results of the methamphetamine test and held a second open home on 5 October 2013, where further feedback that the property was likely a “drug house” was received.²⁴⁰ After the second open home, Mr Murphy learnt that the initial tests taken at the property indicated a positive result and that further methamphetamine testing was required. The further testing was carried out on 8 October 2013 by Todd Sheppard of Enviro Scientific Group Ltd. Whilst at the property for the purpose of completing the additional testing, Mr Sheppard said to Mrs Murphy “that it was clear to him that the property was contaminated because of the smell, which he noticed straight away”. Despite having this knowledge, on 12 October 2013 a third open home was held at the property. On 15 October 2013 the results of the second lot of testing were provided

²³⁸ *Murphy v Real Estate Agents Authority* (CAC 301) [2015] NZREADT42 (3 June 2015).

²³⁹ Above n 238 at [6].

²⁴⁰ Above n 238 at [9].

to Mr Murphy. The tests showed that the property was contaminated and that some areas tested positive for methamphetamine at levels significantly in excess of the Ministry of Health guidelines. Aided with this knowledge, Mr Murphy held a final private viewing at the property before it went to auction, off-site, later that day.²⁴¹ In his defence, Mr Murphy said that he conducted the private viewing only after having provided the attendees with a copy of the drug contamination report.²⁴² Ultimately it was held that the charges of misconduct be dismissed, and that a finding of unsatisfactory conduct be entered against both defendants.²⁴³ This case provides a clear example of the agents' duties to the public and to prospective purchasers when marketing a property which is suspected to have been contaminated by methamphetamine.

In 2016 the issue was further considered in *Barfoot v REAA and Giles*.²⁴⁴ In this case the suspicion of methamphetamine contamination of a residential property and the appropriate procedures required by the real estate agent were discussed. This case involved a property owned by Mr and Mrs Giles that was to be sold by way of auction. A potential purchaser of the property arranged for a methamphetamine test on the property that returned with a positive result. The real estate agent was informed and issued a notification to all potential purchasers which stated that "another party has advised that there may be issues relating to methamphetamine. The vendor has advised that they have no knowledge of these issues. Recommend to any prospective buyers that they obtain their own expert advice in this regard."²⁴⁵ The Vendors were unhappy with the disclosure of the methamphetamine information and did not consent to the information being given to prospective purchasers.²⁴⁶

²⁴¹ Above n 238 [11] – [14].

²⁴² Above n 238 at [50].

²⁴³ Above n 238 at [99] per P F Barber J.

²⁴⁴ *Barfoot v REAA and Giles* [2016] NZREADT 22.

²⁴⁵ Above n 244 at [5].

²⁴⁶ Above n 244 at [7].

The Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 were then considered.

Rules 10.7 and 10.8²⁴⁷ record that:

“10.7 A licensee is not required to discover hidden or underlying defects in land but must disclose known defects to a customer. Where it would appear likely to a reasonably competent licensee that land may be subject to hidden or underlying defects, a licensee must either—

(a) obtain confirmation from the client, supported by evidence or expert advice, that the land in question is not subject to defect; or

(b) ensure that a customer is informed of any significant potential risk so that the customer can seek expert advice if the customer so chooses.

10.8 A licensee must not continue to act for a client who directs that information of the type referred to in rule 10.7 be withheld.”²⁴⁸

It was submitted in *Barfoot v REAA and Giles* that, with regard to rule 10.7, a methamphetamine test showing contamination is not a “hidden or underlying defect”. The property is not defective in any way but rather has been used in a manner which poses an immediate and significant potential health risk; and the situation is not comparable to a defect in title or weather-tightness issues. This is consistent with the Tenancy Tribunal’s comments

²⁴⁷ Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012.

²⁴⁸ Above n 244 at [23].

in *Hughes v BCRE Ltd*, discussed above when considering the possibility of methamphetamine contamination in residential property as a latent defect.²⁴⁹

It was submitted in *Barfoot v REAA and Giles* that Rule 6.4 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 were more appropriate. Rule 6.4 states that “a licensee must not mislead a customer or client, nor provide false information, nor withhold information that should by law or in fairness be provided to a customer or client.”²⁵⁰

In addition, it was submitted that pursuant to the Fair Trading Act 1986, “the immediate disclosure of adverse methamphetamine test results is required as methamphetamine is an issue which should in fairness be disclosed to a customer, and it would be misleading (or even deceptive) to withhold this information or provide the results of only one of two or more tests; so that the results of all tests should be disclosed.”²⁵¹ The Real Estate Agents Authority agreed with the appellant agent in that Rule 10.7 does not apply because methamphetamine contamination is not a defect for the purposes of Rule 10.7, and rather the applicable rule is Rule 6.4.

The chapter begins by considering the fundamental risks that agents face when selling properties that may be contaminated. As an auxiliary tool for preventing the sale of properties that have not been decontaminated, the Listed Land Use Register (LLUR) of Environment Canterbury is examined, although as the chapter will show, the LLUR has certain inaccuracies.

The chapter will provide a practical example by investigating a chemically contaminated property, 56 McGregors Road, Bromley, to consider how issues can play out, before

²⁴⁹ *Hughes v BCRE Ltd – Pukekohe trading as Harcourts & McEwen* [18 August 2016] NZTT Pukekohe at [27].

²⁵⁰ Above n 244 at [35].

²⁵¹ Above n 244 at [36].

considering the effects of Listed Land Use Register on the value of a property. The chapter concludes by considering examples of customer complaints about contamination.

A. Selling a Property – Risks for real estate agents

The contamination of property by the manufacturing and recreational use of methamphetamine is a growing issue in New Zealand. The issue appears to be most common in properties that have been used for rental accommodation. However, regardless of the history of the property purchasers need to be increasingly cautious due to the potential for there to be serious health and financial consequences of buying a property that has been contaminated by methamphetamine.

When purchasing a property people, or more commonly their Solicitors, undertake a due diligence investigation of the property. Often, in a Canterbury context, as part of such investigations Environment Canterbury's Listed Land Use Register ("LLUR") is searched to check if the property has potentially been identified as contaminated.

B. Environment Canterbury's Listed Land Use Register

Environment Canterbury is a Regional Council which manages water, land and air. Its vision is to "facilitate sustainable development in the Canterbury region".²⁵² The LLUR is a database which generates a property statement with information provided by Environment Canterbury. The LLUR records information about contamination and/or potentially contaminated parcels of land. The Environment Canterbury website contains a page which provides further information in respect of properties which are listed on the LLUR. Environment Canterbury

²⁵² Environment Canterbury Regional Council "Our Vision" <www.ecan.govt.nz>. 2018

told the writer that they “sometimes” register methamphetamine laboratories on the LLUR where it is believed that there is a possibility of soil contamination.

An American report records that “for every pound of meth produced, approximately five to six pounds of toxic by-products remain. This waste is frequently poured down drains or spilled onto the ground, where chemicals can migrate into drinking wells and leach into the soil.”²⁵³ Similarly, the Australian Crime Commission note that a “clandestine laboratory manufacturing methamphetamine generates up to 10 kilograms of hazardous and toxic waste for each kilogram of pure methamphetamine produced. Toxic chemicals and residues have been found dumped into drains, rivers, public parks, on roadsides and in sewerage systems, posing immediate and long-term environmental health risks”.²⁵⁴

Environment Canterbury’s LLUR team was contacted with a short survey. The survey aimed to provide greater understanding regarding the role the LLUR plays in protecting a buyer from purchasing a contaminated property and how this Government agency communicates with other organisations such as the New Zealand Police Force and local Councils. Information was requested from organisations that Environment Canterbury liaises with to ensure that land that has been identified as contaminated is recorded on the LLUR. The purpose of this question was to ensure that the organisations are appropriately liaising with each other to ensure that potential property purchasers may have confidence in searching the LLUR and that they are likely to receive an accurate indication as to the likelihood of the property being contaminated. Environment Canterbury responded by saying that it “identified HAIL (Hazardous Activities and Industries List) sites which is land that has or has had an activity defined by the Ministry for the Environment as likely to cause land contamination resulting from hazardous substance use, storage or disposal”. Environment Canterbury continued to

²⁵³ Methamphetamine REMEDIATION RESEARCH ACT OF 2007 – report 110-8 <www.govinfo.gov>.

²⁵⁴ Above n 10 at [20].

say that it relies on multiple sources of information to identify said land areas, including aerial photographs and local council files. Further, where Environment Canterbury believes that information may be held by specific organisations, an example was given of a Clay Target Club Association, Environment Canterbury will request information directly from such organisation in order to identify sites for inclusion.

From the answer received by Environment Canterbury's LLUR, it is clear that Environment Canterbury is liaising with various agencies. However, the specific policy in place to ensure that methamphetamine contamination is promptly identified and recorded on the LLUR remains unclear. Environment Canterbury does not mention their liaising with the New Zealand Police. This is an issue because if the Police become aware of a property being used to manufacture meth, it is likely that by-products will be disposed of in drains and gardens, contaminating land and possibly plumbing and wastewater systems. Environment Canterbury would not be able to obtain this information by looking at aerial photographs. By the time council records are updated, it is possible that the property may have been sold and purchased by someone completely unaware of the risks of chemical contamination.

C. 56 McGregors Road, Bromley, Christchurch

In investigating this issue further, the writer investigated a property, situated at 56 McGregors Road, Bromley, Christchurch, advertised for sale on Trademe and on the Harcourts Real Estate website ("the property"). The property, from the photographs, appeared to be a modest home with standard weatherboard exterior-cladding. The property, as evident from the "sale by mortgagee auction" and the certificate of title, was subject to a mortgage in favour of ASB Bank Ltd. The position of the mortgagee will be discussed in more detail later in the thesis.

The property was to be sold by way of mortgagee auction on Friday, 10 March. This property was initially of interest due to the caption “As Is Where Is Classified as HAIL Activities A14 – Pharmaceutical Manufacture, by Environment Canterbury”. This property initially became identified as contaminated, and the writer was interested to know how this came to be. Environment Canterbury’s Advisory Officer, Jason McDonald, stated in his email of 10 March 2017 that a note was placed on the file following Environment Canterbury’s communication with the Police. In his email Jason advised that the note, dated 15 December 2015, read: “A clandestine methamphetamine laboratory was found operating in the sleepout and garage of 56 McGregors Road, Christchurch, upon Police arrival 04/12/2015. Hazardous chemicals and contaminated equipment believed to be used in the manufacture of prohibited drugs have been removed from the site. Residue of hazardous substances and waste products may still remain in or on this property.” This shows that Environment Canterbury is liaising with the Police to ensure that accurate and up-to-date records are made available to the Public. However, the consistency of such investigations is not clear. Clear guidelines should be in place ensuring it is common and consistent practice for the Police to always notify Environment Canterbury of their discovery of clandestine methamphetamine laboratories where there is a potential for land contamination to have occurred.

This question of whether there is a standard process for receiving notification of potential contamination, with a specific example being given of the police becoming aware of a meth lab was then asked of Environment Canterbury. Environment Canterbury responded by saying that if they become aware of a HAIL activity being undertaken now or in the past at a property Environment Canterbury will publish that activity on the LLUR if Environment Canterbury think that “it is more likely than not to have occurred”. Environment Canterbury continued to answer this question by stating that notification of a clandestine laboratory from a Police source would be sufficient evidence to list the site as a HAIL activity on the LLUR. This

information, on the LLUR, is publicly available. Environment Canterbury said that the Police reports they receive are often not specific enough to determine whether land contamination is possible as the Police reports often only identify a property where clandestine laboratory equipment was found, and not necessarily where drugs were manufactured. The test that Environment Canterbury are using in determining whether or not to record a HAIL activity on the LLUR is of interest. As mentioned above, the test is whether it is “more likely than not to have occurred”. Such test is likely to be influenced by the individual that receives the information and is tasked with deciding whether or not to record it. It is likely that further guidance in this area may be useful to ensure that the public are best-informed. For example, if the LLUR were to record on file that they held further information regarding clandestine laboratory equipment being found onsite. The potential purchaser may then contact Environment Canterbury to either order a full property statement or for more information. This would then alert them to the risk but put the onus on the Purchaser to make further enquiries and investigations, such as a soil test, at their discretion. The Police may also want to consider stating in their report to LLUR whether the equipment found appears to have been used or not. If the equipment is still packaged and appears unused it would seem unlikely that any manufacturing may have occurred. If the equipment were well used, although it may not be possible to confirm the location the equipment was used, there is a greater likelihood of it having been used at the address discovered.

D. Environment Canterbury and communication with the police

Environment Canterbury were asked what investigations they undertake to determine whether or not the land is likely to be contaminated. An example was given of a neighbour contacting Environment Canterbury to report their suspicions of methamphetamine contamination. The writer asked Environment Canterbury whether they contact the Police as part of their

investigation or what processes does it undertake with regard to investigating the neighbour's concerns. Environment Canterbury responded by saying that they would check aerial photos of the property, consent and local records, and that they would contact the Police if they were to receive a complaint. It is unclear why one of the first steps Environment Canterbury takes is to check consents recorded at the property address. Although unlikely, it is assumed that this is to check that the property is not manufacturing some other permitted pharmaceutical product. Environment Canterbury stated that generally people would complain of a clandestine laboratory to the Police first, before contacting the Regional Council. Therefore, Environment Canterbury believes, it would likely first receive notice of the possible methamphetamine contamination via a Police report. No evidence was provided to support Environment Canterbury's comment that people would generally complain to the Police first, and this is most likely to be an assumption.

In a recent New Zealand Law Society seminar entitled "Property – Methamphetamine Issues", a speaker of which was Raaj Govinda of the Hutt City Council, Wellington, it became apparent that people, usually concerned neighbours, often do contact their local council to report their suspicions in the first instance.²⁵⁵ The Hutt City Council website states that their Environmental Health team investigate notifications about premises being used for the manufacture or consumption of methamphetamine or where precursor chemicals have been stored.²⁵⁶ Environment Canterbury's comment that it is most likely that concerned neighbours would contact the police in the first instance to report their suspicions contradicts the Council's comments.

²⁵⁵ New Zealand Law Society Continuing Legal Education "Property – Methamphetamine Issues" presented by Lisa Gerrard and Raaj Govina dated July 2017.

²⁵⁶ Hutt City Council at <www.huttcity.govt.nz> as at 18 September 2017, page recorded as last being updated on 7 August 2017.

The Hutt City Council records on its website that depending on the degree of evidence found during its investigation of a suspicious property, they may serve a cleansing order on the property owner, or issue an emergency declaration if there is a very high risk to people or property. There is no mention here of any policy in place to notify and liaise with police, Regional Council, or even to record this information on the Land Information Memorandum. Having established that people may not necessarily contact the police in the first instance it is suggested that there should be guidance in place for the communication between agencies and the initial response and investigations complainants can expect to receive. Lack of policy and guidance for communication between key agencies is of concern as the Regional Council's do not have jurisdiction to issue cleansing orders under the Health Act 1956. This is a function of the territorial authorities.²⁵⁷ Due to the different roles that each agency has to play in preventing the manufacture of methamphetamine and keeping communities safe it is essential that communication is clear, consistent and efficient.

Environment Canterbury continued to answer the writer's question by saying that in some circumstances it would test for contaminants and assist the land owner in applying for funding to the Contaminated Sites Remediation Fund. However, Environment Canterbury confirmed that they do not routinely test for contamination.

E. LLUR and the value of a property

To ensure that valuable information is not lost Environment Canterbury does not remove records from the LLUR. Instead upon remediation of any contaminated land the site is reclassified by Environment Canterbury to reflect the current state of the land. Environment Canterbury have said that this would be the case if reports were available detailing a

²⁵⁷ Waikato Regional Council letter to Hamilton City Council dated 20 August 2015 "Transfer of Information Request – To all District Councils".

remediation, or if the site was incorrectly identified as a HAIL.²⁵⁸ Environment Canterbury's website states that there is no firm evidence that being on the LLUR will affect the value of a property.²⁵⁹ Nevertheless, the writer asked Environment Canterbury what research, if any, has been undertaken to support this, or whether Environment Canterbury were simply unaware of any evidence to show that being on the LLUR specifically decreases the value of a property. Of concern to the writer was the idea that a property may be incorrectly listed on the LLUR. For example, if a property was tenanted, Police might discover equipment commonly used for the manufacturing of methamphetamine, albeit unused. However, due to the lack of guidance in this area such detail was not passed on to Environment Canterbury resulting in the LLUR recording site contamination. The Landlord and property owner may then find themselves in a situation where they are unable to obtain a high price for the property – even at market value – due to the risk of contamination. The owner may then have to expend time and money obtaining testing and reports to show that the property has not been contaminated. Further, it is proposed that the obtaining of finance and insurance on a property recorded on the LLUR may not be as easy to obtain if it were not listed on the LLUR. Environment Canterbury responded by saying that they had discussed property values with the Valuers Institute of New Zealand that had advised Environment Canterbury that being listed a HAIL site does not on its own devalue a property. Environment Canterbury have said that many aspects of a property are taken into consideration by valuer's when they consider its value, and HAIL is one of them.²⁶⁰ Environment Canterbury is not aware of any evidence to suggest

²⁵⁸ Environment Canterbury Regional Council answers to questionnaire by the author dated 30 August 2017.

²⁵⁹ Environment Canterbury Regional Council website <www.ecan.govt.nz/your-region/your-environment/hazardous-land-use/listed-land-use-register/> as at 15 September 2017: "will the value of my house decrease because my property has been listed on the Listed Land Use Register?". Answered By ECan as follows: The value of your house is dependent on a number of different factors, and there is no firm evidence that being on the Listed Land Use Register will affect the value of your property. In fact, after we identified sites in Christchurch in 2014 and added them to the register, there was no noticeable effect on property values. We recommend you talk to a registered valuer. Details of these can be found in the Yellow Pages. It is important that you let a tenant or buyer know your land is on the Listed Land Use Register if you intend to rent or sell your property. If you are not sure what you need to tell the other party, you should seek legal advice.

²⁶⁰ Environment Canterbury Regional Council answers to questionnaire by the author dated 30 August 2017.

that Banks are less likely or more reluctant to lend against a property on the LLUR, or insurers less likely to insure a listed property.²⁶¹

F. An Example of council complaints about methamphetamine in 2016

The Council has an important role to play in issuing cleansing orders, liaising with other agents and working to ensure community health and safety. The Hutt City Council's General Manager's Report – Governance and Regulatory has a section entitled "Environmental Health".²⁶² This section records that it has:

"Been informed about *another*²⁶³ couple of houses in the Hutt area that have tested positive for "P" (methamphetamine). At this stage the tests are indicative only and further testing is required. As a Council, the Manager for Environmental Health is on the steering group to develop the standards for Testing and Remediation of Methamphetamine contaminated houses. The knowledge gained from this group has been invaluable in handlings such incidents in the Hutt".²⁶⁴

The above statement of the Manager of the Hutt City Council shows that the problem is being taken seriously by the Council and that they are interested and positively working with other organisations in the development of testing standards. The statement indicates that there have been other instances of homes being identified as contaminated or as clandestine laboratories in the Hutt area. This statement does not shed any light on how the incidents are handled or dealt with by the Council, although the Hutt City Council's report continues by stating that upon notification of the contamination to the Council it will issue the property owner with a

²⁶¹ Environment Canterbury Regional Council answers to questionnaire by the author dated 30 August 2017.

²⁶² Geoff Stuart "Hutt City Council's General Manager's Report – Governance and Regulatory. Report No: PandR2016/3/141" dated 3 June 2016.

²⁶³ Emphasis added by the writer.

²⁶⁴ Above n 262 at [39].

Cleansing Order under the Health Act. Then Council will then require the property owner to commission and pay for a comprehensive methamphetamine test and for the subsequent decontamination of the property. After the owner believes that the property has been cleansed the Council requires a further comprehensive test to ensure that the property is suitable for habitation in accordance with the Ministry of Health's guidelines for contamination levels. The Hutt City Council's report is dated 2016. As the new standard has exceeded the Ministry of Health's guidelines it is likely that this would now be the standard adhered to by the Council. The Hutt City Council has confirmed that it does not undertake any methamphetamine testing and that it is the responsibility of property owners and occupiers to ascertain if contamination is present. This is similar to real estate agents in that it is their policy that they do not undertake any testing of suspicious property's themselves.

In 2016 the Hutt City Council noted that there were no rules around methamphetamine contamination at the time, only best practice and guidelines. Two years later, in 2018, this continues to be the situation. The Hutt City Council identifies the lack of rules in this area as the reason for its involvement and funding of the group setting the regulations in respect of testing and remediating contaminated property.

The Hutt City Council record that they maintain a record of any testing for substances in private properties. It would seem a breach of client confidentiality if a homeowner were to engage a methamphetamine testing agency to test a property and for the agency to notify the Council of the testing and of the subsequent results. The Council record that where methamphetamine residue levels are above "trigger levels", appropriate testing and remediation is undertaken. In situations where the tests confirm excessive levels of contamination, owners and occupiers are removed from the property while remediation is undertaken. The Council confirms that this information will be imputed onto the property's Land Information Memorandum.

The Hutt City Council is actively engaged in protecting the community from the effects of methamphetamine. It appears to have clear processes and procedures in place for staff to follow and to ensure that subsequent purchasers of property, provided they purchase a Land Information Memorandum and have access to the property's records including any cleansing orders previously issued.

Chapter Ten – Financial Policies

The chapter begins by considering the responsibilities of the mortgagee to ensure that they have purchased a property in good condition. With the buyer's responsibilities covered, the chapter shifts to consider four different banks, seeing how each one approaches the issue of contamination and the different mechanisms and procedures they use to prevent financial losses when contaminated property is inadvertently purchased with finance.

A. The responsibilities of a mortgagee

It is suggested that as a general rule a mortgagee should at minimum obtain a baseline methamphetamine test before borrowing, especially if borrowing against a “high-risk” property. A high-risk property may be a former Housing New Zealand Corporation property or one with a known reputation for being associated with either the consumption or supply of drugs. This category may even extend to properties with long rental histories. It is suggested that finance providers may insist on a potential purchaser obtaining a baseline test. The position of a sample of major New Zealand finance providers is now considered.

B. The positions of major finance providers

In order to ascertain the position of major finance providers, given the potential for methamphetamine to have a significant economic impact on the value of a property, lenders such as Bank of New Zealand, Kiwibank Ltd, and ASB Bank were contacted. The finance providers have not all agreed to the publishing of the information they provided. For this reason, each Bank will be referred to by a number.

(a) Bank one

Bank one declined to answer each of the researcher's questions individually. Instead it confirmed that each home loan application, being unique, is considered on a case by case basis. To the writer, this indicates that it has no set policy in place with respect to testing and illegal substance contamination insurance cover. Bank one was willing to provide general information and stated that it:

“encourages customers to enquire as to the soundness of the property, especially if there have been any concerns expressed as to potential damage. This can take the form of a pre-purchase inspection and/or methamphetamine assessment. Whilst there are often visible signs a property has been subject to methamphetamine contamination (such as chemical odours, or a property has not been well maintained), a comprehensive pre-purchase inspection is expected to identify potential risks.”

Furthermore, where a customer identifies a property they own is contaminated, and which is subject to a mortgage in favour of Bank one, it will aid as necessary to support the remediation or repair of the property.

The information provided by Bank one is useful in that it demonstrates a lack of policy currently in place to deal with methamphetamine contamination in property. Often methamphetamine contamination does not leave an odour and is not visible to the naked eye. It is therefore unlikely that a simple inspection of the property would reveal chemical contamination.²⁶⁵ Further, if chemical contamination is not initially suspected pre-purchase it would seem unlikely that a “comprehensive pre-purchase inspection” is expected by Bank one. This may then result in customer of Bank one purchasing a contaminated property which they later find to be contaminated. Although Bank one confirmed that they would assist with

²⁶⁵ Kelly Bek “Purchasing Property – Do I need a Meth Test” <www.cooneyleesmorgan.co.nz>.

remediation, it is suggested that more could be done pre-purchase to ensure the property being purchased is free from contamination. It is suggested that Bank one create a policy and upskill their staff in this area. It is hoped that this would ensure greater consistency in the processing of loan applications. Bank one may be better assisting customers in avoiding the purchase of contaminated property rather than running the risk and offering to aid customers should they end up in that position. It would not be expected that the Bank undertake a full due diligence assessment for each customer. However, banks often require evidence of the soundness of a property, including recent valuations and building and electrical reports. It is suggested that the bank develop an internal risk assessment policy where there is discretion, at minimum, for a baseline methamphetamine test to be required before a loan application is approved.

In terms of insurance cover, it also seems unlikely that the Bank requires more than an Insurance Certificate of Currency when completing a customer's loan application and before arranging the drawdown of funds to enable the customer's purchase. It is suggested that the Bank take more time to consider the suitability of the customers insurance policy to ensure it is adequate and does not exclude cover for methamphetamine contamination.

(b) Bank two

Bank two was quick to confirm that upon reviewing the writer's questions they do occasionally deal in this area. Despite this, Bank two stated that they do not yet have any formal policies or guidelines in place at this stage.

(c) Bank three

Bank three appears to have been aware and on top of the issue since at least 2016, when it published a news release in respect of methamphetamine contamination being a high concern for property investors. It responded to the writer's questions by confirming that a methamphetamine test is not mandatory for any purchase. However, in many instances Bank three recommends it to customers. Bank three have confirmed that "if it is considered that the property is likely to have been contaminated then a test will be a pre-requisite to any consideration of utilising the property as security for a loan."

C. Perspective of a finance provider on checking the LLUR

Bank three was asked if it checks the LLUR or undertakes any other internal due diligence investigations to more accurately assess the risk of lending against specific properties. Bank three responded by stating that the LLUR is a Canterbury site managed by Environment Canterbury and specifically relates to areas of industrial land, such as hazardous industries and previous occupation. It generally does not relate to residential land and buildings unless these have been constructed on potentially contaminated sites; this will form part of the LIM report for any property transaction. This is recommended to its customers and is sometimes a pre-condition of a loan. As to due diligence – this is generally performed by way of its association with CoreLogic and it has specified particular land hazards that it wishes to be aware of. All prospective securities must be entered into this system to enable a proper risk assessment to take place. Whilst it is true that the LLUR is specific to the Canterbury region there are other equivalent web resources available for other parts of the country. It is considered by the writer sufficient for the bank to perform its own due diligence investigations via CoreLogic. The extra step of checking the LLUR is arguably up to the customer when assessing the value of the property.

D. Methamphetamine contamination and mortgagee sale

The sale of methamphetamine contaminated property by way of mortgagee auction has been briefly considered above in respect of the property located at 56 McGregors Road, Bromley, Christchurch. Bank three was asked about the potential risk of a customer defaulting on their loan and leaving the bank with damaged and contaminated property as security for the borrowings. Bank three stated that where a customer experiences financial difficulties and the sale of the security is contemplated then it would already have assessed the likelihood of contamination, deferred maintenance and other property matters at the time customer was transferred to its Collections and Recoveries division. Recoveries actions take into consideration:

1. Holding the property for a period before entering the mortgagee sale process; and
2. Remediation (of any kind) of any property where the act of remediation increases the likelihood of full or better repayment.

Although not stated, it is assumed that one of the first steps to be taken by the Bank's Collections and Recoveries division would be to obtain a baseline methamphetamine test.

Bank three was asked if it has insurance to cover losses that cannot be recovered from the customer. The scenario for consideration was of a customer purchasing a property and failing to make repayments. The property was then found to be contaminated and the customers equity in the property was insufficient to repay the outstanding loan to the bank once the property had been remediated and sold. Bank three advised that it does not separately insure against credit loss.

Under the Property Law Act there are certain statutory processes to follow in proceeding to mortgagee sale. Bank three was asked whether or not its policy is to pursue a customer for

loss suffered in situations where money is outstanding following the sale of the property. It confirmed that where there is a loss it pursues the customer for repayment of that loss. It described many avenues for this repayment such as repayment over time, writing-off the debt, and bankruptcy. This depends upon the circumstances, the customer, and their willingness to assist in the process.

In a safeguarding attempt, bank three does require criminal convictions to be disclosed. The writer raised the possibility of discrimination. Bank three was reluctant to answer this question, offering a further interview due to the many possible instances and outcomes. The writer did not proceed with this to avoid departing from the focus of the thesis.

In terms of property investment, bank three leaves it up to the investor to choose the correct tenants and any contamination is at their risk not the Bank's. Any illegal activity allowed on the property puts the mortgagor in default of their mortgage. Bank three has not taken any particular steps with respect to the contamination concern other than attempting to ensure that the property is not contaminated when taken as security. Subsequent events are the mortgagors concern.

A perspective of “appropriate insurance”

Bank three requires investors to have suitable rental house insurance which contains a contamination cover. However, Bank three believes that insurance companies have limited their liability under this cover to a maximum of \$30,000, which it notes can leave the insured with costs in excess of this. As mentioned above, it is considered that the banks do not read the policy wording thoroughly and instead may accept a certificate of insurance which may not contain information on what the policy does and does not cover.

A perspective on the new testing standard

Bank three was asked if it has any comment on the new standard released for remediation levels and whether or not it was consulted throughout the process. It responded by saying that the adoption of the standards does ensure that testing and remediation is carried out in a suitable manner and does eliminate the sometimes-suspect testing regime of some operators. Bank three was consulted and submitted comments on the standards. The levels stated in the standards does accord with its general views.

Loan documents and possible policy reform

Bank three confirmed that it does not have specific clauses in mortgage documents related to methamphetamine. However, the clauses in its documents do cover defects, which cover illegal substance damage, repairs and maintenance.

Bank three's current policy is that all methamphetamine contaminated properties being proposed as security need to be approved by Credit Assessment. In the future it is anticipated that there will be some leeway for frontline lenders depending upon the types of indicator test (composite aggregate and composite average). But in general, for any reading over 0.3ug the lending proposal will require submission to Credit Assessment.

In summary of the interview with bank three it was concluded by bank three that methamphetamine contamination has become more prevalent and it believes it is also more prevalent in the media now. Bank three will lend against a remediated property provided the detailed assessment readings are acceptable. Minor contamination – that is, contamination well below New Zealand's current standards levels – will generally be accepted without any need for remediation or cleaning although bank three does recommend cleaning where any residue is present.

(d) Bank four

When purchasing a property that a customer intends to reside in as their main home, it is common for finance providers to require a building inspection report and often an electrical report to ensure that there is sufficient value in the property to cover a loan secured against it. Bank four were asked why it does not require a baseline methamphetamine test prior to lending against the property. It said that the primary responsibility for pre-purchase due diligence on the property lies with the purchase. Where the resultant loan to value ratio is at the higher end of the spectrum the bank will usually require the value and overall quality of the property to be supported by a registered valuers report. If the valuer that completes the inspection and subsequent report detect, or are presented with, any substantive evidence that the property may be contaminated by methamphetamine then Bank four confirmed they reserve the right to require a professional independent body to undertake an inspection and assessment on the specific risk of chemical contamination. Such report then provides the basis in respect of whether or not Bank four will agree to lend against and accept the property as security.

In terms of debt recovery, similar to Bank three, Bank four has confirmed that the customer will remain liable for any outstanding debt. In this situation, it may choose to commence recovery action and to pursue the customer until all obligations have been met. Bank four elaborated on this point by saying that it has the legal right, and the decision, to recover any remaining debt. This decision is made on a case by case basis. It has the right to recover all costs associated with selling the property including costs to remediate any methamphetamine contamination. Bank four has said that its process is to serve a notice of demand on the borrower and if the demand amount is not remedied by the due date the bank will proceed with a mortgagee sale of the property.

Bank four was asked whether or not it believed it had any recourse against the customer where it is unable to prove when and how the contamination was caused. Bank four answered positively saying that the customer is liable for the liabilities they have incurred against the property regardless of who may have created the contamination – that is, the current owner or any previous owners.

In respect of the new testing standard, Bank four said that it has been consulted through the New Zealand Bankers Association and is working its way through it from an operational perspective. It was asked whether it was considering any action, process or policy reform in context of methamphetamine contamination. Bank three confirmed that no specific policy has yet been developed, but that it is likely any future policy will be designed around the standard (NZS 8510: 2017).

Similar to Bank three, it believed that there is now a higher risk of methamphetamine contamination and an increase in the number of affected properties. Bank four comments that it is difficult identifying which properties are contaminated, including new loan applications and existing properties within its portfolio. Bank four confirmed that there has been no change in its lending practices. It is suggested that aided with the knowledge that more properties are contaminated, Bank four could work on a policy to assist with identifying which properties are contaminated in an attempt to mitigate loss and better assist its customers.

It appears that lenders do not always have a clear understanding and consistent approach when it comes to methamphetamine contamination in properties and the consequences of the decline in the property valuations. If multiple properties are owned, then this can affect the

loan to value restrictions (“LVR”), and the lender may request additional funds to be repaid to fall within the LVR rules.²⁶⁶

D. The perspective of Investors and the Risk of Methamphetamine Contamination

Thirty-eight percent of investors have said they are worried about the prospect of contamination from the production or use of methamphetamine in their properties. However, it does not appear, from the finance providers interviewed, that many steps have been taken to address this risk. This question was specifically posed to Bank four. It responded by confirming it has taken no steps to address the concerns of property investors and reaffirmed that they are responsible for their own due diligence. In agreement, it is suggested that a conveyancing professional is in a better position to advise the purchaser. However, there are instances where the opportunity to advise may be missed such as where an agreement is made unconditional prior to legal consultation.

Although outside the scope of this thesis it is thought that the clauses in New Zealand’s standard form Agreement for Sale and Purchase which may mitigate risk be considered. Further, it may be necessary for agents to incorporate specific clauses as may be suggested by the NZREAA after thorough analysis.

²⁶⁶ “Methamphetamine in Properties: What you need to know if you own a property” (19 October 2016) <www.parryfield.com>.

Chapter Eleven – Making Claims

So far, this thesis has considered the framework through which insurance is provided. These chapters have shed light on the risks faced by landlords, but this chapter takes a closer look at making insurance claims from the landlord's perspective. Previous chapters have shown how a house and land can be contaminated. However, there are other areas where the landlord will face considerable risks. The first area is the replacement of chattels and soft furnishings. It is difficult to accurately test such items for contamination. The second area is the claiming of “stigma damages”. A property may be thoroughly remediated, but a reputation for meth manufacture and use may spread among its members, making the property difficult to rent or sell.

A. General Insurance and Contamination in the United States

The manufacturing of methamphetamine often results in the creation of various chemical by-products. Liquid by-products are commonly disposed of in gardens and public drainage with little regard for the environment. The disposal of chemical by-products in this manner may contaminate soil and wastewater systems.

An international example of insurance and groundwater contamination shows that general liability insurance may not cover groundwater contamination. In *Buell Industries Inc. v Greater New York Insurance Co.* the contamination issue was primarily in respect of groundwater.²⁶⁷ Buell Industries Incorporated (“Buell”) is a Delaware corporation with its principal place of business in Waterbury, Connecticut. The issues in this appeal to the Supreme Court of Connecticut concerns two manufacturing facilities owned by Buell:

²⁶⁷ *Buell Industries Inc. v Greater New York Insurance Co.* 791 A.2d 489 (Suo. Ct Conn. 2002), Supreme Court of Connecticut, 26 February 2002.

Highland Manufacturing (“Highland”) and Anchor Fasteners (“Anchor”). Buell manufactures metal parts at each of the facilities. In 1990, Buell commenced an environmental investigation of its facilities. It discovered that both sites were contaminated. Buell claimed each of the sites was contaminated due to releases that had occurred during and after 1966. At Highland, the main source of contamination was trichloroethylene, which was discovered beneath the plant’s former wastewater lagoon. The trichloroethylene was in dense liquid form, was not fully dissolved in the groundwater and spread from the lagoon to neighbouring properties through the groundwater. The Highland facility utilised a degreasing machine that used trichloroethylene. Metal parts were placed into the degreasing tank to remove grease and dirt. The parts were then taken out of the liquid trichloroethylene and placed into a vapour trichloroethylene for continued cleaning and drying. Trichloroethylene was usually stored in barrels on the ground near the degreasing machine. In this case there was no disagreement that trichloroethylene existed in the groundwater at Highland, but how it got there was greatly disputed. Anchor produces a variety of metal products, such as screws, nuts and clips. At Anchor, the main source of contamination was oil. In 1986, an underground waste oil tank (“tank”) was removed from the loading dock area at Anchor. During this excavation, a former dry well was discovered, approximately 6.5 feet or 1.981 metres. The dry well was dismantled and removed along with the tank. Despite the removal of the tank and the dry well, oil contamination was discovered in the ground and in 1994 approximately 800 cubic yards or 611.6 cubic metres of soil were removed from the area in an attempt to cleanse the site. Nevertheless, this failed to remediate all contamination. The parties agreed that the Anchor site was contaminated, although the cause of oil contamination and the insurers’ responsibility for the costs of its remediation were disputed. Buell filed claims with its insurers for the costs of remediating the environmental contamination at Highland and Anchor. Buell sought coverage, under the insurance contracts’ property damage and personal injury provisions, for

its costs associated with the investigation and remediation of the contamination at the its facilities.

Buell's Insurers denied coverage in response to the contamination claims. The insurance policies are described as follows. Federal provided primary comprehensive general liability insurance to Buell for the period from 1 February 1975 to 1 February 1986. Chicago's policies provided liability insurance to Buell for the period from 1 February 1980 to 1 February 1985. Both policies provided coverage for property damage and personal injury. Its insurance was occurrence-based, meaning it was provided on a per occurrence basis with "occurrence" defined, in the Federal policy as "an accident, including continuous or repeated exposure to conditions, which results, in bodily injury or property damage neither expected nor intended from the standpoint of the insured." Each of insurance policies in this case included a pollution exclusion clause. Although the wording of each policy was slightly different, both excluded coverage for claims resulting from the discharge of pollutants. However, the policies also contained an exception to the pollution exclusion which reinstated coverage when the discharge of pollutants was sudden and accidental. Following the insurers refusal to provide cover, Buell filed an action for a declaratory judgment on 26 January 1999. Buell sought a judgment by the court declaring its Insurers, Federal and Chicago, jointly and severally liable for the sums it had paid, and that it would pay, with respect to the contamination at the Highland and Anchor sites.

This relevance of this case, in the context of methamphetamine contamination, is that residential sites in situations of heavy methamphetamine manufacture are likely to become contaminated over a prolonged period of time. Even if the contaminated dwelling is ultimately demolished and removed from the site, or the dwelling remediated to an acceptable level below the current standard, the land may still require remedial work, such as excavation of the soil, before it may be redeveloped. The cost of remediating the land may be significant

and therefore is likely to be claimed by an insured. It is important that the insurance policies, unlike those described in the case of *Buell Industries Inc. v Greater New York Insurance Company*, are not full of exclusions which may be confusing to an insured and create uncertainty as to what remediation is actually covered. If the land is chemically contaminated, then it is suggested that the insurance policy either clearly include or exclude cover for the remediation of the land. It is suggested that if cover for the remediation of contamination is capped, at the common level of thirty thousand dollars in New Zealand, then this money should be available for application in respect of the remediation of the contaminated land if necessary. As this thesis has previously mentioned, in accordance with information provided by Environment Canterbury it is arguable whether or not a listing and record of contamination on the LLUR decreases the value of a property. From a general perspective it is certainly possible that it may have a negative impact on the sale or tenancing of a property due to the stigma which attaches. For example, if the property is to be used as a family home as many residential properties are, it is likely to reduce those interested in purchasing it as parents are unlikely to allow their children to play in a chemically contaminated garden for example. It would also seem unlikely that the land could be used to grow vegetables and overall may pose a health risk. From the perspective of others in the community it would seem important that any contaminated soil be removed from the site to prevent the spreading of the chemical contamination to neighbouring sites. There is a risk that the spreading of the soil may improve the standard of the originating site due to a dilution of the chemicals once the soil were spread out. Regardless, it would appear in everyone's best interests from a health perspective for the chemical contamination to be professionally remediated.

Ministry of Health and Environment Canterbury

The Ministry of Health recently undertook a review of the Methamphetamine Testing and Remediation Standards that refer to the specific level of methamphetamine in dwellings. Environment Canterbury's website contains a link to the Ministry of Health's comprehensive guidelines for the remediation of a clandestine laboratory.²⁶⁸ Because Environment Canterbury regulates the contamination of soils and the wider environment, they were not consulted throughout the process and have confirmed that they did not make any submissions on the revised standard. However, due to the potential for ground contamination, as discussed above, it is suggested that Environment Canterbury's and the information of similar organisations' input is gathered going forward.

B. Insurance and Contamination of Soft Chattels and Furnishings

This part of the thesis considers the liability of an insurer to cover the cost of replacing soft furnishings that are likely to be contaminated but cannot be tested. This section reemphasises the complexity of the property and insurance issues which arise in this area of the law.

A report, "Methamphetamine Sampling Variability on Different Surfaces Using Different Solvents" confirms that "porous surfaces such as unpainted drywall, unpainted wood, carpeting, and clothing will have very poor recovery of any methamphetamine present. Recovery rates will be less than 10% and, in many cases, less than 1%, regardless of the solvents utilized. Therefore, if these surfaces are sampled to determine methamphetamine contamination levels, even low levels of methamphetamine should suggest much higher contamination than would samples taken on non-porous surfaces".²⁶⁹ Because of the inability

²⁶⁸ Environment Canterbury Regional Council. Listed land use register. (2018)
<www.ecan.govt.nz>

²⁶⁹ Martyny J. "Methamphetamine Sampling Variability on Different Surfaces using Different Solvents" National Jewish and Medical Research Centre (June 2008) at [4].

to accurately test porous substances insurers are reluctant to provide cover for the replacement of chattels and soft furnishings in chemically contaminated homes.

When methamphetamine is consumed, damage occurs to hard and soft surfaces in a dwelling because methamphetamine is a crystal that vaporises when it is heated. The vapour that is emitted contains many highly poisonous chemicals that are absorbed by the surfaces and structural features of a property, such as curtains, walls, furniture and carpets. The issue in respect of these soft furnishings, less the walls, is that they are often unable to be properly tested. The word “properly” is used although a “bulk sampling” testing method is possible, it is destructive in nature and the results cannot be analysed in accordance with New Zealand’s standards and guidelines. The chemicals contained in the vapour are harmful to those in contact with them and can cause serious health consequences. Because the soft furnishings can not be properly tested, a conflict has arisen between owners and insurers as to whether or not such items require replacement. The property owner is unable to prove that such furnishings are contaminated with high levels of methamphetamine and chemical residues because they cannot accurately test them, yet science shows that soft and porous surfaces, such as polyurethane as described above in *McAlavey v Beachside Boys Property Management Limited*, absorb the chemicals more readily than hard solid surfaces. An insurer might argue that because the methamphetamine can not be easily transferred from the surface that has absorbed it, the risk to health is much lower. Attempts to test porous substances have shown that the transfers from that surface to other surfaces or onto humans that come into contact with those surfaces are unlikely. “Simply sitting on a chair in a methamphetamine-contaminated house may not impart much methamphetamine to the clothing of the individuals sitting on the chair. If vigorous wiping only results in a 1% transfer to the wipe, simply coming into contact with that surface should not result in much transfer at all”.²⁷⁰ However, carpeting

²⁷⁰ Above n 269.

may be somewhat different as vacuuming has been shown to result in a re-suspension of the methamphetamine from the carpeting. It is suggested that one of the most effective ways to decontaminate a dwelling is to strip out all the furniture, soft materials and chattels that have likely absorbed the methamphetamine and associated chemicals to avoid further spreading of the chemicals by hands, for example, over time. Depending on the level of contamination, the costs of doing this can be in the thousands. In some cases, the damage may be irreparable, and demolition may be the only option. Even so, a careless demolition of the property may leave the soil contaminated. It appears that unless specific cover for methamphetamine related damage is in place, the costs of any remedial or replacement works may not be covered by an insurer. Landlords and property owners need to be aware of this when selecting an insurance policy.

B. The Stigma Associated with Contaminated Property

In *Gibson Barron Realty Ltd v Naicker* the Tribunal considered that unless all trace of methamphetamine residue is removed, a stigma would likely attach to the premises which would then affect the landlord's ability to obtain new tenants.²⁷¹ "Stigma damages" were first awarded by the Tribunal in relation to a diminution of value on resale of the property where a stigma attached to the disclosure that the premises had formerly been contaminated with high levels of meth.²⁷² In *Boxabeers Family Trust v Bennett and New*, the Insurer covered the full costs of the remediation because the contamination levels were over the then-safe level of habitation of 0.5mcg/100m². The stigma was considered to have attached even though the property had been fully decontaminated. Damages were awarded because the lower sale price achieved was a reasonably foreseeable loss arising from the tenant's breach. In this case and

²⁷¹ Above n 74.

²⁷² *Boxabeers Family Trust v Bennett and New* 13/6146/MK, 29 January 2015; see also *Morton v Douglas Homes Limited* [1984] 2 NZLR 548 and *Lee v Napier City Council* [2010] NZWHT Auckland 8.

in *Gibson Barron Realty Ltd v Naicker* the stigma is not so much about the actual risk but more in respect of “people’s perceptions of risk and uncertainties about the property”.²⁷³ There may be some merit in people’s perception in these circumstances as if a property is not properly cleansed. For example, if the property is tested once freshly painted, the methamphetamine residue may seep back through. If the property were to be later re-tested methamphetamine level readings are likely to produce higher positive results. A recent article by Meth Safe confirmed that around 65% of the methamphetamine tests in various New Zealand regions will undergo painting of surfaces as part of the remediation process and, of that, 40% will come back with some level of contamination.²⁷⁴ The article confirms that “painting over methamphetamine is not an effective means of treatment because meth will bleed through the paint layers over an extended period and become detectable on the surface”.²⁷⁵ As the Tribunal has declined to award stigma damages for the loss of value on resale where the proof of loss was not established, it is clear that to successfully receive an award of damages in respect of stigma robust evidence must be presented.²⁷⁶ If such evidence may be produced should an Insurer then be liable for payment of damages for the economic loss associated. This is likely to come down to the specific wording of the landlord’s insurance policy.

Methamphetamine contamination in residential property is complex and, as described above, damage often extends beyond the walls of the dwelling. The case of *Buell* is an international example of ground contamination and the associated insurance arguments that arise. This case re-emphasises the importance of clear insurance policy wording to avoid ambiguity and

²⁷³ Above n 74 at [14].

²⁷⁴ Meth Safe “Painting over Meth Contamination: Another minefield for property owners” 23 June 2017 <www.methsafe.co.nz>.

²⁷⁵ Above n 274.

²⁷⁶ *Bentley v Baxter* 4080515, 24 July 2017; and *Barfoot and Thompson v Smedicus* 4024168, 29 September 2016 (proof of loss not established – stigma).

disputes. Because of the potential disposal of methamphetamine by-products into soil and drains the writer was surprised at the lack of input by organisations such as Environment Canterbury into development of New Zealand's standard NZS 8510.

In addition to contamination of land and drainage systems, methamphetamine residue is known to contaminate the surfaces of chattels within a dwelling. The contamination often spreads, but difficulty in testing soft surfaces makes evidence for the purpose of an insurance claim difficult to gather. The complexity of this area of the law is further demonstrated by the stigma that may attach to a property that is used for consumption or manufacture of methamphetamine. The stigma is likely to result in economic loss either at the time of on-selling the property or re-tenanting it. Despite remediation of the land, cleansing or replacement of all soft chattels and subsequent re-testing it is possible for a stigma to attach and a "drug-house" reputation to develop.

This section of the thesis is intended to highlight the complexity of the issues that stem from methamphetamine contamination. The overview of three areas: external land contamination; soft, porous chattel contamination; and damage caused by the attachment of a drug stigma to the contaminated property demonstrates why the formation of clear, targeted insurance clauses are essential. It also shows why further regulations are required which are specifically tailored to address chemical contamination in residential property.

Chapter Twelve – Housing New Zealand Corporation

Of all the landlords who face the issue of methamphetamine contamination, the greatest entity is the state. Housing New Zealand became an incorporated company pursuant to the Housing Restructuring Act 1992. It is a crown agency that assists with providing accommodation for New Zealand citizens in need. Housing New Zealand Corporation is required to “give effect to the Crown’s social objectives of providing housing, and services related to housing, in a business-like manner”.²⁷⁷ This service dates back to 1894 when the State advances Office was established.²⁷⁸ Richard Seddon introduced the Workers Dwelling Act 1905 that made New Zealand the first nation in the Western World to provide a social housing scheme. Although this Scheme ultimately failed in 1906, the idea has been refined and continues.²⁷⁹ Housing New Zealand Corporation was established as a Statutory Corporation on 1 July 2001 under the Housing Corporation Act 1974, as amended by the Housing Corporation Amendment Act 2001.²⁸⁰ Housing New Zealand Corporation has statutory obligations to display social and environmental responsibility, but at the same time it must also efficiently manage its assets, liabilities and the Crown’s investment.²⁸¹

In the context of the duty to maintain the premises in a reasonable and tidy condition the Tenancy Tribunal has established that there are no special privileges for Housing New Zealand tenants.²⁸² In *Tararo v Housing New Zealand* the District Court considered Housing New Zealand’s termination of a tenancy where the tenant had permitted the premises to be used for an unlawful purpose, contrary to s 40(2)(b) of the Residential Tenancies Act.²⁸³ The

²⁷⁷ Housing Corporation Act 1974, s3B(a).

²⁷⁸ “State housing agencies” Housing New Zealand <<https://www.hnzc.co.nz/about-us/state-housing-agencies/>>.

²⁷⁹ New Zealand Ministry for Culture and Heritage Te Manatu Taonga “2 – Suburbs – Te Ara Encyclopedia of New Zealand” <[en/suburbs/page-2](https://www.teara.govt.nz/en/suburbs/page-2)>.

²⁸⁰ Housing Corporation Amendment Act 2001 <www.legislation.govt.nz>.

²⁸¹ D Grinlinton *Residential Tenancies*: 4th edition, LexisNexis NZ Ltd, 2012, 2.3, at [21].

²⁸² *Morgan v Housing New Zealand Corporation* [10 January 2008] NZTT, Porirua.

²⁸³ *Tararo v Housing New Zealand Corporation* DC Porirua 07/853/PO, 17 March 2008.

Court held that a person enjoying a tenancy from Housing New Zealand does not obtain any special privileges in respect of complying with the terms of the tenancy.

This chapter considers the issue of methamphetamine contamination in the context of state housing. First, the duties of the landlord and tenants are considered, and the ability of Housing New Zealand to recover for damage caused by the tenants is examined. As mitigations for loss, the chapter considers MethMinder, an alarm system that alerts users to contamination. An issue that Housing New Zealand Corporation faces alongside landlords is also examined: the need to prove responsibility for damage. Finally, the chapter considers proposals for the implementation of a standard in excess of 15µg/100cm².

A. The Duties of Housing New Zealand and Its Clients

Housing New Zealand Corporation is New Zealand's biggest landlord, providing homes to more than 180,000 people.²⁸⁴ It describes its vision as being "the social housing provider of choice".²⁸⁵ However, these aspirations are threatened by the issue of contamination. Darroch Ball to the Minister for Social Housing asked on 1 April 2016: "How many Housing New Zealand tenants have had their house tested for methamphetamine contamination each year since 2008?". The Honourable Paula Bennett, as the Minister for Social Housing, replied by stating that Housing New Zealand has advised that it centrally records the number of properties that have tested positive for methamphetamine contamination in 2013-2014. Housing New Zealand advised that in 2013-2014 a total of 28 properties tested positive for methamphetamine contamination. In 2014-2015 this number rose to 229.²⁸⁶ Although this

²⁸⁴ Methamphetamine Contamination Housing New Zealand's Response (September 2018) at <www.hnzc.co.nz>.

²⁸⁵ Housing New Zealand Corporation *Annual-Report-2015-16.pdf* at [1].
<www.hnzc.co.nz/assets/Publications/Corporate/Annual-report/Annual-Report-2015-16.pdf>.

²⁸⁶ New Zealand Parliament. 3848 (2016). Darroch Ball to the Minister for Social Housing. www.parliament.nz accessed 8 September 2016.

answer fails to identify how many properties were actually tested, the data shows that Housing New Zealand rental premises are not excluded from the issue of methamphetamine contamination. Housing New Zealand Corporation's September 2018 report confirms the writer's view by stating that between July 2013 and May 2018, nearly 5000 Housing New Zealand properties were tested for methamphetamine contamination. About half returned positive test results in excess of the standards applicable at the time of testing.²⁸⁷ Further, Housing New Zealand Corporation's annual report for 2015-2016 states that "the largest proportion of its long-term vacant properties, 30 percent, were due to methamphetamine contamination and remediation."²⁸⁸ Housing New Zealand Corporation has identified a significant increase in 2014-2015, when eight percent of long-term housing vacancies were caused by methamphetamine contamination. Housing New Zealand Corporation states that over the period of 2012 – 2015 they have responded to an increase in the number of properties contaminated by methamphetamine manufacture and consumption. This increase has been attributed to a broader management focus on the issue and through improved detection by targeted testing of properties where contamination is suspected. The significant increase in the number of methamphetamine contaminated properties being attributed to a broader management focus on the issue was posed to Housing New Zealand Corporation. On 4 October 2017, a representative of Housing New Zealand Corporation responded, stating that they had seen an increase of contaminated properties due to a number of factors. These factors include an increased awareness of the dangers of methamphetamine use in its homes (as opposed to manufacture), improved processes for identifying contaminated properties, engaging better information sharing with other agencies, including Police, being more proactive toward testing, and specific training for staff to help them learn to identify signs of

²⁸⁷ Above n 286 at [16].

²⁸⁸ Above n 286 at [16].

methamphetamine use. Housing New Zealand Corporation have also identified the importance of other community members, such as neighbours, in assisting with the detection of potentially contaminated properties.

During the 2015-2016 period, Housing New Zealand Corporation reports spending over \$21 million on chemical testing, decontamination and remediation costs. 315 previously contaminated homes were able to be brought back into service, eight were demolished as the levels of contamination were so high that the properties could not be satisfactorily repaired.²⁸⁹ Housing New Zealand Corporation was asked whether or not its insurance covers chemical testing, decontamination and remediation costs in respect of its contaminated properties. Further, it was asked whether insurance covers lost rental income whilst the property is vacant due to methamphetamine contamination. Housing New Zealand Corporation responded to these questions by confirming Housing New Zealand Corporation self-insures against methamphetamine contamination in its properties, and therefore does not carry separate insurance. The full position of Housing New Zealand Corporation's insurance has been difficult to obtain. A relatively old article of 12 April 2013 stated that Housing New Zealand Corporation was unable to obtain private insurance for its properties in Christchurch for the insurance renewal period of 31 January 2011 to 31 October 2012. Specific EQC cover was put in place due to the lack of private insurance cover.²⁹⁰ If the proposed Residential Tenancies Amendment Bill (No 2) is enacted it is likely that Housing New Zealand Corporation's insurance information will become more easily accessible given that tenants may expect to receive a written copy of the premise's insurance policy.

²⁸⁹ Above n 286 at [21].

²⁹⁰ Nick smith \$320m HNZ insurance settlement welcomed dated 12 April 2013 <beehive.govt.nz> accessed 22 July 2017.

Housing New Zealand Corporation leases many homes from private owners and has an option to purchase should the owner wish to sell. These leased properties are used to provide state housing to those in need.²⁹¹ If Housing New Zealand Corporation is to buy a property that they already lease, and the same tenant has lived in the property then it will only test the property if it has suspicions in respect of possible methamphetamine contamination. Housing New Zealand Corporation has confirmed it exercises discretion in these situations. If the property was not tested at the commencement of the lease, it may be difficult to ascertain whether the damage was caused prior to the leasing or as a result of the actions of a Housing New Zealand Corporation Tenant. If the damage was caused by a Housing New Zealand Tenant, it would seem that Housing New Zealand Corporation must remediate the damage in accordance with the provisions of the relevant commercial lease agreement. Within this document Housing New Zealand undertakes to hand back properties at the end of the lease term free from contaminants, as defined in the Resource Management Act 1991.

The cost of a baseline test is relatively insignificant compared to the costs of decontamination. It is suggested that baseline testing be carried out as a matter of policy before purchasing any new properties. If a purchaser is to consider buying a former Housing New Zealand Corporation property, it is suggested that this also be, at minimum, subjected to a baseline test to ensure the dwelling is free from methamphetamine and chemical residue. Housing New Zealand Corporation has confirmed that, apart from currently leased properties where they exercise discretion, any new properties are always tested for methamphetamine contamination prior to purchase.

B. Housing NZC and MethMinder

²⁹¹ Above n 285 at [113]. As at 30 June 2018 HNZN leased 2426 properties from private owners.

MethMinder is a product that can detect the chemicals which are used in the manufacturing process of methamphetamine. In a media article of 10 August 2016, Housing New Zealand Corporation's programmes manager, Charlie Mitchell, was quoted as having said that the Corporation has investigated meth detecting devices but "these do not currently meet our needs". Housing New Zealand Corporation was asked more about this and why the MethMinder product was considered unsuitable for Housing New Zealand Corporation's rental properties. Housing New Zealand Corporation confirmed that products, such as MethMinder, pick up gasses emitted in the methamphetamine manufacturing process. Housing New Zealand Corporation believes that there is a greater prevalence of contamination due to methamphetamine smoking as opposed to manufacture and this is the key reason why it believes MethMinder, or similar products, were unsuitable for use in its properties. Housing New Zealand Corporation identified the following reasons why a detection device is considered unsuitable in its properties:

- Potential breach of tenant privacy
- False alarms
- High costs for the ongoing rental of the devices and for replacing damaged devices
- The ability for a tenant to tamper with the device.

Housing New Zealand Corporation has confirmed that it regularly and routinely investigates new technologies that could aid in the prevention of contamination of its properties, but re-emphasised that currently available methamphetamine detectors do not meet its needs.

In response to the above comments of Housing New Zealand, Miles Stratford, Director of MethMinder was contacted and his response to each of Housing New Zealand Corporations points is recorded as follows:

- MethMinder is targeting chemicals associated with methamphetamine manufacture. Concerns in respect of potentially breaching tenant privacy may be best dealt with by adjusting the tenancy agreement to cover this.
- The vast majority of alarm events are indicative of behaviour that is out of the ordinary. It is confirmed that false alarms have not been an issue across its client base.
- With volume, costs will reduce. It is confirmed that Housing New Zealand Corporation have not had a conversation in respect of volume discounts. If HNZN had chosen to engage, then Miles has confirmed it would have been possible to allow the development of technology to detect smoking of methamphetamine. It is confirmed that detection of smoking methamphetamine is technically possible.
- The MethMinder device includes anti-tamper technology and is backed up with testing to establish the status of the property at the time of installation. With active management of a property, other risk indicators would be taken in to account, such that if efforts to interfere were successful (not so far an issue we are aware of), then it would still be possible to identify the meth related behaviour).

MethMinder or a similar device is considered a good way of mitigating loss as it is intended to deter tenants from consuming or manufacturing methamphetamine from the outset. Housing New Zealand records in its September 2018 report that it spent around \$120 million on testing, decontaminating and reinstating methamphetamine affected properties between July 2013 and June 2018. Although its policy is to recover the costs of intentional property damage caused by tenants where possible, only a fraction of this amount, less than two

percent, was actually recovered.²⁹² Because of the low recovery rate from tenants, it is suggested that taking steps to deter tenants from causing the damage in the first place is a much better option.

C. Housing New Zealand Corporation and Proving the Cause of the Damage

Whilst perusing Tenancy Tribunal decisions involving methamphetamine contamination, the writer came across a 2016 decision of the Tenancy Tribunal where a tenant was ordered to pay \$19,481 after contaminating her Christchurch State Housing. The writer asked Housing New Zealand Corporation how they prove whether the current tenant caused the contamination if Housing New Zealand Corporation is not routinely testing the properties before and after each tenancy. Housing New Zealand Corporation was also asked if it was likely to change its policy on this. Housing New Zealand Corporation responded by saying that its current policy is to test a property when it has reason to believe that the property might be contaminated. It is suggested that this is too late. If Housing New Zealand Corporation has reason to believe that a property is contaminated, they will then need to prove that it was, on the balance of probabilities, the current tenant (or their guest) that caused the contamination. Housing New Zealand Corporation has stated that to determine if a tenant was responsible for methamphetamine contamination at the property, it contains evidence such as: the tenant admitting drug use in the property; Housing New Zealand Corporation staff finding drug paraphernalia at the property; and Police advising that the tenant has been convicted or has been charged with drug use. It is expected that Housing New Zealand Corporation would also consider it appropriate to test the property if the tenant were charged with other drug offences such as possession or supply. It would seem unlikely that a tenant would admit drug use. Secondly, if drug paraphernalia were discovered at the property, it would likely still be

²⁹² Above n 286 at [15].

necessary to prove ownership of such items. It may be possible that drug paraphernalia could have been left at the property by a previous tenant. *Hughes v BCRC Ltd v McEwen*, discussed above, is an example of a new tenant discovering drug paraphernalia in the garden which was left behind from a previous tenant. Given that the property in *Hughes v BCRC Ltd v McEwen* tested positive for drug contamination, Housing New Zealand Corporation would likely have considered that the tenant had caused the contamination. Housing New Zealand Corporation has said that if it is unsure whether or not a tenant used drugs in the property, or if there are any other considerations such as the impact on children, it may decide to rehouse the tenant on the condition that the new property is tested before the tenant moves in, and that the property will be tested again in several months. It is suggested that:

- i. Housing New Zealand Corporation baseline test all properties prior to the commencement of each new tenancy. In addition to providing a basis for determining when damage was caused, any current properties that are contaminated would also be detected and may be remediated to ensure there is no possibility of affecting the health and wellbeing of future tenants, their guests, and families.
- ii. Secondly, a query is raised in respect of Housing New Zealand Corporation's ability to enter the rental premises, during occupation by the tenant, several months into the tenancy if the tenant were not to agree. Under the proposed Residential Tenancies Amendment Bill (No 2) there would be regulations surrounding this and Housing New Zealand Corporation would have the right to do so. However, the entering of a tenant's property, as proposed by the bill, has been subject to controversy over whether this is a breach of the tenant's privacy. Given that Housing New Zealand Corporation has identified the presence of a MethMinder device as a potential breach of tenant privacy it would seem that the physical entry into the property and

subsequent testing for chemical residue would be a further and more significant breach, especially if the tenant were to refuse permission for the testing.

- iii. Finally, it is suggested that if the tenant is suspected of having contaminated the first rental property, rehousing the tenant and re-testing the new property in several months may simply result in the contamination of two Housing New Zealand Corporation properties by the same tenant. This may then result in significant expense to Housing New Zealand Corporation in remediating any damage and decontaminating the property. Even if the Tenancy Tribunal were to order that these expenses be payable by the Tenant, it is doubted how successful Housing New Zealand Corporation may be in actually obtaining the money from the Tenant. In the interim Housing New Zealand Corporation is likely to have another property out of service.

Housing New Zealand Corporation has confirmed that it has no plans to begin routinely testing all its properties between tenancies. This is likely due to the factors discussed above in respect of the MethMinder device and due to the associated expenses. Following the release of its September 2018 report²⁹³ it has become clear that HNZN will only test on suspicion and baseline testing between tenancies will not be implemented.²⁹⁴ Housing New Zealand estimate the potential costs to baseline test all vacant properties to be as high as “\$21.2m per annum, including the cost of lost rental income. Baseline testing would also result in increased decontamination and reinstatement costs, estimated to be between \$9 million and \$10 million per annum”.²⁹⁵ The writer considers, firstly, that there would unlikely be any lost rental income given that this statement is referring to vacant properties and secondly, there would be increased decontamination costs only of the properties were found to require such cleansing. This statement by HNZN appears to imply that it would rather remain ignorant of

²⁹³ Above n 285.

²⁹⁴ Above n 285 at [43].

²⁹⁵ Above n 285 at [44].

the damage and possible health consequences than test the properties and appropriately remediate the damage to ensure the property is compliant with legislation and not posing a risk to the health of future tenants and their guests.

New Zealand's methamphetamine standard, NZS 5810 2017, sets out a framework for validating different testing products on the market and HNZN believes that in going forward some of these products may be cost-effective for it to use. Housing New Zealand Corporation has said that it will review these products as they become validated and assess them to see if they meet its needs.

As identified above, it is suggested, and evidence has confirmed, that there is a significant issue in actually obtaining money from the former tenant for remediation of damage caused during a tenancy. Housing New Zealand Corporation has said that it charges the costs of testing and decontamination to tenants where there is sufficient evidence that they contaminated their property. An order for the tenant to pay is obtained through the Tenancy Tribunal, and the tenant is given the opportunity to make a repayment arrangement. Housing New Zealand Corporation has confirmed that where no repayment arrangement is reached, the debt is referred to a collection agency. Housing New Zealand Corporation accepts that there are challenges to recovering money from ex-tenants. It has said that The Residential Tenancy Act requires it to apply to the Tenancy Tribunal no later than sixty days after the end of a tenancy. Housing New Zealand Corporation has said that in its experience it can take "some time to test and decontaminate a property, and this makes it difficult to establish costs within the required timeframe". It is suggested that as part of the Residential Tenancies Amendment Bill (No 2) this timeframe should be reconsidered or a quotation accepted by the Tenancy Tribunal as sufficient. Housing New Zealand Corporation have said that, in addition, if costs are established it is required to obtain a current address for the ex-tenant as part of its application to the Tenancy Tribunal. Housing New Zealand Corporation has said that it is

often unable to locate the ex-tenants to confirm an address for service. In response, it is suggested by the writer that either:

- i. Housing New Zealand Corporation, and any other residential landlord, may insist on obtaining a guarantor's physical address which the tenant may have confirmed as part of the tenancy agreement as being acceptable for service. It is accepted that obtaining a guarantor's physical address may not be possible for all tenants given a lack of familial support and often varied social circumstances; or
- ii. Given the prevalence of technology it may be possible for the tenant to confirm service by way of email. At the commencement of the tenancy the tenant may agree to accept electronic disclosure, such as of Housing New Zealand Corporation's insurance information pertaining to the property as will likely be required under the Residential Tenancies Amendment bill (No 2) if enacted, any methamphetamine test results if a test has been undertaken in respect of the property previously, and to accept the service of any documents electronically. If the tenant does not have a personal device available with access to internet they may visit a local library or internet café to obtain access. It may be a requirement of the tenancy agreement that the tenant agrees to check emails weekly or upon notification by Housing New Zealand Corporation that an email has been sent.

Research shows that illegality of a particular drug is rarely taken into consideration by individuals considering whether to use that drug.²⁹⁶ For this reason, regulation and a more general health-based approach as opposed to legislation is likely to be more effective. In

²⁹⁶ Australian Institute of Health and Welfare, '2010 National Drug Strategy Household Survey Report', (Drug Statistics Series No 25, Australian Institute of Health and Welfare Canberra, July 2011) at [168].

accordance with the writer's views of a more health-based approach, in going forward Housing New Zealand Corporation intends to abandon its "zero-tolerance approach" to drug use within its properties. It has now "introduced pre-placement interviews to allow Housing New Zealand to better understand the tenant's situation and to match them to a property that meets their needs. This also provides an opportunity to identify other information that could be useful, for example if the applicant has mental health needs or is working with Probation Services or Corrections." In addition, it has "stopped ending tenancies for methamphetamine contamination, except in cases where the drug was being manufactured at the property", it has "stopped suspending tenants" and has "employed additional tenancy managers, including intensive tenancy managers, who will work with individual Housing New Zealand tenants who are most at risk of losing their tenancies, and tenants who need additional support."²⁹⁷

D. The implementation of a standard in excess of 15µg/100cm²

The above steps by Housing New Zealand initially appear to demonstrate its willingness to amend policy and to act in the best interests of the tenant. However, in addition to the above actions and the 2018 policy review briefly described above, Housing New Zealand has implemented its own standard of 15µg/100cm² or higher. This standard is based on Sir Peter Gluckman's report "Methamphetamine contamination in residential properties: Exposures, risk levels, and interpretation of standards", was released on 29 May 2018. This less conservative standard is being implemented by Housing New Zealand despite NZS 8510, which was released in June 2017 after committee input from HNZC. This means that Housing New Zealand will not rehouse tenants or cleanse a property if it is not contaminated in excess of 15µg/100cm². This is likely to be of concern to tenants that have not caused contamination but are found to be living in a contaminated property. These tenants are unlikely to be

²⁹⁷ Above n 285 at 44.

rehoused nor will HNZN cleanse the property unless contamination levels exceed its own standard of 15µg/100cm². This is a great leap from the Ministry of Health's former 0.5µg/100cm² guideline and well above the current standard of 1.5µg/100cm². The implementation of a threshold of 15µg/100cm² fails to align with Housing New Zealand Corporations policy of putting the well-being of tenants first and appears predominantly aimed at reducing expenditure. This high standard does not align with international standards, guidance or best practice and it fails to address health claims made by those living in contaminated property. International toxicologists have commented on their inability to reach the numbers in Sir Peter Gluckman's report using standard risk assessment practices and models. NZS 8510 has been reviewed and found to be free of any undue influence.²⁹⁸ The same, to date, may not be said of Sir Peter Gluckman's report and subsequent standard. Adding a further element of inconsistency is the remediation of leased properties to a standard below 1.5µg/100cm² upon the expiration of the commercial lease agreement. Although this is a fascinating consideration, the key here is that neither standard is law. Both standards offer guidance which may be interpreted and implemented as different agencies see fit.

Summary

Housing New Zealand Corporation faces similar problems to private landlords. Research shows that HNZN has been experiencing the effects of methamphetamine contamination in many of the properties it manages. An analysis of its various policies over the years show different social trends and methods of responding to this issue. Varying standards are likely to create further inconsistencies in decisions of the Tenancy Tribunal and Courts. It is

²⁹⁸ Ministry of Business Innovation and Employment "Independent review finds meth standard not improperly influenced" 20 September 2018 at <www.mbie.govt.nz>.

suggested that this area requires health-based further research and ultimately incorporation into legislation to ensure that New Zealand's most vulnerable really are protected.

Chapter thirteen – Recommendations for effective Reform

“Landlords are evicting tenants, insurance premiums are rising, and property owners are spending tens of thousands of dollars on decontaminating houses at levels so low the risk to human health is neither appreciable nor quantifiable”²⁹⁹

This thesis has argued that amendments should be made to the Residential Tenancies Act that address contamination in property. The Residential Tenancies Amendment Bill (No 2) is tailored well to address the issue but should be broadened to include all forms of contamination to ensure it remains useful and effective long-term.

The methamphetamine standard is offered up as a significant tool in dealing with methamphetamine contamination. However, guidance is insufficient for an issue with significant health and socio-economic effects. Legislation is required to reinforce the rights of landlords and tenants in this area, enabling clear and consistent application of the standard.

Standards New Zealand has made determining the existence of contamination easy by prescribing a national standard of 1.5ug. The standard is controversial, having been described as being set at a “conservative level”,³⁰⁰ far below where you could expect to see health issues as a consequence of exposure.³⁰¹ However, the risks vary depending on the person and are, for example, greater to those that are pregnant. A study has shown significant risk factors that apply to pregnant women because methamphetamine will cross the placental barrier and adversely affect the developing foetus. Studies have shown that exposure to methamphetamine in pregnant women is associated with lower gestational age and birth

²⁹⁹ Nick Kim in Maria Slade’s “The great meth testing scam” The Spinoff 2018 <<https://thespinoff.co.nz>> 27 September 2017.

³⁰⁰ Above n 299, per Jackie Wright.

³⁰¹ If a property tests positive for meth at 1.5 micrograms per 100 square centimetres it will meet the definition of contaminated. In perspective, this is approximately 300 times lower than the minimum dose of amphetamine given to children to treat attention deficit hyperactivity disorder in the United States of America.

weight which may then contribute to neonatal morbidity and mortality.³⁰² It has been shown that ceasing exposure to methamphetamine at any time during pregnancy improves birth outcomes.³⁰³ This example shows the importance of a low, safe, standard of baseline testing to ensure that inadvertent harmful exposure is prevented. The arguably conservative New Zealand standard of 1.5ug is useful in terms of making an insurance claim for remediation as if a property exceeds the standard the owner is likely able to make a claim to ensure chemical residue levels are safe for the occupants, particularly pregnant women or those suffering other underlying health issues which may be triggered by the chemical residue. Tenancy Tribunal Adjudicators have been seen utilising the standard. This is resulting in greater consistency in determinations of contamination disputes.

The recent release of Sir Peter Gluckman's report and the implementation of a standard of 15µg/100cm² by Housing New Zealand is contrary to the comments above. It is suggested that this is a cost-saving standard and is not in the best interests of New Zealand families. This standard fails to address records of people getting ill from living in houses that test positive for low levels of methamphetamine residue and requires independent assessment and is likely to cause greater inconsistency in decisions of the Tenancy Tribunal and Courts. The great disparity in the standards proposed creates uncertainty for tenants looking to end tenancies, landlords looking to evict tenants, and insurers assessing methamphetamine contamination claims.

The Residential Tenancies Amendment Bill (No 2) provides no right to end a tenancy if the methamphetamine residue tested is below the standard. Therefore, the standard must be reasonably low to protect the health and safety of tenants. Some people are likely to be more

³⁰² Tricia Wright, Renee Schuetter, Jacqueline Tellei, Lynnae Sauvage "Methamphetamines and Pregnancy Outcomes" at discussion J Addict Med. 2015 Mar-Apr; 9(2): 111–117. <www.ncbi.nlm.nih.gov/pmc/articles>.

³⁰³ Above n 285 at summary.

vulnerable to the effects of meth exposure, including the elderly, babies, pregnant women, and those already suffering from a pre-existing health condition. However, the standard must not be so low as to create unnecessary remediation due to the costs. The lower the standard the more insurance claims are likely to be made. This will, therefore, likely result in greater increases in insurance premiums.

This standard is not legally enforceable. However, it does provide useful guidance for landlords, tenants and tenancy tribunal adjudicators. Despite the guidance provided by the methamphetamine standard, uncertainty remains for tenants and landlords in respect of liability for contamination and the eviction of tenants for suspected contamination. There also remain the risks of tenants negating a tenancy in contaminated property, privacy aspects of testing during a tenancy and devices such as MethMinder. Consequently, uncertainties remain in this area if there is no reform. This may have a significant impact on the lives of tenants' and landlords' in ensuring they protect their investments.

The purpose of this part of the chapter is to discuss and explore solutions that could work alongside the standard, NZS 8510, to provide a more comprehensive remedy for tenants and landlords in the future. The options for reform are submitted with the advantages and disadvantages of each canvassed. Finally, a recommendation is made as to which could work best to create certainty and the effective use of the standard.

A. Solutions to Meet the Parties' Needs

(a). Option one: The legislation – proposed Residential Tenancies Amendment Bill (No 2).

*“As well as formalising the standard, the proposed Residential Tenancies Amendment Bill will allow landlords to evict their tenants on just seven days’ notice if the house tests positive at the magic new 1.5 cut-off point.”*³⁰⁴

One aspect of the proposed bill that requires discussion and consideration to determine if it would be a suitable solution is that of rights in respect of termination tenancies. There is a fear among tenants that if the bill is enacted it may provide scope for a landlord to trigger eviction with a short notice period if contamination is discovered at the rental property. However, the bill restricts the tenancy termination provisions to cases where testing has been undertaken in accordance with the regulations and where testing has confirmed chemical contamination is in excess of the levels set by the standard.

The bill provides that a landlord who enters a property for the purpose of carrying out methamphetamine testing in accordance with the regulations must notify the tenant of the results within seven days of receiving the results. This essentially provides the tenant with further notice of the possibility of contamination and that the tenancy may be ended. The tenant is advised of the potential issue of chemical contamination when the landlord requests that the property be tested and the tenant may take this opportunity to then begin considering possible alternative accommodation arrangements in the event that the testing returns positive results. From a common-sense perspective, it would seem unlikely that a landlord would disturb a tenant during a tenancy to undertake testing without reasonable evidence to suggest previous contamination or that the current tenant may be contaminating the premises. This should then be enough to give the tenant notice of the issue.

³⁰⁴ Maria Slade “The great meth testing scam” <www.thespinoff.co.nz> 27 September 2017.

This fear is apparently arising because the landlord does not have to provide alternative accommodation for the tenant, nor does the landlord have to enter into a new tenancy agreement with the tenant following remediation of the property.

The current legislation provides for termination of tenancies where the rental premises are methamphetamine-contaminated. A landlord or tenant may apply the s 59 or s 59A provisions in the Residential Tenancies Act to terminate tenancies. Section 59 of the Act provides landlords and tenants with the power to terminate a tenancy on short notice if, except as a result of a breach of the tenancy agreement, the rental premises are destroyed, or are so seriously damaged as to be uninhabitable. In these circumstances the landlord may give seven days' notice and the tenant may give two days' notice to end the tenancy. Similarly, in accordance with s 59A, a tenancy may be terminated on short notice if, as a result of a breach of the tenancy agreement, the premises are destroyed or are so seriously damaged as to be uninhabitable. If they are not in breach, the landlord may, in these circumstances, give seven days' notice and the tenant may give two days' notice.

It is suggested that the bill, if enacted, will provide for greater clarity in respect of responding to methamphetamine and chemically contaminated property. It is anticipated that the bill will provide for increased certainty and will ensure that the standard is utilised, and regulations followed. The bill is considered a much-needed addition and compliment to the current Residential Tenancies Act.

(b). Option two: Drug-testing social housing tenants

This is controversial and has been seen to fluctuate in and out of the media for many years. However, it is suggested that this would likely have an impact on reducing methamphetamine consumption. Housing New Zealand Corporation may be in a position to better protect state

assets if able to test its tenants for methamphetamine and to utilise legislation to this effect. There must be controls in place to ensure that there were no breaches of privacy and basic human rights. It would seem unrealistic to allow landlords to require drug testing of all prospective tenants due to cost. A reduction in the consumption and manufacture of methamphetamine creating chemical contamination, particularly in HNZN properties, is required and this may be one step towards achieving it. This thesis does not wish to consider the ethical arguments for and against the drug testing of prospective tenants. The writer is aware that this is not a new proposal and that it is highly controversial. However, if such legislation were to be enacted it may contribute positively towards a reduction in methamphetamine in rental accommodation, specifically HNZN properties. This suggestion is contrary to Housing New Zealand's 2018 policy amendments which include the abandonment of its "zero-tolerance" approach to drug use within its properties.

It is considered that the drug testing of prospective tenants as a final step of their tenancy application allowing them to rent a state-owned property may actually cause further homelessness and issues, especially for vulnerable children involved. From a health perspective, living in a methamphetamine-contaminated property is unsafe if the chemical contamination exceeds the guidelines. Housing New Zealand has implemented a standard of $15\mu\text{g}/100\text{cm}^2$. If a parent was to fail a drug test, hypothetically making them ineligible for residence in a state-owned property, the family may be unlikely to afford other unsubsidised accommodation. This could result in homelessness. With family welfare in mind, therefore, Housing New Zealand does not evict or suspend tenants, but encourages them to seek help. It is possible that the mental and physical health effects of homelessness are equal, if not worse, than living in a contaminated property. It is hoped that Child Youth and Family, or a similar agency, would intervene and work with the offending parents to eliminate the addiction and help create a safe environment for the upbringing of children.

*“The illegal manufacture and use of the drug methamphetamine is a significant contemporary social issue in New Zealand. It is important that we understand how this drug can pose a serious risk to children and young people, their parents/caregivers and unborn infants so that appropriate interventions can be put into place”*³⁰⁵

In considering the reality of this issue and the wider effects of drug testing beneficiaries, the New Zealand Police and Oranga Tamariki Joint Standard Operating Procedures for Children and Young Person in Clandestine Laboratories were considered.³⁰⁶ This document provides the overarching process for Police and Child, Youth and Family partnership in response to child abuse that may constitute a criminal offence. The documents offer a good example of the Police and Child, Youth and Family working together to investigate criminal offending while ensuring that children and young people caught up in such situations are kept safe. The joint standard is intended to ensure timely, coordinated and effective action by Child, Youth and Family and Police so that:

- children are kept safe;
- offenders are held to account wherever possible; and
- child victimisation is reduced.

³⁰⁵ Oranga Tamariki Practice Centre “Methamphetamine” (14 November 2013) <<https://practice.orangatamariki.govt.nz>>.

³⁰⁶ New Zealand Police and Child, Youth and Family (A service of the Ministry of Social Development) “Child Protection Protocol: Joint Operating Procedures” (September 2016).

Two examples of neglect, as described in the Joint Standard, are applicable to this thesis.

These are:

- a. allowing a child to be exposed to the illicit drug manufacturing process; and
- b. allowing a child to be exposed to an environment where volatile, toxic, or flammable chemicals have been used or stored.

These examples of neglect and the safety of children present in clandestine laboratories are expanded and discussed in more detail in the Standard Operating Procedures – CYP in Clandestine Laboratories.³⁰⁷

The third principle recorded in the joint standard is to “promote the wellbeing of children by working together with other agencies, the community and their whanau.” This principle is demonstrated positively by recording “when a clandestine laboratory is located the Police will inform the District Council. A Council approved remediation must be completed before the child or young person can be considered for return to the clandestine laboratory address”.³⁰⁸ It is suggested that this principle could be better implemented with regard to other agencies to ensure a more efficient, consistent and effective use of state resources.

(c). Option three: Greater controls on precursor substances, such as pseudoephedrine.

“Experience from other jurisdictions suggests that restrictions on the domestic availability of pseudoephedrine translate into reductions in the number of

³⁰⁷ New Zealand Police and Child Youth and Family and District Health Boards “Joint Standard Operating Procedures for Children and Young Persons in Clandestine Laboratories” (6 December 2016).

³⁰⁸ Above n 296 at [24].

clandestine laboratories discovered. Given the high societal cost of such laboratories, this would be a public good.”³⁰⁹

Pseudoephedrine and ephedrine are precursor substances that form the basis of methamphetamine. Both substances are scheduled as controlled drugs in the Misuse of Drugs Act 1975. International examples of a positive correlation between greater controls on precursor substances are positive. This is not a new idea, having been raised in the past and considered by Professor Peter Gluckman in 2009. This is likely an effective control and method of reducing the diversion of these substances and subsequent extraction of the chemical and manufacturing of methamphetamine. Studies show that methamphetamine is seldom imported, as opposed to plant-based drugs, and more often home-made in clandestine laboratories. The issue at the crux of this thesis is the home-made clandestine laboratories that contaminate residential property. It is arguable, however, that greater controls on precursor substances will result in greater importing of the substance from overseas. While this is beneficial in terms of reducing the prevalence of clandestine laboratories in residential properties, contamination is still likely to result from the consumption of methamphetamine. This will likely have little positive effect on the associated health costs. It may also create a bigger issue for Customs.

While discussing the focus of my thesis at a social event, the writer heard of a person's experiences where they were required by a family member to frequently visit many different pharmacies to purchase cold and flu medications which contained pseudoephedrine. This person was paid to do so and, although it was never directly disclosed, it was believed that this was for the purpose of manufacturing methamphetamine. This is an example of “pill

³⁰⁹ Office of the Prime Minister's Science Advisory Committee, Professor Peter Gluckman “Consideration of reduction of access to, or elimination of, pseudoephedrine in ‘cold and flu’ preparations” Report to the Prime Minister (30 July 2009) at [2].

shopping”. Pill shopping is now much less successful given the reclassification of pseudoephedrine as a Class C controlled drug (Schedule 3 of the Misuse of Drugs Act 1975). Pseudoephedrine was reclassified from Pharmacy Only to Prescription Medicine Controlled Drug class C5 in 2004. Finally, it was made a class B2 drug, increasing the penalties for illegitimate possession.

Evidence from other jurisdictions suggests that restricting access to pseudoephedrine results in a reduction in the number of meth labs discovered. As an example, Queensland Australia, has introduced a pharmacy-based programme to eliminate pill shopping. Queensland’s Project STOP has reportedly resulted in a 39% decrease in the number of clan labs identified.³¹⁰ The level of diversion of domestically obtained pseudoephedrine for illegal purposes is considered significant by New Zealand Police, and therefore greater controls on pre-cursor substances is likely to help reduce the quantity of clandestine laboratories in residential property in New Zealand.³¹¹

It is thought that the majority of pseudoephedrine used in the manufacturing of methamphetamine is illegally imported into New Zealand. Customs is increasing its capability to deal with methamphetamine and precursor trafficking at the border. Customs is working to minimise the trafficking of the drug into New Zealand and the pre-cursors substances through Customs’ Methamphetamine Campaign Plan 2016–2020.

The state of Oregon in the United States has imposed successively more restrictive regulations on the sale of pseudoephedrine, culminating in a switch to prescription-only in 2006. This has not affected methamphetamine-related harm, as reflected in the number of deaths from use of the drug, which has increased steadily from 1998 to 2008. However, according to statistics

³¹⁰ Above n 309 at [18].

³¹¹Ministry of Health “Misuse of Drugs Amendment Bill” (March 2010).

from Oregon State Police and Oregon State Medical Examiner, the number of clandestine laboratories discovered in the state has reduced markedly, from a peak of 473 in 2003 to 21 in 2008.

A consideration of Project STOP (Queensland, Australia) was undertaken by the writer. However, given word constraints and the omission of most Australian material this too has not been included.

(d). Option four: Baseline testing

It has become evident that once methamphetamine testing establishes a positive result that exceeds current standards, the question then arises as to when and how the damage came about. Baseline testing removes any doubt and may be a relatively economic safeguard for landlords and insurers.

(e). Option five: Detection devices

MethMinder other similar products could be made mandatory in state owned rentals. Although there are costs involved in installing and monitoring these products, they could be beneficial due to the deterrence factor and long-term savings. Detection devices are useful in that they do not provide time for the levels of contamination to escalate. Although contamination occurs from a single cook of the drug, the levels of chemical residue are likely to increase and build up over time. Detecting the manufacture of methamphetamine early is likely to result in less damage to the property and lower remediation costs. Whilst some private landlords may choose to utilise this option, given Housing New Zealand Corporations recent policy changes, it is unlikely that it will. Landlords should be aware that these products exist and consider installation, particularly if they have suspicions in respect of tenants. An example of where this sort of product may have been useful is the case considered by the

Ombudsman where a Purchaser left the former owner in possession of the property until her return from overseas. Should she have had any concerns, installation of a MethMinder may have acted as a deterrent to drug manufacturing in her property. It is suggested that Insurers may also use this sort of device when considering an insurance application for a client whom may have disclosed methamphetamine related convictions.

(f). Option six: Tenant interviews

Following various informal discussions with landlords, the possibility of visiting and meeting with prospective tenants in their own homes prior to agreeing to rent the property to them may be time well-spent in the long term. Although significant time will likely be involved, an interview provides a prospective landlord with the opportunity to consider the state of the tenant's former property and to look out for signs of methamphetamine consumption or manufacture. Housing New Zealand Corporations introduction of "pre-placement interviews" are an example of this suggestion in action. Because this policy is relatively new, it will be interesting to see how effective these pre-placement interviews are in the long term and how they are managed and developed in the future. It is considered that these in-home tenant meetings could be an insurance requirement and part of the landlord completing all due diligence requirements. It is acknowledged that there are possible restrictions in many areas, such as where families and prospective tenants are moving to a new area (geographical restrictions), homelessness and prospective tenants, usually younger, who are moving out of their former family home. There may also be privacy issues where other co-residents of the former dwelling do not agree to the new landlord visiting the property. It is identified that there may also be issues where people may reside with others with low cleanliness standards. Prospective tenants looking to remove themselves from that environment may be

disadvantaged. While it may prove beneficial in some situations, it is considered that in reality many barriers present themselves and it is unlikely to be effective in many circumstances.

(g). Option seven: Trial periods

As in employment where there are often 90-day trial periods, it was considered that there may be a similar trial period in rental accommodation. However, upon reflection the idea was soon to be dismissed due to the disadvantages. The obvious downside to this idea is the need for security of housing and instability this would likely create for families. Moving to a new house is often very stressful. Fear of failing a trial period would create added stress and uncertainty for tenants. This idea also fails to provide any assurances for landlords that the property would be maintained in the long term. It is likely to result in tenants making a special effort for the first “trial period” only. For the reasons specified, this idea was quickly dismissed by the writer.

(h). Option eight: Complete lists of tenants.

It is essential that the landlord obtains the names of all residents and ensures that everyone residing in the property is a party to the Residential Tenancy Agreement. Various landlords in informal discussions have mentioned tenants who only record the name of a partner if they themselves have Tenancy Tribunal records. It is suggested that landlords and property managers need to be more stringent when commencing a tenancy, making sure all tenants are party to the lease. It is also considered that perhaps Insurers should insist on greater restrictions in respect of sub-letting property and the renting out of rooms individually. This suggestion would also allow future landlords to search Tenancy Tribunal records and for the data available to show disputes tenants have been involved in in the past.

(i). Option nine: Raising contamination standards.

New Zealand's Standard 8510 sets, what is considered by many, a low and conservative level of acceptable chemical contamination in residential property. It is possible that the standard is too low. While many insurers believe the 1.5 standard is too conservative, it appears they have accepted that it is better than they had before when comparing it to the former 0.5 Ministry of Health guidelines.

Housing New Zealand Corporation has acted in response to consideration that the standard is too conservative and, as previously discussed, it has implemented its own much higher standard. It is suggested that further research and testing be carried out and a standard, perhaps somewhere in the middle, be developed. This standard needs to extend beyond mere guidance and reference should be made to it in legislation to enable clear, consistent application. The writer is not suggesting that the specific level be referred to in the legislation as this is likely to develop and change over time.

(i). Option ten: Increasing insurance premiums to cover risk.

Insurance Council operations manager Terry Jordan has commented that “insurance claims for the remediation of meth-contaminated properties have shot up from a handful each year to currently over a hundred a month”. In response to this significant increase in claims, “insurers have done what they always do and limited their liability. Whereas once property owners could claim for their total losses, now most insurers cap their cover for meth-related damage to between \$25,000 and \$30,000. Homeowners are also now lumbered with increased excesses and higher premiums.” Whilst there is a risk that Insurers may increase premiums to cover this additional risk, there do not appear to have been many complaints of this to date. It is suggested that provided Insurers make contracts clear and unambiguous, landlords may shop around and ensure they take out a policy which best meets their needs. An ideal policy

would balance the landlord's due diligence obligations and responsibilities with the price of the premium, reasonable excess and capped cover that is realistic if the cleansing and remediation of a property and land should be necessary.

Summary

When considering effective reform solutions to target the issue of methamphetamine contamination in residential property it became clear that the complexities which arise make it impossible for a single option to fix the problem. Although methamphetamine contamination may arise from a single smoke or cook of the drug, the various issues which surround and stem from it make options for reform difficult. It is suggested that the options described above are likely to aid in reducing the levels of contamination and in making sure that where contamination occurs it is dealt with appropriately, efficiently and consistently. The health, well-being and privacy of tenants must be balanced against the risks and potential costs incurred by landlords and insurers.

Conclusion

Investigations throughout this thesis aim to address three key questions as described in the introduction. Firstly, *why is methamphetamine a complex issue from an insurance perspective?* Secondly, *what legislation and guidance does New Zealand currently have in respect of methamphetamine contamination and what amendments could be made to improve and develop this area of property and insurance law?* Thirdly and finally, *what can be done to mitigate loss?*

A basic principle of New Zealand insurance law is that an insured may not recover for deliberately caused loss. Although contamination damage caused by the consumption or manufacture of methamphetamine requires a deliberate action, there are exclusions to the rule which may permit recovery in some situations.

The Insurance and Savings Ombudsman has reviewed many complaints in this area, where claims have been declined by insurers. The Ombudsman has called for greater consistency in the process of responding to claims made in respect of damage caused by methamphetamine. Insurers have responded by clarifying policy wording and creating caps on cover to limit their liability.

An example of the complexity of the insurance issues which arise in a methamphetamine context is demonstrated by a consideration of recovery in the context of soft furnishings and items which are unable to accurately tested for the chemical residue, and for the spreading of contamination away from the place where the damage originated. Methamphetamine Sampling Variability on Different Surfaces Using Different Solvents confirms that:

“porous surfaces such as unpainted drywall, unpainted wood, carpeting, and clothing will have very poor recovery of any methamphetamine present. Recovery rates will

be less than 10% and, in many cases, less than 1%, regardless of the solvents utilized. Therefore, if these surfaces are sampled to determine methamphetamine contamination levels, even low levels of methamphetamine should suggest much higher contamination than would samples taken on non-porous surfaces”.

Balancing the rights and obligations of the landlords against those of tenants, which appear more often than not to be the cause of the contamination, has not worked in the past. It has led to inconsistency in the ability to recover under various insurance policies and left many landlords in a position where they must cover the cleansing costs personally. The complexity is further exacerbated by a consideration of how the loss is to be categorised and assessed by Tribunal Adjudicators. A consideration of the loss caused by others in respect of drug stigma is then considered. Although this does not appear to feature prominently in New Zealand case law it has been raised internationally. Damages have been awarded for loss caused as a result of the stigma associated with methamphetamine contamination in the residential property where loss was caused. The case of *Boxabeers Family Trust v Bennett and New* provides a useful example of this.

New Zealand legislation has proved to be malleable in the past, and the introduction of the Residential Tenancies Amendment Bill (No. 2) would provide for specific legislative amendments tailoring parts of the Act to deal with contamination in property. The proposed legislation is expected to create a starting point to assist Judges and Tribunal Adjudicators in their decision-making process. Further, it would likely prove useful in ensuring tenants and landlords are aware of their rights and obligations whether there are suspicions of contamination or where testing shows contamination to be present.

Issues regarding the standard of acceptable levels of methamphetamine in residential property have been advanced by the development of NZS 8510, but this standard must not remain

stagnant and as new information, particularly in respect of the effects of the chemicals on human health becomes available, it must be updated. There appears to be few current restrictions and qualifications required to undertake professional methamphetamine testing. Research has highlighted concerns given the potential for a conflict of interest to arise, often where there are links between the testing and subsequent decontamination services to be provided.

There do not appear to be many legal experts specialising in the insurance implications of chemical contamination in residential property. However, as knowledge of the issue is growing it appears that more insurance companies, finance providers, property managers and real estate agents are responding.

While there are similarities between the laws and regulations in the United States and Australia, so that lessons learned during the development of their policies and regulations can be helpful, the issues are not identical. Further, as they vary by state the international laws and regulations cannot be directly applied in a New Zealand context. Our insurance and existing legislation are unique to New Zealand. Commercialisation of methamphetamine testing, based on NZQA regulations, ethical considerations and New Zealand's specific case precedents calls for developments in this area which are specific and tailored to suit New Zealand.

Methamphetamine contamination involves serious commercial interests, with a commercial potential worth that extends beyond testing and decontamination. In terms of mitigating loss, this thesis has identified that some major New Zealand finance providers are more proactive in protecting themselves and their clients than others. Greater development in this area would have a positive effect on reducing loss suffered from an economic perspective. Communication between government agencies such as Environment Canterbury, District

Councils and Police is happening. However, policy should be developed to ensure communication is consistent, discussions are well-recorded and important information is available to prospective purchasers and landlords while respecting privacy rights. The installation of devices such as MethMinder are considered and it is hoped that as technology advances such devices may be installed, particularly in rental accommodation, to detect methamphetamine manufacture and to hold a specific tenant accountable for insurance purposes.

As mentioned in Chapter one, New Zealand is considered to have a “unique problem with methamphetamine” linked to the ease of availability of precursor substances. It is recognised and accepted that people need to be able to obtain effective pain relief when necessary. However, it is suggested that the purchase of drugs commonly used in the manufacture of methamphetamine, commonly known as precursor substances, be more difficult to obtain and sold with greater restrictions. In considering this recommendation, guidance was sought from pharmaceutical department of the State of Michigan, United States. Without taking too much of a criminal law detour, it is known that synthetic drugs such as amphetamines tend to be produced in or near their consumer markets, often in clandestine laboratories. At the crux of this thesis is the tendency of these clandestine laboratories to be located on residential property. When compared to plant-based drugs such as cannabis, heroin and cocaine, amphetamines are less commonly the subject of transcontinental trafficking activities. This, however, is not considered true for their precursor chemicals, especially ephedrine and pseudoephedrine, commonly used for methamphetamine production, and 1-phenyl-2-propanone (P2P, or benzyl methyl ketone, BMK). These chemicals are commonly used to produce amphetamine and may also be used to manufacture methamphetamine.³¹² It is

³¹² Above n 4 at [10].

suggested that New Zealand follow the examples set internationally by the Czech Republic, the United Kingdom and the State of Michigan, which have introduced restrictions on the sale of cold remedies containing pseudoephedrine, given their use in the manufacture of illicit amphetamines.

In December 2016 New Zealand Police began a wastewater pilot programme to get an accurate assessment of the prevalence of drug use in the community. Council wastewater monitoring is useful in identifying the extent of the problem and where the worst affected areas are located. It is considered that the disposal of chemical into drains create the potential for plumbing and wastewater system contamination and that perhaps this information should be recorded on a public database, similar to Environment Canterbury's LLUR. The dumping of by-products into drains and the monitoring of this via an external wastewater system creates no breach of privacy as monitoring is not occurring inside the dwelling. This is in contrast to a device such as MethMinder.

Further investigation, such as the wastewater pilot programme, in respect of the impact of methamphetamine in residential property is required. Simply doing nothing about contamination is not a wise option. There is a 'gap' in our legislation regarding an activity that we know is already being undertaken in New Zealand and causing loss. Inaction risks further inconsistent decision-making and insecurity for tenants and landlords.

Bibliography

A New Zealand Tenancy Tribunal Decisions

Estate Futures Limited v McIlroy & Davenport [1 June 2018] NZTT Davenport.

Global Rentals and Property Management Limited v Peters [21 December 2017] NZTT North Shore 4109677.

Harris v Thomas Baseden Real Estate Limited on behalf of Neil John Torrie [2016] NZTT North Shore, Auckland 4001631.

Housing New Zealand Corporation v Romaine [2016] NZTT North Shore, Auckland 4010235.

Hughes v BCRE Limited – Pukekohe trading as Harcourts and McEwen [2016] NZTT Pukekohe 4001997.

Malik v Crockers Property Management Limited [2018] NZTT 4137003.

McAlavey v Beachside Boys Property Management Ltd [1 June 2018] NZTT Christchurch

Mendez-Gray v Jennens and Realty Link Taupo Limited [2016] NZTT Rotorua 4003261.

Morgan v Housing New Zealand Corporation [10 January 2008] NZTT, Porirua.

Riverlands Real Estate Ltd v Walker-Lee [1 June 2018] NZTT Huntly.

Te Kira v Shivanand [2018] NZTT Hamilton 4138745.

Tekoa Trust – Russ v Tauhore [12 April 2018] NZTT Palmerston North

Tekoa Trust v Stewart [23 August 2016] NZTT Palmerston North.

Vannisselroy v Tutty [1 June 2018] NZTT Whangarei.

Visagie and Visagie v Harper Property Management Limited and Tom Sebastian [2016] NZTT Pukekohe.

B Ombudsman Cases, Complaints and Case Studies

Insurance – Fire & General, Complaint Number 122222 (2012).

Insurance – Fire & General, Complaint Number 122435 (2012).

Fire and General Insurance, Complaint Number 116979 (2010).

Fire and General Insurance, Complaint Number 113182 (2008).

Fire and General Insurance, Complaint Number 122222 (2007).

C Books and Chapters in Books

Alston A., Pigou P., and Slatter *Residential Tenancies* (2nd ed, Butterworths of New Zealand Ltd, Wellington, 1993).

Bennion T. and others *New Zealand Land Law* (online edition, Brookers Ltd, Wellington).

Bennion T., Brown D., Thomas R., and Toomey E. *New Zealand Land Law* (2nd ed, Brookers, Wellington, 2009).

Burrows J., Finn J. and Todd S. *The Law of Contract in New Zealand* (5th ed, LexisNexis NZ, Wellington, 2016).

Grinlinton D. *Residential Tenancies: The Law and Practice* (4th ed, LexisNexis, Wellington, 2012).

Hinde, McMorland, Campbell & Grinlinton *Land Law in New Zealand* (LexisNexis, Wellington, 2003).

Lang A. *Residential Tenancies Handbook New South Wales* (The Law Book Company Limited, Sydney, 1986).

Mathias D. *Misuse of Drugs* (Thomson Reuters New Zealand Ltd, December 2015).

McLay G., Murray C. and Orpin J. *New Zealand Law Style Guide* (2nd ed, The Law Foundation New Zealand, Thomson Reuters New Zealand Ltd, 2011).

Merkin R. and Nicoll C. (eds) *Colinvaux's Law of Insurance in New Zealand* (2nd ed, Thomson Reuters New Zealand Ltd, 2017).

Spiller P. *Butterworths New Zealand Law Dictionary* (7th ed, LexisNexis, 2011).

Tenancy Bond Division of the Housing Corporation of New Zealand *An Explanation of the Provisions in the Residential Tenancies Bill* (Wellington, 1985).

Webb D. and Rowe D. (eds) *Insurance Law Practice, Policy & Principles* (The Centre for Commercial & Corporate Law Inc, Christchurch, 2004).

D Journal Articles

Adrian Rollins “Meth Mayhem” (October 2017) Australian and New Zealand Institute of Insurance and Finance. Volume 40, Issue 3.

Carl Cahanin “Failure of the Anti-Drug Abuse Acts” (June 2016) Research Gate.

Cressey P., Horn B. “New Zealand Ministry of Health Exposure Factors Handbook: Recommended Values” (2016) Institute of Environmental Science and Research - Report to the Ministry of Health, Report No. FW16002.

Davis J., Stevens E. and Staiff D. “Potential exposure of apple thinners to azinphosmethyl and comparison of two methods for assessment of hand exposure” Bulletin of Environmental Contaminant and Toxicology 31: 631-638.

Fox L. “An update on the methamphetamine issue” (2016) The Property Lawyer – Volume 17 Issue 1.

Fox L. “An update on the methamphetamine issue – Part 2” (2016) The Property Lawyer – Volume 17 Issue 2.

Gawin, F., & Ellinwood, E. “Cocaine and other stimulants: actions, abuse and treatment.” (1988) New England Journal of Medicine, 318, 1173-1182.

Hammon T. and Griffin S. “Support for selection of a methamphetamine cleanup standard in Colorado” Regulatory Toxicology and Pharmacology 48: 102-114.

Hill M. “Contamination at the Tank Farm: the final word” (2016) The Property Lawyer – Volume 17 Issue 1.

Jensen-Mccloy L. “What is the real impact of *Clayton v Clayton – (Claymark Trust)*” (2016) The Property Lawyer – Volume 17 Issue 1.

Mark Bennett “Problems in Residential Tenancy Law revealed by *Holler v Osaki*” (2017) 48 VUWLR.

Todd Durell, Larry Kroutil, Paul Crits-Christoph, Nina Barchha and David Van Brunt “Prevalence of nonmedical methamphetamine use in the United States” (25 July 2008) U.S National Library of Medicine National Institutes of Health, Substance Abuse Treatment Prevention Policy, Volume 3.

Tricia Wright, Renee Schutter, Jacqueline Tellei and Lynnae Sauvage “Methamphetamines and Pregnancy Outcomes” (2015) J Addict Med 9(2): 111–117.

E Bills

Residential Tenancies Amendment Bill (No. 2)

Healthy Homes Guarantee Bill (No. 2).

F Parliamentary and Government Materials

United States Department of Justice Office of the Inspector General Audit Division “The Drug Enforcement Administration’s Clandestine Drug Laboratory Cleanup Program”. Audit Report 10 -29 (June 2010).

United States Environmental Protection Agency, Report to Congress Under the USA Patriot Improvement and Reauthorization Act of 2005 “RCRA Hazardous Waste Identification of Methamphetamine Production Process By-Products”.

G Policy and Reports

Gluckman P “Methamphetamine contamination in residential properties: Exposure, risk levels, and interpretation of standards” (29 May 2018).

Fowles J., Deyo J. and Kester J. “Review of Remediation Standards for Clandestine Methamphetamine Laboratories: Risk Assessment recommendations for a New Zealand Standard” (7 October 2016) Report No: FW16039.

Housing New Zealand Corporation Annual Report “To be the social housing provider of choice” (2015-2016).

Housing New Zealand Corporation “Policy for Managing Methamphetamine (meth) in Housing New Zealand Managed properties” (2 March 2017) P-250.

Housing New Zealand Corporation “Managing Methamphetamine (P) in Housing New Zealand managed properties” (6 December 2016) CA-716.

Housing New Zealand Corporation “Methamphetamine Contamination Housing New Zealand’s Response” (September 2018).

Hutt City Council Policy and Regulatory Report “General Manager’s Report – Governance and Regulatory” (3 June 2016) Report No: PandR2016/3/141, File 16/656.

Michigan State Police “Methamphetamine Reporting Act – Michigan State Police Methamphetamine Investigation Team” (1 April 2015) Report to the Legislature – MCL 28 193.

New Zealand Police and Oranga Tamariki “Child Protection Protocol: Joint Operating Procedures Between New Zealand Police and Child, Youth and Family” (September 2016).

New Zealand Police and Child Youth and Family and District Health Boards “Joint Standard Operating Procedures for Children and Young Persons in Clandestine Laboratories” (6 December 2016).

Office of the Prime Minister’s Science Advisory Committee, Professor Peter Gluckman “Consideration of reduction of access to, or elimination of, pseudoephedrine in ‘cold and flu’ preparations” Report to the Prime Minister (30 July 2009).

Standards New Zealand “Testing and decontamination of methamphetamine contaminated properties” NZS 8510:2017.

Tremains Real Estate “Meth and P Awareness Guide” PDF (no date)
<www.tremains.co.nz>.

E Internet Resources

AA Insurance <www.aainsurance.co.nz>.

Auckland Council <www.aucklandcouncil.govt.nz>.

Auckland District Law Society <www.adls.org.nz>.

Auckland Property Investors Association <www.apia.org.nz>.

Australian Government – Australian Institute of Health and Welfare <www.aihw.gov.au>.

Australian Government – Department of Health, Office of Drug Control
<www.odc.gov.au>.

Australian Meth Inspectors <www.australianmethinspectors.com.au>.

AMI Insurance <www.ami.co.nz>.

ANZ Bank New Zealand Limited <www.anz.co.nz>.

Bank of New Zealand <www.bnz.co.nz>.

Berry & Co. <www.berryco.co.nz>.

Chemistry Australia <www.chemistryaustralia.org.au>.

Christchurch Library <my.christchurchcitylibraries.com>.

Christchurch City Council <www.ccc.govt.nz>.

Cooney Lees Morgan <www.cooneyleesmorgan.co.nz>.

Duncan Cotterill <duncancotterill.com>.

Environment Canterbury <www.ecan.govt.nz>.

European Monitoring Centre for Drugs and Addiction <www.emcdda.europa.eu>.

Hamilton City Council <www.hamilton.govt.nz>.

Human Rights Commission <www.hrc.co.nz>.

Hutt City Council <www.huttcity.govt.nz>.

IAG New Zealand Limited <www.iag.co.nz>.

Insurance Council of New Zealand <www.icnz.org.nz>.

King County Bar Association <www.kcba.org>.

Kiwibank Corporation <www.kiwibank.co.nz>.

Landlords for Kiwi Property Investors <www.landlords.co.nz>.

Listed Land Use Register Canterbury <www.llur.ecan.govt.nz>.

Medline Plus <medlineplus.nlm.nih.gov>.

Ministry of Business, Innovation & Employment <www.mbie.govt.nz>.

Ministry of Health <www.health.govt.nz>.

Ministry of Justice <www.justice.govt.nz>.

New Zealand Drug Foundation <www.drugfoundation.org.nz>.

New Zealand Law Society <www.lawsociety.org.nz>.

New Zealand Legislation <www.legislation.govt.nz>.

New Zealand Parliament <www.parliament.nz>.

New Zealand Police <www.police.govt.nz>.

New Zealand Property Investors Federation <www.nzpif.org.nz>.

New Zealand Real Estate Agents Disciplinary Tribunal <www.nzlii.org/nz>.

Parry Field Lawyers <www.parryfield.com>.

Precise Consulting and Laboratory <www.preciseconsulting.co.nz>.

Real Estate Authority <www.rea.govt.nz>.

Research Gate <www.researchgate.net>.

Richard Magrann-Wells <www.blog.willis.com>.

Selwyn District Council <www.selwyn.govt.nz>.

Standards New Zealand <www.standards.govt.nz>.

State of Michigan – Department of Health <www.michigan.gov>.

Statistics New Zealand <www.stats.govt.nz>

Stuff <www.stuff.co.nz>.

Tararua District Council <www.tararua.govt.nz>.

Tenancy <www.tenancy.co.nz>.

Tenancy Tribunal <www.justice.govt.nz>.

The White House – President Barack Obama <obamawhitehouse.archives.gov>.

The White House – President George Bush <georgewbush-whitehouse.archives.gov>.

TSB Bank <www.tsb.co.nz>.

Turner Hopkins Barristers and Solicitors <www.turnerhopkins.co.nz>.

United States Environmental Protection Agency <www.epa.gov>.

United Nations Office on Drugs and Crime <www.unodc.org>.

United Nations Treaty Collection <www.treaties.un.org>.

University of Canterbury <www.canterbury.ac.nz>.

University of Maryland <www.cesar.umd.edu>.

U.S Department of State <www.2001-2009.state.gov>.

U.S Government Track <www.govtrack.us/congress/bills>.

U.S National Library of Medicine – National Institutes of Health <www.ncbi.nlm.nih.gov>.

Victoria University of Wellington <www.victoria.ac.nz>.

Waikato Regional Council <www.waikatoregion.govt.nz>.

Western Sydney University <www.westernsydney.edu.au>.

F Interviews and Direct Communications

Alan Shields, ANZ Bank, E.mail correspondence of 20 September 2017.

Alex Travis, Housing New Zealand Corporation – Acting Manager of Government Relations, written correspondence of 4 October 2017.

Alicia Long and Glenn Conway, Housing New Zealand Corporation, E.mail correspondence of 13 July 2017, 17 July 2017, 21 July 2017, 23 July 2017, 21 August 2017 and 18 September 2017.

Andrew King and Jan Hains, New Zealand Property Investor Federation, E.mail correspondence, 4 May 2017.

Bruce Taylor, Ministry of Business, Innovation and Employment, E.mail correspondence of 1 May 2017.

Georgina Bond, ASB Bank, E.mail correspondence of 1 August 2017.

Kieren Gray, Beachside Boys Property Management Limited and Bayleys Real Estate, Telephone and E.mail correspondence of 21 August 2018.

Michelle Chung, Environment Canterbury, E.mail correspondence of 30 August 2017.

Miles Stratford, Director of MethMinder, Telephone and E.mail correspondences, 16 October 2017 – October 2018.

Natalie Benning, BNZ Bank, E.mail correspondence of 6 August 2017.

Siobhan Enright, ASB Bank, E.mail correspondence of 7 August 2017 and 10 August 2017.

Stefan Herrick, ANZ Bank, E.mail correspondence of 1 August 2017.

Stephanie Rixecker (Dr.), Environment Canterbury Director of Science, written correspondence of 30 August 2017.

Terry Jordan, Insurance Council of New Zealand, E.mail correspondence, 5 May 2017.

Tony Herrick, KiwiBank, response to survey, 17 August 2017.

G Conferences and Seminars

Kate Serrano “Methamphetamine Residue Transfer Efficiencies from Household Surfaces” (20 June 2012, RT 225, National Jewish Health, Indianapolis).

Land and Property Law Forum 2017 “Methamphetamine contamination in NZ houses – an overview for the property sector”. 30 November 2017.