Resource Management Tips for Commercial & Property Lawyers

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Resource Management (Simplifying and Streamlining) Amendment Bill 2009.

The Government's promise to reform the RMA is (at the time of writing) at the Bill stage, awaiting report from the Local Government and Environment Select Committee. The amendment is planned to be in force by 1 October 2009. Where changes to the current law are intended by the Bill these are signalled below.

Fines for prosecutions to get a big increase.

The RMA Amendment Bill proposes an increase in the maximum fine for committing an offence under the RMA from $200,000 to $600,000 for corporate offenders and $300,000 for individuals. A further proposal would give the sentencing Court power to require a review of a resource consent held by an offender.

Contracting over $20,000 with local government entities in Auckland?

The Local Government (Tamaki Makaurau Reorganisation) Act 2009 establishes the Auckland Transition Agency until formation of the new Auckland Council on 1 November 2010. Approval from the Transition Agency is required for Auckland local government entities to enter into any contract (other than an employment agreement) that imposes any obligation on the existing local authority after 30 June 2011 and where the consideration is $20,000 or more.

Preparing clients for next generation plans.

The prospect of a district or regional plan review presents a great opportunity to communicate with existing clients as well as to maximise the development potential of land by securing beneficial changes to zoning and other planning rules. Many local authorities are actively reviewing their district and regional plans.

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- For the next Auckland City plan check out **http://www.itsmybackyard.co.nz**. Auckland City Council's website **www.itsmybackyard.co.nz** contains a draft for the next Isthmus plan for Auckland which sets out future zoning, development densities and height controls.
- For a draft of the next Tauranga plan (expected to be formally notified mid October 2009) see **http://www.taurangadistrictplan.govt.nz**.

Simple steps to minimise the risk of prosecution for breach of the RMA.

Clients involved in land use and development face the risk of breach of the RMA, including for the actions of staff or contractors. An analysis of prosecution actions by local authorities shows that it is often the basic steps which are overlooked:

- The majority of prosecutions involve cases where work has occurred without the necessary resource consent.
- Sometimes it is (wrongly) assumed that resource consent is only required from the territorial authority (i.e. district or city councils), and as a result any need to obtain consent from the relevant regional council is overlooked.

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- Compliance with any conditions is mandatory for those carrying out works under resource consent, however not infrequently there is little knowledge of the detail in consent conditions.
- A check should ensure contract terms fit with the consent conditions where work is contracted or tendered in advance of resource consent being granted.
- Once resource consent is granted, communication of consent conditions to staff as well as to contractors is vital, yet often overlooked. The consent holder needs to ensure the staff and contractors are informed of the consent terms.

Designing a compliance program for clients?

The limited nature of "no-fault" RMA defences means that it may be necessary for defendants to a prosecution to show that a system for environmental compliance exists. The Australian and New Zealand Standards *AS/NZS 4360: Risk Management, and Compliance Programs NZ/AS 3806: 2006* together set out a helpful framework for the design of risk management and compliance programs.

A useful backstop: statutory liability insurance.

Best viewed as a backstop measure to limit the financial consequences of enforcement action, statutory liability insurance can be a useful protection in the event of errors or mistakes occurring. Liability insurance will generally meet the costs of any Court penalty that may be imposed and also the costs of legal representation. Of course, insurance will not avoid any negative business or reputational damage as a result of any conviction. Insurers offering statutory liability insurance include QBE, Lumley, and Vero.

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Insurance risk for buildings subject to natural hazards.

The popularity of coastal property in recent years has seen many high-value residential buildings granted building consent but subject to notice under section 72 Building Act 2004 (or its predecessor, section 36 Building Act 1991). This notice applies where land is subject natural hazard, but the building work itself is unlikely to worsen or accelerate the hazard. Provided the territorial authority gives notice to the Registrar-General of Lands, the territorial authority is then exempted from liability for damage arising from the natural hazard. While the exemption from liability for territorial authorities is relatively well known (registration of the notice should be apparent from a title search), less well known is the discretion held by Earthquake Commission to decline (or meet only part of) a claim where a certificate of title contains an entry identifying the natural hazard concerned. With predictions of sea level rise and increased storminess due to global warming, the insurance implications from the issue of building consent subject to a natural hazard notice has the potential to catch out uninformed purchasers whose properties suffer damage from a storm or other natural hazard event.

Key dates to appeal and give notice under the RMA.

Subject to the ability to waive timeframes with the leave of the court, key timeframes in the RMA include:

- To appeal resource consent: 15 working days from notice of the decision.
- To appeal a plan: 30 working days from notice of decision.
- To join an appeal: currently 30 working days from notice of the appeal, but in the RMA Amendment Bill this is proposed to be 15 working days after the end of the appeal period.
- To give notice of an affirmative defense to a prosecution: 7 days after service of a summons.

Limits to LIM reports.

A LIM (*land information memorandum*) is the standard pre-purchase enquiry, however there are limits to the scope of LIM reports:

- A LIM only relates to information from the territorial authority – not a regional council.
- The territorial authority is not obliged to identify features apparent from a district plan.
- The obligation to make disclosure of special features and hazards, only applies to features known to the territorial authority.
- Information supplied by the LIM may not necessarily cover adjacent land.

For information held by a regional council, property information on request for a fee is provided by some regional councils, or inspection can be made of regional council records.

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Know the difference between lapse, expiry, transfer, and surrender of consents.

With many approved projects being put on hold due to the downturn, the security of resource consents for a deferred project will require close scrutiny. It's important to know that the consent for an approved (or partially completed) project will still be able to exercised when there is an upturn in the market.

- ***Lapse (not giving effect to consent).*** Lapse applies to situations where the consent has not been given effect to. A resource consent will lapse on the date specified in the consent, or if no date is specified, five years after the commencement of consent, unless the consent is given effect to, or application is made to the consent authority to extend the lapse period having regard to substantial progress and other matters set out in section 125 RMA. Whether consent has been "given effect to" will be a question of fact and degree.

- ***Duration or term of consent.*** Duration is the length of term of the consent, once given effect to. Duration is of greater importance to discharge consents, water consents and coastal consents all of which have a limited term which may be up to 35 years, or five years if not specified. Unless specified in any grant of consent, land use and subdivision consents have an unlimited duration: section 123 RMA.

- ***Transfer.*** Transfer of consents is especially important to water and discharge consents, and also coastal permits. Typically transfer of a discharge consent or water permit takes effect on the notice being received by the regional authority. There is no prescribed form of transfer under the RMA although many regional councils have their own forms. Unless the consent expressly provides otherwise, a land use consent and a subdivision consent attach to the land under section 134 RMA, and do not require express transfer.

- ***Surrender.*** The holder of resource consent may surrender the consent with notice to the consent authority under section 138 RMA. If a purchaser is expressly seeking to acquire a property for the benefit of an existing resource consent, then it is prudent for the purchaser to obtain an express warranty that the vendor will not do anything to affect the validity of the consent or to surrender or transfer the consent. Standard warranties need to be checked to ensure that they expressly deal with the issue of the possible surrender of resource consents.

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No rollover of existing consents due to expire.

he RMA has no "roll over" provision enabling automatic grant of resource consent for activities which currently have consent but whose consent is due to expire. Section 124 RMA enables the holder of an existing consent due to expire to apply for a new consent no later than six months prior to expiry, and to continue to exercise the consent while the new consent has been applied for and until such time as the consent application is determined, or any appeal resolved.

What are reverse sensitivity effects?

Reverse sensitivity involves the vulnerability of an existing activity to legal attack from newly located activities that are adjacent and which are incompatible. Reverse sensitivity is especially relevant to noise issues. Section 16 RMA provides that every person carrying out an activity has a duty to avoid unreasonable noise. As with the common law, 'coming to the nuisance' is no defence to enforcement action based on section 16 RMA. Reverse sensitivity effects often arise for infrastructure providers such as airports and ports, but these effects can be faced by other industries e.g. farming operations fearing the impact of lifestyle lots, or nightclubs or pubs with surrounding residential use.

How to protect against reverse sensitivity effects.

Strategies for dealing with reverse sensitivity effects include:

- Protecting the existing activity through rules in district plans.
- Requiring the new activity enter into a "no complaints" covenant via a land encumbrance.

If an existing industry is likely to be affected by a sensitive adjacent activity which established by the grant of non-notified resource consent, it may be necessary for the existing industry to consider challenging the grant of resource consent by judicial review proceedings. This assumes that reverse sensitivity effects to the existing industry were not taken into account by the local authority who granted consent.

Dealing with Hazardous Substances?

The Hazardous Substances and New Organisms Act 1996 (HSNO) replaced the former dangerous good legislation. To show compliance with HSNO, purchasers will typically be looking for evidence of compliance with the following:

- ***Location Test Certificate*** (*similar to the old Dangerous Goods Licence*). If there are flammable substances or oxidising substances at the facility and they exceed the amounts set down in the legislation, there is a need for a Location Test Certificate and a test certifier will need to visit the facility to issue the certificate.
- ***Stationary Container Test Certificate*** (*for above ground and below ground containers including underground tanks*).
- ***Controlled Substance Licence***. Under HSNO Act, certain substances can only be used by people who hold a Controlled Substances licence.

Staff dealing with hazardous substances should hold authorisation as an Approved Handler.

> "The presence of asbestos building products has both employment and property law implications"

Checking for asbestos in buildings.

Building inspection of commercial buildings prior to purchase should include assessment of the presence of asbestos due to its prevalence as a building and insulation material up until the 1970's. Asbestos building products include asbestos cement cladding, textured ceiling coatings (in residential housing as well as commercial premises), thermal insulation around pipes and boilers, and fire-protective linings on structural steel. The presence of asbestos building products has both employment and property law implications. The Occupational Safety and Health Service of the Department of Labour ("OSH") administer the Health and Safety in Employment (Asbestos) Regulations 1998, and have issued Guidelines for the Management and Removal of Asbestos. A copy of the guidelines are on the OSH website. The guidelines require the need to identify and assess asbestos in buildings, and require owners (but not owners of private homes) to:

- take all practical steps to identify asbestos products within their properties and record the location and condition of such asbestos, once identified, in a record for the building in accordance with the OSH guidelines;
- inform tenants of the presence of asbestos and of any action on asbestos which may become necessary; and
- ensure that all contractors required to do work are informed of the presence of asbestos.

When is there a "change of use' of a building?

An owner of a building must give written notice to the territorial authority where there is a change of use under section 114 Building Act 2004. A 'change of use' is defined in the Building (Specified Systems, Change the Use and Earthquake-Prone Buildings) Regulations 2005. Where a building has been designed for a specific purpose e.g. residential apartments, and there is later a change of purpose to say, serviced apartments, then depending on occupancy levels, the new use as a serviced apartment may cause a change of use of the building.

Securing building code compliance certificates on a change of use.

Where there is a change of building use, the building consent authority can withhold a code compliance certificate under section 115 Building Act:

- for a residential conversion, unless satisfied that the building will comply with the building code in all respects;
- in any other change of use, unless satisfied that the building will comply with the building code as nearly as reasonably practicable in respect of fire, sanitary facilities, and structural performance; and,
- where a commercial building is open to access by the public, adequate provision is made for access and facilities for people with disabilities under section 118 Building Act.

Purchasers and financiers should ensure that a building's use category (as specified under the building regulations) is accurately reflected in the building consent. If not, the code compliance certificate can be withheld by the council.

Development contributions: when payable?

Development contributions become payable under section 198 Local Government Act 2002 (LGA) on the granting of any of the following:

- resource consent;
- building consent;
- consent by a local authority to connect to a service.

If it is known that a development contribution has been paid at the time of grant of resource consent, it is prudent for a purchaser to check with the local authority concerned whether any additional contribution is payable for any later stage of development i.e. the grant of building consent or approval of a service connection. Unfortunately the devil is in the detail when it comes to development contributions. The detail is contained in the local authority's development contributions policy, and the long-term council community plan (LTCCP).

When is a refund of development contributions due?

A territorial authority must refund to the consent holder under section 209 LGA, a development contribution already paid or land already set aside if:

- resource consent lapses,
- resource consent is surrendered,
- building consent lapses,
- the development or building in respect of which the consent was granted does not proceed,
- the territorial authority doesn't provide the reserve, or infrastructure for which the development contribution was required.

If a development contribution has been required for a specified reserve purpose, a territorial authority has an obligation under section 210 LGA to refund the money or return the land acquired if the money is not applied or the land not used for the purpose within 10 years.

Poorly drafted submissions limit appeals against Council decisions.

When it comes to appealing a Council decision on a plan, it is a frequent problem that the ability to appeal the decision to the full extent desired is found to be limited by the scope of the original submission. Unfortunately for many intending appellants the narrow scope of the original submission is discovered years later when appeal rights and options are being considered. Appeal rights exist to the Environment Court on a plan decision only if the specific objective, policy rule, or other method was referred to in the submission on the plan. It follows that the relief sought in a submission will limit the scope of any later appeal against the Council decision. This restriction on rights of appeal on plans has legal consequences, as an appeal to the Environment Court on a matter outside the relief sought by a submission can be struck out.

Ensure plan submissions cover all bases.

Even if the relief to be pursued on appeal is within the scope of the original submission, some grounds of appeal can only be pursued if they are referred to in the original submission itself. For example:

- The adequacy of any regulatory impact analysis (evaluating the costs and benefits of the proposal and its regulatory efficiency as contained in section 32 RMA) can be challenged only if the section 32 evaluation was expressly raised in a submission.
- Where a proposed plan renders any land incapable of reasonable use, or places an unfair and unreasonable burden on any person having an interest in the land, the provision in the proposed plan must be challenged by a submission. Rights are then preserved to apply to the Environment Court under section 85 RMA to delete the restrictive provision.

Even if the client is supportive of the council's proposals, there is merit in lodging a submission in support of the council's plan. That way the submitter can be heard in opposition to any contrary submissions and appeal rights are preserved.

What if a future plan change is likely to be more restrictive for activities currently permitted?

If concerned with an activity that is currently permitted in a district or regional plan, and that activity is likely to be restricted in a proposed plan, it is worthwhile obtaining a certificate of compliance under section 139 RMA. This has the effect of being a deemed resource consent, and continues to authorise the activity after the proposed plan as notified. Certificates of compliance can also be obtained for existing use rights.

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Climate change: who is covered by the Emissions Trading Scheme, and when?

Climate change liabilities will need to be borne in mind so that rights, obligations and liabilities from emissions trading schemes are addressed in common transactional documents. New Zealand's Emissions Trading Scheme (ETS) is regulated by the Climate Change Response (Emissions Trading) Amendment Act 2008. The ETS scheme is based on units which must be obtained to cover emissions. These units can be bought and sold. Under the scheme emitters will need to buy units to cover emissions. The ETS scheme has a staged implementation. The dates covering activities in respect of which persons must be participants in the ETS scheme are contained in schedule 3 to the Climate Change Response (Emissions Trading) Amendment Act 2008 and applies to the following industries:

- Forestry from 1 January 2008.
- Liquid fossil fuels (mainly transport) from 1 January 2009.
- Stationary energy (coal, gas, geothermal) from 1 January 2010.
- Industrial process emissions from 1 January 2010.
- Agriculture, waste and all other emissions from 1 January 2011.

A list of activities with respect to which persons may be (voluntary) participants is set out in schedule 4. Schedule 4 includes many of the industries listed in schedule 3 but which do not meet the statutory thresholds for mandatory participation.

Parliament has recently passed legislation to defer certain forestry aspects of the current Emissions Trading Scheme (particularly in relation to pre-1990 forests), see: the Climate Change Response (Emissions Trading Forestry Sector) Amendment Act, enacted in June 2009.

National government to review New Zealand's Emissions Trading Scheme.

The National led government has formed a Select Committee to review New Zealand's ETS legislation and the wider climate change policy for New Zealand. The select committee's hearing of evidence was completed in May 2009. Report back is now expected late August 2009.

Contaminated sites: risks for innocent owners.

The scope of the RMA's enforcement order regime together with the lack of ability to require retrospective liability against prior owners for pre-RMA contamination creates significant risks for the unsuspecting purchaser of a contaminated site. This is because:

- There is no ceiling on the financial liability that the Environment Court may impose for an enforcement order requiring cleanup of a contaminated site.
- The Environment Court may impose owner/occupier liability for cleanup of historical (pre-RMA 1991) environmental problems, even though the owner was not responsible for causing contamination. The Environment Court does not have to investigate who is at fault or responsible where reliance is made on the owner/occupier liability provisions in section 314(1)(da) RMA.
- Under the RMA the polluter, owner and occupier can all be held liable for enforcement orders or abatement notices requiring cleanup of contaminated sites. However, if the site was contaminated historically, prior to 1 October 1991, but adverse effects are generated after 1 October 1991, then based on Environment Court case law only the present owner or occupier of the site can be proceeded against under the RMA. This is because the RMA has been held not have retrospective application prior to enactment on 1 October 1991.
- An enforcement order can also be granted by the Court so that it applies to personal representatives, successors, and assigns of a person": section 314(5) RMA.
- The wide definition of "owner" in section 2 of the RMA includes conditional or unconditional purchasers of any leasehold estate or interest in land.
- The definition of "occupier" (in section 2 RMA) means "the inhabitant occupier of any property". It follows that the occupant under a licence will also be an occupier as defined, and potentially subject to the RMA enforcement regime.

When is rigorous environmental due diligence investigation required?

Aside from commercial reasons (no warranties, limited warranties, or an acquisition involving share purchase rather than an asset purchase), from an environmental law perspective the following circumstances may point to situations where a more rigorous pre- acquisition due diligence investigation is required:

- A conversion of land use e.g. from industrial/commercial to residential, or from intensive horticultural to residential use.
- Past land use involving the storage (above ground or below ground) of chemicals or petroleum products.
- Fill on the land, potential land instability or other natural hazards.
- Parties to a commercial lease want to "benchmark" any land contamination, to avoid the tenant becoming liable to the landlord due to contamination caused by previous tenants: see clause 22.1 of the ADLS (Fifth Edition) Deed of Lease.
- There are hazardous activities on nearby properties (e.g. service stations, manufacturing plants involving hazardous substances storage, former rubbish dumps, etc.)
- Land acquired holds resource consent, but the conditions are very detailed, or rely on mechanical processes to achieve compliance with consent conditions.
- There are potentially onerous restrictions on the land, such as a designation or archaeological sites.

Beyond desktop due diligence: when to bring in the consultants?

During due diligence lawyers are limited typically to a desktop review of information supplied by local authorities, or sometimes (if acting for a purchaser) documents supplied by the vendor. If a desktop review shows up the property has problems, or problems are contemplated because of previous land use it may be necessary to instruct an environmental consultant to carry out a physical inspection of the property. Many multi-disciplinary engineering consultancies have contaminated land specialists who are adept at accessing available public records such as fire service records, and borehole records, which may further pinpoint problem areas. It may possible to carry out non-invasive testing of land which can be useful if parties want to investigate possible contamination without alerting regulatory authorities. If a client is engaging a consultant, bear in mind the ability to claim legal professional privilege over any report if the consultant is instructed by the lawyer for the purpose of giving legal advice.

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