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The Resource Management Act

Risks and liability

Breaching the Resource Management Act can be expensive and time consuming. One risk that an alleged offender can help mitigate is the choice the local authority makes to either issue an enforcement notice or to prosecute for that breach. This will of course depend on how serious the offence is considered to be. However, that choice has significant financial consequences for the offender. This article examines how an alleged offender can help manage that process to obtain the best commercial outcome.

Restrictions, compliance and punishment

Part III, and in particular ss9–17 of the Resource Management Act (RMA), imposes restrictions on common law rights for landowners to use land and water as they wish (quite apart from other restrictions and limitations imposed by other areas of the law and the common law itself).

The restrictions include limits on the use of land, certain uses of beds of lakes and rivers, water, discharge of contaminants and the duty to avoid unreasonable noise.

If there is a breach of those restrictions, the relevant local authority may take a number of actions to achieve compliance and/or penalise the offender. Those actions are set out in Part XII of the RMA and include:

- Abatement Notices – issued and served by local authorities only
- Excessive Noise Directions – issued by local authorities
- Enforcement Orders – made by the Environment Court on application by any person
- Infringement Notices – issued by local authorities only
- Prosecutions – which may be initiated by any person.

Abatement Notices, Excessive Noise Directions and Enforcement Orders are used to obtain compliance with the RMA, Regulations, a District Plan or a resource consent.

Infringement Notices and prosecutions on the other hand are used to punish and deter non-compliance.

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Against that background, the issues to be addressed in this article are:

- The risks arising from the choice made by a local authority whether to issue an Infringement Notice or a prosecution; and
- Liability issues arising in prosecutions;
 - Strict liability and defences available;
 - Liability of principals and employers for acts of agents and employees – what might be done to lessen the risk of a guilty verdict.

The first of these issues is discussed below, and the second in the Summer 2007 issue of *Fineprint*.

Infringement Notice or prosecution?

Infringement Notices can only be issued for 'Infringement Offences'¹ The current list of infringement offences include most of the principal offences against the RMA itself. Importantly, s343B says that a person who is alleged to have committed an infringement offence may either be served with an Infringement Notice, or prosecuted.

The choice is important because once a decision has been made to either prosecute or issue an Infringement Notice, the decision cannot be revisited.

If this is not successful, the enforcement agency may be persuaded to issue an Infringement Notice rather than prosecute and the factors mentioned above can be canvassed.

The choice of which procedure the local authority uses will depend on how serious it considers the offence to be, but that choice has significant financial consequences for the offender, either:

- A penalty of imprisonment for a term not exceeding two years or a fine not exceeding \$200,000. If the offence is a continuing one, there could be a further fine not exceeding \$10,000 for every day or part of the day during which the offence continues.

- In addition to or instead of a fine or imprisonment, on conviction the court can make Enforcement Orders to remedy the adverse effects on the environment caused by the offending activity, ie: a court ordered clean up.

The local authority will speak with the offender about the alleged offences and seek explanations before making a decision whether to issue an Infringement Notice or prosecute.

That range of penalties compares adversely with the \$300 – \$1,000 maximum infringement fees payable under the Infringement Notice procedure.

The process chosen by the local authority therefore is a significant risk issue for the alleged offender. It is a choice that the offender might be able to help manage, although that needs to be undertaken very carefully and quickly.

Mitigating factors

The following factors may be considered when endeavouring to persuade the local authority not to take punishment action or, at most, to issue an Infringement Notice rather than prosecution:

- Minimal environmental damage
- Immediate clean up action taken by the offender at their own expense
- Steps taken to avoid re-occurrence
- The offence occurred at a time when steps were being put in place to create a new management regime
- The act of the offence would not have reasonably been within the contemplation of the offender
- The harm was at the lower end of the scale
- Adverse effects were short term
- An offence was not deliberate
- The lack of any profit element
- Through no fault of the offender, work did not go according to the approved plans
- The offender has sound training and organisational systems in place and

the offence occurred simply through human error which could not reasonably be avoided

- The intervention of unpredictable weather conditions
- The offender was let down by professional advisors
- Prior exemplary or good record of the offender
- Personal and financial circumstances of the offender
- Compliance audits are regularly undertaken.



In most instances, the local authority will speak with the offender about the alleged offences and seek explanations before making a decision whether to issue an Infringement Notice or prosecute or, indeed, whether to take any action at all.

That is the time at which great care should be taken, especially by those who are subject to on-going compliance obligations. It is the time when advice from us and other professional advisers should be sought because there is the opportunity to discuss with the enforcement agency not only the decision whether or not to take enforcement action, but also the form of it. Such an example is issuing an Abatement Notice requiring compliance, rather than take action to punish non-compliance.

If this is not successful, the enforcement agency may be persuaded to issue an Infringement Notice rather than prosecute and the factors mentioned above can be canvassed.

If prosecution does proceed, the defendant has difficult liability hurdles to overcome. These issues will be addressed in the second part of this article in the Summer 2007 edition of *Fineprint*.

¹ See s360(1)(b)(a) of the RMA

Terminating Employment

Make sure you do it right

Dismissing employees is always difficult for everyone, but following the right procedure from the start will save you time and money in the long run. This article looks at the process with particular focus on the final warning meeting.

Employment law in New Zealand is often perceived as being worker friendly and biased against employers. Whatever the true position, most employers are aware that dismissing an employee is a very sensitive issue and is fraught with difficulties.

Choosing the right staff, training them well and addressing any concerns that come to light at an early stage can help lessen the frequency of dismissal processes at your firm.

Employment can be terminated for a number of reasons. The employee could turn out to be unsuitable for the job, there could be serious discipline issues or there may be other issues at stake.

There is no such thing as the perfect dismissal. Even if an employer gets all of the steps right an employee can still demand pay and compensation for hurt and humiliation. Using the correct process can make it less likely that an employer will have to pay.

In essence the law says that when conducting a dismissal an employer has to be reasonable. Unfortunately, the 'reasonable employer' which the law has in mind is very conscientious, far more conscientious than the average New Zealand small business owner.

Get it right from the start

All employees must have a written employment agreement. If the agreement contains a dismissal or disciplinary procedure, make sure it is followed.

In all cases, other than those involving serious misconduct, before a 'final' disciplinary process is started the employee should have received a series of warnings and, just as important, help and training from the employer directed at improving the employee's performance.

The system of warnings which is implemented is up to an individual employer, but it is generally accepted that it is reasonable to go through a three stage

process: verbal warning, written warning and final warning. In some cases of serious misconduct it may be appropriate to have a disciplinary meeting without first issuing verbal and written warnings.

Being 'reasonable' is a good start, but having the correct procedures in place is even better.

Investigations are like a miniature court process

The final disciplinary investigation is where many employers trip up. The employer is judge, jury and executioner with respect to the employee's job, and for this reason needs to be very careful to ensure the process is followed to the letter, and that the employee is treated with dignity and respect.

An employer should not make a decision to dismiss until all the evidence is in front of him or her and all the parties have been heard. Any hint of prejudice or a rush to judgement is likely to cost an employer money down the track.

Keep records of meetings and interviews, and retain the original records and notes. In the Employment Relations Authority hearings only the original handwritten notes will carry much weight.

If a right to suspend an employee is contained in the employment agreement, it should only be used if the situation is serious enough. An employer has no right to suspend an employee if the agreement does not mention suspension.

The person who is going to make the decision over whether to dismiss the employee needs to conduct the investigation. It is not good enough that the boss reads the manager's report and then fires the employee.

Usually the centrepiece of a disciplinary investigation is the meeting between the employee and the employer. The employee needs to be informed at least 24 hours in advance of the meeting, what is going to happen at the meeting and how serious it is.

The employee should be advised to take a representative to the meeting – this could be a union delegate, a friend or a lawyer. At the meeting the employee should be provided with all the relevant information. Once the information has been presented the employee should be allowed to digest the information and be asked for a reaction and an explanation of any alleged misconduct.

Disciplinary meetings can be tense and emotional. It is often a good idea to split them up with refreshment breaks and there is no harm in having more than one if a fair process requires it.

Deliberation is important

Having had a disciplinary meeting the employer will need to think about all the evidence and the employee's reaction to it. Something new may have cropped up which will warrant further investigation.

At this stage, if the employer is satisfied that the conduct actually took place and/or that the performance is not up to scratch a decision will need to be made if dismissal is warranted.

If the decision is taken to dismiss, the reasons must be clearly stated in a letter to the employee. Only reasons spelt out at the time of dismissal can be relied upon at a later date to justify the employer's decision to the Employment Relations Authority.

Just be reasonable

Dismissal is a very serious matter which deeply affects the employee in question and for this reason care should be taken when going through the disciplinary process. Being 'reasonable' is a good start, but having the correct procedures in place is even better.

Family Protection and Second Marriages/ Relationships: Claims Against Estates

Many couples leave all their property to each other by their Wills, presuming the other will provide for their children should they die. However, for someone in a second marriage or relationship who has children from a previous relationship, this may prove to be unwise. Your estate may end up in the hands of a future partner of your spouse or partner with your children missing out. The story of Michael's children illustrates the need for those with children to ensure their Will accurately reflects their wishes.



Michael and Charlotte were married in 1996. Michael had two teenage children from a previous marriage and Charlotte also had two children. Michael's children lived with Michael and Charlotte; Charlotte's children remained with their father.

Shortly after they married, Michael and Charlotte made 'mirror Wills' leaving everything to the other. Michael trusted Charlotte to provide for his children if he died, as did Charlotte of Michael.

Michael was killed in an accident in January 2003. In shock from their father's death, questioning their share of their father's estate was the last thing on the minds of his children. They presumed Charlotte would take care of everything and did not question her about their father's Will.

In November 2003, Charlotte married Brent. The family home was put up for sale. In light of Charlotte's remarriage, Michael's children began to wonder what was going to happen to their father's estate. Charlotte promised them both a share in the proceeds of the family home; however the house was subsequently sold in March 2004 without a penny passing to either child.

At this point Michael's children began asking Charlotte about their father's estate and his Will. When they did not get a satisfactory answer they talked with a lawyer. Charlotte's response, through

her lawyer, was that Michael's Will left everything to her, most of the assets were joint assets and passed to her by way of survivorship, and in any event the estate had been distributed and they were out of time to make a claim.

After both parties incurring considerable legal costs, Michael's children received a small settlement, on the condition they would make no claim against Charlotte's estate in the future.

Charlotte may have had the best of intentions to provide for Michael's children in her Will. However, as young adults, a share in Michael's estate would have been of greatest benefit to his children at the time he died, rather than 10, 20 or even 50 years down the track. In any event, there could be no guarantee Charlotte would make provision for Michael's children in her Will.

The law

After Michael's death, his children – had they known they were not provided for in his Will - had the option of making a claim under the Family Protection Act 1955. The time limit is usually one year from the granting of probate, or two years in the case of minor children (that is, under the age of 20 years). As both of Michael's children were young adults, they were out of time to make a claim. The option of applying for an extension of time was not available as the estate had already been distributed.

It should be noted that there are time limitations under the Property (Relationships) Act 1976 which can work to defeat a family protection claim. In some cases proceedings would need to begin well before the 12 month time limit for such a claim. In all cases, notice of a possible claim should be given at the earliest possible opportunity. It is therefore essential that potential claimants talk with their lawyer without delay if they suspect there may be family protection issues.

The lesson

Michael trusted Charlotte to provide for his children if he died. However, as it was always Michael's intention that his children would receive a share of his estate if he died, his Will should have provided for that. The fact that his Will did not do so meant that money Michael wanted his children to receive is now in the hands of Charlotte and Brent. Undoubtedly Charlotte has learned a valuable lesson about protecting her own children, should that be her wish. No doubt her lawyer would have advised her to execute a new Will and a property sharing agreement without delay.

The fact that his Will did not do so meant that money Michael wanted his children to receive is now in the hands of Charlotte and Brent.

It is easy to think of Charlotte as the 'evil stepmother' and as Michael as having made an error in trusting her. Legally, Charlotte was in the right. Morally however it is hard to not feel the situation is unfair.

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The Mysteries of Copyright Explained

Have you ever come across artwork which you thought was better off in a junk barn? Or decided to make a few copies of some recipes from that cookbook you took out of the library? Well, believe it or not such 'original works' may be protected by copyright

What is copyright?

'Copyright' is a property right which exists automatically on creation of certain 'works', including music, art, sculptures and books. The work does not have to be a Mona Lisa either. Copyright may exist in a work despite a possible complete lack of artistic merit.

In New Zealand copyright is governed by the Copyright Act 1994. In general, the Act provides a copyright owner with the ability to prevent someone else from copying the work or making an adaptation of the work. It is also an offence under the Act to import an infringing copy into New Zealand.

The law recognises the world is full of people with brilliant ideas, which is why copyright protection attaches to the 'original expression' of an idea. This means that ideas, however original, are not protected under the law of copyright. It is the expression of the idea, be it as a painting or a book, that attracts copyright protection.

When is copyright infringed?

For there to be copyright infringement, the work must be copied. What is meant by 'copied' has developed through court decisions. The New Zealand courts will apply the following basic principles to determine whether there has been an infringement of copyright:

1. The reproduction must be either of the entire work, or a substantial part of the work. 'Substantial' is not assessed with reference to how much of the original work is taken, but also the quality of what is taken.
2. There must be sufficient objective similarity between the infringing work and the original copyright work, or a substantial part of the copyright work.
3. There must be some connection between the copyright work and the infringing work. The infringing work must be sourced from the original work.

Although the above principles will apply to all types of original copyright works, different considerations may be relevant depending on the type of work in question.

Remedies

If an infringement of copyright can be established, the copyright owner may be entitled to a number of remedies under the Copyright Act, including but not limited to:

- **An injunction.**
An injunction is a court order which prevents a person from doing a certain act, or requires a person to do something. These can be issued during a trial, or before a trial to maintain the status quo or preserve the subject matter of the case until it has been concluded.
- **Seizure orders.**
This allows the copyright owner to seize evidence which may show the defendant has infringed the owner's copyright. As the effects of such an order can be quite severe, the owner will have to show that it will suffer a substantial loss if the order is not granted and clear evidence of the infringer's intention to destroy or conceal evidence.
- **Damages or an account of profits.**
When assessing damages, the court will consider all the circumstances, and in particular the flagrancy of the infringement and any benefit of the infringer resulting from the infringement.

The issue of copyright infringement has arisen over the most trivial of subject matter, from artwork to a toilet pan connector. So, the next time you come across a work of art you think lacks artistic merit, just remember, be it junk (worthy or not), provided it is original, it may be protected under the law of copyright.

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Wain & Naysmith – Blenheim
Walker MacGeorge & Co – Waimate
Welsh McCarthy – Hawera
Wilkinson Adams – Dunedin
Woodward Chrisp – Gisborne

Postscript

Rates Rebate Scheme

Low income homeowners may be eligible for a rebate on their local authority rates.

- The maximum rebate is \$500
- Income threshold is \$20,000
- Additional income allowance for dependants is \$500 per dependent.

For more information and the form you need to fill out, look on www.dia.govt.nz/ratesrebates. The site has a table and calculator to work out whether your household may be eligible. Ratepayers must wait until their 2006 rates bill arrives before they can apply for a rebate.

New Companies Office website

The Companies Office newly redesigned website was launched in late August. There is now more information on conducting business both in New Zealand and overseas, tax planning and directors' obligations. There are improved navigation options and better searching functions, information on resources available to small businesses, a wider range of customer support services and also helpful links to other useful sites.

Bookmark this website, or put it in your Favourites folder. www.companies.govt.nz

Important tasks for charities

The Ministry of Economic Development (MED) has warned charities that if they do not register with the Charities Commission before **1 July 2008** they will not retain their tax-exempt status. After that date only registered organisations will be eligible for exemption from income tax and gift duty.

For more information, look at www.charities.govt.nz. To register for the Charities Commission's monthly email updates, email: info@charities.govt.nz

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Family Protection and Second Marriages/Relationships In conclusion

Family protection claims are costly, both financially and emotionally. Falling foul of the strict time limitations is easily done in the wake of a traumatic event such as the sudden death of a parent.

The simple but immensely important lesson to be learned from the unfortunate experience of Michael's children is that if you want to provide for your children after your death then make sure your Will clearly reflects this. If you are in a second marriage or de facto relationship and you have children from a prior relationship this is particularly important. There are other means of protecting your children's interests, such as setting up a family trust; however it is most important that your estate planning accurately reflects your intentions. Do not simply presume that others will know what your wishes are or that they will carry them out.