

Don't get caught napping

Imagine being convicted for something you didn't do, certainly never intended to do - and which happened when you weren't even present. That is a reality under the Resource Management Act. Such are the strictures of the RMA that it is possible to commit an offence in New Zealand while you are on your sickbed in London.

The RMA provides some unusual and far-reaching criminal provisions, but they don't need to be the headache many people expect. Getting it right at the outset could well avoid problems or, at the very least, ensure you have a good defence, avoiding embarrassing and costly convictions.

Take these following cases. Some early initiatives would probably have prevented the costly outcomes.

A Christchurch company was recently convicted following construction of a two kilometre track on steep hill country near Kaikoura during the 2006/2007 Christmas holidays. The company's director maintained he knew nothing of the works and the digger driver had gone way beyond his original instructions while everyone else was away on holiday. This did not stop the Court from convicting the company and ordering a total of some \$40,000 in fines and reparations.

In another case, two companies were convicted for sediment discharges from a subdivision on the Akaroa Harbour. Even though the



companies said they had relied on, what turned out to be, incorrect advice from the other parties, they bore the brunt of \$60,000 in fines and reparations.

Meanwhile, the Court of Appeal recently upheld the initial conviction of an Italian partnership and a Panamanian company for discharges into the Lyttelton Harbour from a ship, of which they were respectively the owner and manager. Despite the fact that New Zealand legislation didn't recognise the company's status - and that the men had absolutely no idea of the discharge, convictions were entered and \$70,000 in fines were imposed.

A final illustration consists of a Christchurch company whose employees turned up on a Saturday morning to find their diesel tank dispenser vandalised and minus 5000 litres of diesel. Although the discharge, which was later found in the Heathcote River, had occurred in the middle of the night when no one from the company was anywhere near the site and had sat undetected in a culvert for a week, the company was convicted and

\$40,000 in fines and reparations were imposed.

Each one of these convictions could have been avoided had a number of simple steps been followed.

- The Kaikoura track. Giving copies of the earthworks controls to the digger driver and the digger company, with the requirement to initial these and provide a written undertaking to comply, would probably have been enough to set up the grounds for a successful defence. In this way, a conviction could have been avoided. Otherwise, a written undertaking from the digger driver and owner to adhere to the resource consent process would likewise have set up strong grounds for a defence. In the face of such potentially successful arguments, it is unlikely the Council would have taken the prosecution in the first place.
- Akaroa Harbour sediment discharges. Lodging an application for resource consent to discharge sediment during the

continued on page 4

DUNCAN COTTERILL IS A FULL SERVICE
LAW FIRM WITH SPECIALIST AREAS IN:

EMPLOYMENT

TAXATION

PROPERTY PROJECTS

TRANS-TASMAN

RESOURCE MANAGEMENT

FINANCE & BANKING

COMMERCIAL

INTELLECTUAL PROPERTY

LITIGATION & DISPUTE RESOLUTION



- What physical direction the CBD will grow
- Where core retailing should be concentrated
- How to encourage people to live closer to town
- Encouraging stronger links with important institutions.

Issues that the Council has already identified are linkages to the waterfront and parking in the city centre. The Council has produced a map showing the indicative study area, which extends north to the marina and south to Victory Square. This area may be further refined to identify core character areas.

The Council is yet to determine how the strategy will be implemented. Many of the outcomes of the strategy are likely to be non regulatory and its success will largely depend on buy in from developers, land owners and the general public. But in order to ensure that the outcomes sought in the strategy are achieved, it is also important that its aims are given teeth i.e. through incorporation into the Nelson Resource Management Plan.

Where the rubber hits the road is how the Council enables landowners to deliver the strategy's outcomes. This will require the Council to insert appropriate planning controls in key planning documents, utilising the public processes found in the Local Government Act and the Resource Management Act. To be successful this needs people to make written submissions to the Council setting out their views.

This strategy provides a valuable opportunity for the public to become involved in planning for Nelson's future. The changes likely to flow from the strategy are far reaching and it is important we take this opportunity to provide our views at this early stage. If you have something you want to do in the city centre, or if you have a vision for the city, now is the time to have your say.

Shoshona Goodall, Senior Solicitor
s.goodall@DuncanCotterill.com

This article has been prepared for Wild Tomato, a Nelson magazine.

Spotlight on Nelson

The Nelson City Council's master plan to develop the CBD raises all sorts of interesting resource management issues.

High quality city centres do not create themselves, they need to be planned. We are lucky in Nelson - we have inherited a vibrant city centre with a strong identity.

But there are increasing challenges that face the city centre as it grows, such as planning for retail centres. Unless the District Plan responds to these issues in a cohesive way, then ad hoc private development could erode the quality of the CBD.

The Central City Strategy for Nelson is timely indeed. It provides a welcome opportunity to take a step back and ask: what do you want Nelson to look like in the future?

The development of large format retailing is clearly an aspect, which would benefit from this strategy.

Take the privately-initiated plan change, which allowed large format retailing on the old Honda site. This change, which came into effect in March, highlights the benefit and necessity of a strategic study such as the one Council is currently undertaking for the CBD.

According to evidence presented during plan change hearings for the Honda site, there was a shortage of appropriately zoned land for large format retailing in the city. The Commissioners hearing the application concluded that, "where growth demands are not actively addressed by councils it is necessarily the case that the initiative will be seized by individuals..."

As this change was approved before the current strategic study, it naturally did not take into account the desired outcomes for the city centre, which will be identified through the

present study and now the die is cast with dispersed large format retailing. Only time will tell whether this can be aligned with the strategy's vision for the CBD.

Just what the strategy will contain is not yet known. The Council is starting this process with a blank sheet of paper, and is letting the public consultation process drive the content of the strategy. This process will begin in the next few weeks.

The Council aims to have a draft strategy completed by November this year so that it can feed into the development of the Long Term Council Community Plan 2009-2019 (LTCCP). It is through the LTCCP that the Council chooses how to spend its money and the public has a right to have their say in this process.

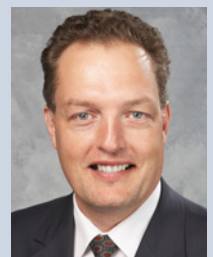
The strategy will look at the important urban design elements that are needed to ensure a vibrant, resilient and safe city centre. It could include matters such as:

RM expertise grows

Hans van der Wal joins our RM team after 11 years' experience implementing the Resource Management Act and other local government legislation in local government bodies, both in Auckland and most recently as in-house counsel for Environment Canterbury.

He has appeared frequently in the District and Environment Courts on a range of environmental enforcement, consenting and regulatory matters and as supporting counsel in the High Court and Court of Appeal.

Apart from the in-depth exposure to the wide range of environmental law issues typically dealt with by regional councils, Hans has also gained additional experience in navigation safety bylaws issues and resource management issues involving the coastal marine environment.



A spanner in the works - avoiding stormwater problems

Finally you hold your subdivision or land use consent in your hands, after what feels like a long battle with subdivision officers, submitters, consultants and hearings commissioners.

Beware! Don't pop the champagne corks quite yet, because there may well be an abatement notice just around the corner telling you not to discharge stormwater without first applying for a discharge permit. By then you will have machinery and numerous contractors on site, or perhaps will be on the verge of sealing the roads. You can't see how you can possibly comply with the notice without sending everyone home, losing all your bookings and having to pay huge costs with no work to show for it. You are convinced the Council's going mad, because you just got your subdivision consent and are doing only what it says.

Kingfisher Point developers Takamatua West Ltd found themselves in much the same position. With machinery and personnel on site and ready to go, they were told by an Environment Canterbury (ECan) monitoring officer that they needed a construction phase discharge permit. Two years later both the developer and the contractor were convicted of illegally discharging sediment after earthworks had gone ahead without the discharge consents. A total of \$70,000 in fines, costs and reparations were imposed. Bunnings Warehouse (Marshlands Road), New Zealand Post (Christchurch Airport) and Neil Construction have all had costly delays due to stormwater consent compliance issues with ECAN.

The question is, how could this have been avoided? Has the Council indeed gone mad? Tempting as it may be to reply "yes", that will not necessarily be true or fair. Rather, the truth is less straightforward, but nonetheless equally important. Your subdivision or land use consent is not the be all and end all. There is another council - the Regional Council, a separate council with its own separate consent requirements, for the discharge of stormwater and many other specialist consents. Overlooking their requirements can be a very costly mistake.

Ideally, regional and district council consents should be processed together, but this relies on applicants and council planners knowing what regional council consents are required as well. That is often missed. New hardstanding and roads produce polluted stormwater and runoff - a contaminant. If there is no regional council consent or permitted activity rule for



the stormwater discharge, an abatement notice is likely to halt works until consent is obtained. Assurances from the city/district Council planner that no further consents were required won't get round the need for a stormwater consent application.

The resulting costs won't be just the time lost while consent is obtained. A stormwater consent processed after the original city/district council consents may require the change of intended lots to stormwater storage or landscaping to treatment areas. That in turn may make it impossible to comply with those consents, requiring further applications to change the consents.

To get and implement the stormwater consents and the changed city/district council consents is going to swallow up extra time and processing costs. A thorough check that you have all regional and city/district council consents before booking any machinery and gearing up to start can avoid these delays and costs.

Even applying for regional council consents at the same time as city/district council consents will not necessarily be plain sailing. Further stormwater consent traps are:

- Promising more mitigation (eg treatment or storage) than you can or want to deliver, just so the application is not notified.
- Filing your consent away when you finally get it, without looking at the conditions to

see whether they are reasonable, achievable, or whether you should object/appeal within the 15 day period.

- Not committing contractors/site manager to fully understanding and complying with the requirements of the consent conditions.

Remember, having a consent with which you cannot comply or which is breached because you did not do enough to ensure compliance is little better than not having one at all.

A possible checklist could include:

- Whether all consents required from both city/district and regional councils have been sought and obtained.
- How best to obtain such consents in the context of council hearings.
- What conditions are reasonable to agree to or propose as part of the consent process.
- Whether to object to or appeal consent conditions on receipt of stormwater/construction phase consents.
- What should be done in terms of making contractors aware of all consent conditions and the need to comply with them.
- What to do when an abatement notice is received.

Hans van der Wal, Associate
h.vanderwal@DuncanCotterill.com

construction phase, coupled with provision of copies of the consent and signed undertakings to comply, would again most probably have avoided the prosecution.

- Oil discharge. Had there been a document signed by the ship's master requiring the slow down of fuel oil pumping, particularly near the time when tanks were likely to reach capacity, as well as regular checking of fuel levels in the tanks, it is unlikely that a conviction against the owner or manager would have followed.
- Sabotaged diesel tank. The provision of a bunded area, a water interceptor, padlock and cage on dispensing equipment or isolation of the dispensing pump when everyone went home (all of which now occur) would probably have avoided the discharge and if not that, would have prevented the Court from finding that not enough was done to prevent the discharge.

That had formed the basis of the conviction.

None of the above unfortunate and reluctant offenders set out to break the law. All will say that if only they had known then what they know now, they could have avoided all of this. The sad irony is that in many cases the knowledge was there and available, but not fully utilised. Consulting a resource management specialist lawyer to advise on the exposure to the risk of resource management prosecutions and the ways to avoid this is prudent. A little precaution is well worth its relatively modest cost when compared with the expense when it all goes wrong. It should help you rest easy at night knowing that you will not wake up in the morning to find you have committed an offence while you were sound asleep.

Hans van der Wal, Associate
h.vanderwal@DuncanCotterill.com

Minister will not intervene

Minister for the Environment Trevor Mallard has decided not to call in Meridian Energy's proposal to construct a dam on the Mokihinui River on the West Coast of the South Island.

Meridian lodged its applications with the Buller District Council and the West Coast Regional Council. The councils have since requested that the Minister call in the applications principally because of concern regarding costs if the matter was to go to appeal. Trevor Mallard said that

notwithstanding that he was aware of the concerns about costs should the matter be appealed "I am satisfied that the councils have the capacity to hear and decide the applications."

The call in procedure has rarely been used in the 17 years that it has been available. The procedure is intended to be used sparingly. However, with increasingly complex proposals and associated pressures on Councils we are starting to see this power used more often.

RECENT PROJECTS

- Subdivision application by an iwi property development arm in Nelson.
- Granting of consent for a large retail activity in central Nelson.
- Gaining a Ministry of Fisheries permit for spat catching in Tasman Bay.
- Acting for clients in relation to dairy effluent issues near Nelson.
- Expansion of a winery in the Marlborough area.
- Submissions on change 1 to Canterbury Regional Policy Statement.
- Advice to applicants and affected parties on several South Island based irrigation and hydro electricity generation schemes.

Disclaimer: This newsletter provides general information and is not intended to be comprehensive or a substitute for legal advice. Legal advice should be sought before applying it to particular circumstances. Whilst care has been taken in the preparation of this newsletter, no liability is accepted for any errors. © Duncan Cotterill Lawyers 2008

THE RESOURCE MANAGEMENT TEAM

							
Ewan Chapman Partner e.chapman@DuncanCotterill.com	Camilla Owen Partner c.owen@DuncanCotterill.com	Cindy Robinson Partner c.robinson@DuncanCotterill.com	Hans van der Wal Associate h.vanderwal@DuncanCotterill.com	Shoshona Goodall Senior Solicitor s.goodall@DuncanCotterill.com	Pauline Leeming Senior Solicitor p.leeming@DuncanCotterill.com	Adam Copland Solicitor a.copland@DuncanCotterill.com	Andrew Thomas Solicitor a.thomas@DuncanCotterill.com

Christchurch Level 9, Clarendon Tower Oxford Terrace PO Box 5 DX WP20314 Telephone 64-3-379 2430 Facsimile 64-3-379 7097 New Zealand	Nelson 197 Bridge Street PO Box 827 Telephone 64-3-546 6223 Facsimile 64-3-546 6033 New Zealand	Wellington Level 4 The Bayleys Building Cnr Lambton Quay & Brandon Street PO Box 10-376 DX SP23544 Telephone 64-4-499 3280 Facsimile 64-4-499 3308 New Zealand	Auckland Level 1, CPO Building 12 Queen Street PO Box 5326 DX CP24082 Telephone 64-9-309 1948 Facsimile 64-9-309 8275 New Zealand	Sydney Level 13, Tattersalls Building 179 Elizabeth Street NSW 2000 PO Box A168 DX753 Sydney South, NSW 1235 Telephone 61-2-8267 3800 Facsimile 61-2-9261 2940 Australia
--	---	--	---	--