TECHNICAL PAPER:

ON THE ROAD TO PROSPERITY – DON'T TAKE THE SHORTCUT TO RMA PROSECUTION

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ABSTRACT:

Under the Resource Management Act 1991, a number of parties associated with a project can be prosecuted for offences under that Act. This can include engineers working on the project.

This session will look at what constitutes an offence, when you could be charged with an offence, and what steps you can take to reduce the chances of this happening to you. This is an important issue and it is essential you are armed with the information to reduce the risk to you.

INTRODUCTION

This paper looks at what amounts to an offence under the Resource Management Act 1991 ("RMA"). Critically, intention to commit an offence is not necessary in order to be successfully prosecuted under the Act. Further, a variety of people associated with a project under which an offence occurs may be found liable for the offence. Engineers are at risk from prosecution, and therefore should be aware of what could be an offence and how you can take steps to attempt to avoid prosecution.

WHAT IS AN OFFENCE UNDER THE RMA

Section 338 of the RMA outlines offences against the Act. The list is wide ranging.

Primarily, every person commits an offence who contravenes, or permits a contravention of, any of the following:-

a. Sections 9, 11, 12, 13, 14 and 15 (which impose duties and restrictions in relation to land, subdivision, the coastal marine area, the beds of certain rivers and lakes, water and discharges of contaminants);

b. Any Enforcement Order;

c. Any Abatement Notice;

d. Any water shortage direction under Section 329; and

e. Section 15A or Section 15C (which impose restrictions in relation to waste or other matter).

Acts or omissions that would amount to offences under the Act include:-

a. Using land contrary to a district or regional rule without a resource consent and without existing use rights[1].

b. Subdividing land where the subdivision is not expressly allowed by a National Environmental Standard ("NES") or a rule in a District Plan and Proposed District Plan, or a resource consent[2].

c. Using the coastal marine area in a manner not expressly allowed by a NES, a rule in a Regional Coastal Plan and Proposed Regional Coastal Plan or a resource consent. This can include the reclamation of foreshore or seabed, erecting, altering, extending or removing structures fixed in, on, under or over foreshore or seabed, disturbing any foreshore or seabed, depositing substances in, on or under foreshore or seabed and other related uses set out in Section 12 of the Act[3].

d. Using the bed of a lake or river in a manner that is not expressly allowed by a NES, a rule in a Regional Plan and Proposed Regional Plan or resource consent. Activities such as using, erecting, altering, extending or removing structures, disturbing the bed, depositing substances in, on or under the bed or reclaiming the bed would fall under this category[4].

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[1] Section 9, RMA

[2] Section 11, RMA

[3] Section 12, RMA

[4] Section 13, RMA

e. The taking, using, damming or diversion of water that is not expressly allowed by a NES, a rule in a Regional Plan and Proposed Regional Plan, or resource consent[5].

f. The discharge of:

   i. contaminant or water into water, or

   ii. contaminant onto or into land in circumstances which may result in that contaminant entering water, or

   iii. contaminant from any industrial trade premises into air, or onto or into land

   if that discharge is not expressly allowed by a NES, a rule in a Regional Plan and Proposed Regional Plan, or resource consent[6].

Common offences under the RMA involving consultants include sediment discharge to land or water, contamination of land or water with fuels or other contaminants, unauthorised works in waterways or riverbeds, and not following conditions of resource consent.

Under the RMA, the prosecution does not need to prove that the Defendant intended to commit the offence. These offences are "strict liability offences", which means the simple fact that the act or omission occurred is enough for there to be an offence. There is no need to look at surrounding reasons and mindset.

This means that, where there is a good reason or excuse for committing the offence, the Defendant would still be found guilty of the offence. The excuse or reason would then be a factor to reduce the sentence, but not to avoid conviction itself.

PENALTIES

Individuals who commit an offence under the Act are liable to a penalty of imprisonment of up to 2 years or a fine up to $300,000.00.

Persons other than a natural person (companies, partnerships and the like) are liable to a fine up to $600,000.00.

Where offences are continuing ones, a fine of up to $10,000.00 per day or part day can be imposed for the period that the offence continues.

In addition, a person who commits an offence under the Act can be sentenced to community work, or be required to do any of the matters under Section 314 (being matters for which an Enforcement Order can be made).

One of the orders that can be made under Section 314 is a requirement that a person pay money or reimburse another for actual and reasonable costs and expenses incurred by that other person. Defendants are often required to pay cleanup and other mitigation costs under this section. These can be substantial.

The 2009 Amendments to the RMA introduced the ability for the Court to order the review of a consent held by the Defendant, if the offence involves contravention of that consent.

WHO CAN BE PROSECUTED

[5] Section 14, RMA

[6] Section 15, RMA

If a person or other entity directly commits an offence, they can be prosecuted. However, others can be also prosecuted, which is where the issue usually arises for engineers. Those other people can be prosecuted, regardless of whether the person who directly committed the act is liable or not.

A person or entity can be liable where the offence is committed by someone acting as their agent (including any contractor) or their employee. That person or entity is liable in the same manner and to the same extent as if they had personally committed the offence. They need not have been the person physically carrying out the work that is the subject of the prosecution for this to be the case.

In addition, if a person other than a natural person (most likely a company or similar entity) is convicted of an offence, a director or person involved in the management of that defendant entity is guilty of the same offence if it is proved that:

a. The act or omission that constituted the offence took place with that person's authority, permission or consent; and

b. That person knew, or could reasonably be expected to have known, that the offence was to be, or was being, committed, and they failed to take all reasonable steps to prevent or stop it.

So, engineers could be liable if:-

a. They, themselves, do something which is an offence.

b. They permit someone else to commit an offence (which is interpreted fairly widely).

c. Someone acting as their agent commits an offence.

d. Someone acting as their employee commits an offence.

e. They are a director or a person involved in the management of the person/entity who commits the offence.

The possibilities are wide, and, with the ability to be prosecuted for something that another person physical does, or does not do, there are ongoing risks with many projects.

DEFENCES

The available defences are set out in the RMA. They are very limited.

It is a defence, under Section 341(2)(a), that:

a. The action or event to which the prosecution relates was necessary to save or protect life or health or prevent serious damage to property or avoid an actual or likely adverse effect on the environment;

b. The conduct of the Defendant was reasonable in the circumstances; and

c. The effects of the action or event were adequately mitigated or remedied by the Defendant after it occurred.

It is also a defence, under Section 341(2)(b), that the relevant action or event was due to an event beyond the control of the Defendant. This includes natural disaster, mechanical failure or sabotage. In addition, the Defendant must show that:-

a. The action or event could not reasonable have been foreseen or have been provided against, by the Defendant and;

b. The effects of the action or event were adequately mitigated or remedied by the Defendant after it occurred.

As well as providing for only limited defences, the RMA requires the defendant to give prompt notice of their intention to rely on these defences. The Defendant must give written notice of this within 7 days of receiving the summons or charge. There is the ability for the Court to extend that time period but it is a rare for an extension to be granted.

The difficulty in meeting the defences and the requirement to give notice mean that legal representation should be sought immediately if charges are laid against you. If notice is not given as required, the defences cannot be relied upon.

Even if the requisite steps are taken, it can be very difficult to qualify for these defences under the RMA.

In Canterbury Regional Council v Steel Bro New Zealand Limited[7]*, Steel Bro* was charged with discharging diesel onto land without a consent or permission and discharging diesel in circumstances which resulted in a contaminant entering water. Thieves accessed a diesel pump on the Defendant's property, which was not enclosed. They stole a quantity of diesel and left the pump running. A mechanism to cut off the flow after 10 minutes was not operating. The diesel flowed into a stormwater drain and eventually into the river and estuary. It took some time for this to be identified. There was no padlock on the bowser to prevent unauthorised usage and no system to prevent hydrocarbons entering the stormwater system which drained into an open culvert.

In that case, the Defendant was unsuccessful in trying to demonstrate that the event was beyond its control. Whilst there was an element of sabotage, the Court was of the view that it was not only foreseeable, but it was preventable. The major cause of the accident was found to be the omissions of the Defendant in not ensuring that diesel on their premises was secure from sabotage. The Court considered that it was readily foreseeable that a criminal third party could become involved in the course of events that did unfold.

The Defendant was fined $10,000.00 and was required to pay reparation of over $44,500.00. The High Court increased the reparation amount from the $20,000.00 awarded in the District Court.

So, even where sabotage occurred, the Court considered whether the Defendant had taken sufficient steps to avoid that sabotage occurring. In that case, the Defendant had not taken sufficient steps and, therefore, the Court found it guilty and required substantial fine and reparation payments.

In circumstances where the defences are difficult to meet, it is all the more important to avoid committing an offence in the first place.

EXAMPLES

The best way to illustrate how the RMA works for prosecutions is to look at some cases as examples.

Canterbury Regional Council v Takamatua West Limited & A Tisch & Calcon Limited [8]

The Facts

Takamatua West Limited ("Takamatua") engaged Calcon Limited ("Calcon") to undertake the physical works to create a subdivision, including earthworks for road formation and other infrastructure installation. Calcon subcontracted the earthworks to Barry Foster Contracting Limited, which carried out the earthworks under Calcon's control.

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[7] CRI-2006-409-000232, High Court, Christchurch, Panckhurst J, 28 February 2007

[8] District Court, CRI-2007-009-004858-60-66, 4 April 2008

Takamatua also had an engineering contract with an engineering company based in Wellington ("TCB"). They also engaged Andrew Tisch of E2 Solutions Limited to be the onsite engineer. Takamatua had commissioned an erosion and sediment control plan ("TCB") and they contracted and instructed both Mr Tisch and Calcon to implement this on site.

Prior to the work commencing, the Canterbury Regional Council ("Council") suggested that Takamatua required a resource consent for the construction phase and discharge of sediment laden waters. Takamatua determined that it had a compliance certificate authorising this discharge and did not obtain a consent. They also told Mr Tisch and Calcon that they had the requisite consents and authorities.

After a number of events, the Council issued an Abatement Notice to Takamatua. After that, there was a subsequent discharge of sediment to three gullies and to Takamatua Bay, following rainfall. The prosecution related to the rainfall event. The alleged breach of Abatement Notice also occurred at the same time.

Any adverse effects from the sediment discharge were short term and ameliorated and continued to ameliorate over time. A major effect was the loss of ability for the streams to convey clear water.

Charges

Calcon was charged with discharging a contaminant onto land in circumstances where it may have entered the water. Identical charges were laid against Mr Tisch and Takamatua.

Takamatua also faced an additional charge of failing to comply with an Abatement Notice. All parties entered guilty pleas and were convicted of the offences. Essentially, the required act to establish the offence had occurred and all other mitigating factors could only be taken into account on sentence.

Deliberateness

The Court accepted that Calcon relied on Takamatua having the relevant consents. Calcon was unaware of the ongoing dispute over the discharge consent and was not advised of the Abatement Notice. However, the storage of soil on the site, which ultimately discharged down the hill was viewed as a significant factor affecting the discharge. The Court thought that Calcon would, or should, have been aware that it would be difficult to control that amount of sediment.

The Court considered that Mr Tisch was aware of the dispute over the consent. As a professional engineer, the Court considered that he knew, or should have known, that the storage of soil on site would essentially affect the ability to control the discharge from the site.

The Court accepted that Takamatua was essentially in control of the site and maintained an active interest in operations and was responsible for the consent. Takamatua made the decision that it had a compliance certificate and did not require a further consent. However, attitude was relevant and Takamatua's awareness of the significance of storing a large amount of soil on the site.

Penalty

The Court took into account the engineer's considerable experience and the fact that a conviction may reduce or prevent future engineering roles for environmental matters. The Court accepted his lawyer's submission, which was unusually supported by the Council, that the engineer should receive a discharge without conviction. However, he was ordered to pay $10,000.00 to the local residents group and $6,000.00 to the Council's costs.

With regard to Calcon, the Court took into account the fact that it was unaware of the Abatement Notice or the dispute over consents. The company's unblemished record was also taken into account. Calcon was fined $10,000.00, required to pay $6,000.00 to the residents group and $2,000.00 investigation costs to the Council.

Takamatua was fined $10,000.00, required to pay $10,000.00 to the residents group and $2,000.00 to the Council on the discharge offence. The Court took a dim view of the breach of Abatement Notice and considered that it was the company's responsibility to ensure that it was complied with, despite contractors being involved. On that charge, Takamatua was fined $20,000.00.

This case demonstrates that engineers are responsible for events that occur on projects. The case also demonstrates that those who know about consent issues will be liable as will those who are oblivious to them. Each party must take individual responsibility to ensure full compliance with the RMA.

Doug Hood Ltd v CRC, and Hollingum v CRC[9],

Canterbury Regional Council v Doug Hood Ltd and Hollingum[10]

This case related to the collapse of the Opuha Dam. Doug Hood Limited was the construction contractor and Mr Hollingum was the project manager. Part of the dam was washed away following an attempted controlled release of water which had built up behind it.

The defendants argued that emergency provisions of the RMA applied which would have meant that the defendants were not contravening the RMA and prosecution could not succeed. The charge related to the activity of constructing a dam such that an uncontrollable build up of water occurred, rather than the cutting of an emergency channel to release that water. The High Court said that the defendants were in control of the construction of the dam. By its very nature, it could not be safely overtopped in the event of a flood during construction. The possibility of flood was an ever-present risk and there was no means to address that known risk. In essence, the Court took the view that the cutting of the activity channel (which the defendants sought to rely on) was a response to an emergency of the defendants' own making.

The HC upheld the decision that the construction contractor and the project manager were responsible for the associated discharge of dam materials into water.

Their appeals against conviction were declined by the High Court. The fines ordered in the District Court stood, being a fine of $30,000 for Doug Hood Ltd and $20,000 for Mr Hollingum. This case was in the late 1990s. Since then penalties under the RMA have increased and the Courts have imposed greater fines. If this happened today, greater fines would be likely.

Northland Regional Council v Lands & Survey Ltd and M Elrick and McBreen Jenkins Construction Ltd and R Wilson[11],

Charges were laid in relation to discharge of contaminants from earthworks on a construction site. The Court dealt with the sentencing of the defendants in two groups: the Supervising Engineer Group, comprising Lands & Survey and one of its directors, the surveyor/supervising engineer working on the project, Mr Elrick; and the Contracting Group, comprising McBreen Jenkins Construction Ltd and its employee Mr Wilson.

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[9] [2000] 1 NZLR 490, HC Christchurch, Panckhurst and Chisholm JJ

[10] 1998) 4 ELRNZ 395, DC Christchurch, Judge Skelton

[11] 12 September 2006, DC Whangarei, Judges L J Newhook and B P Dwyer

The Court found that the surveyor/supervising engineer knew the regional rules and had hoped that earthworks would be minimised and would not exceed the requirements in the plan. However, contract documents were structured in a way that permitted volumes would be exceeded. He returned from leave to find that permitted volumes had been exceeded but deliberately decided that works would continue and a retrospective consent sought. This was not done for 3 months.

The starting point for both groups was $60,000, reduced to $40,000 for guilty pleas. This was further reduced to $25,000 for the supervising engineer group, split 50:50 to be $12,500 for each party.

The fine for the contracting group was increased to $50,000 given prior offences, divided as $45,000 for McBreen Jenkins Construction Ltd and $5,000 reduced to $2,500 for previous record for Mr Wilson. The Court noted that fines for employees such as Mr Wilson could be greater in the future.

Engineers and project managers need to be vigilant in ensuring the RMA is met at all times. If an issue is identified, work may have to stop to rectify matters and avoid prosecution. Prosecution may occur even if the engineer/project manager should have known of, but did not actually identify, the problem.

Waikato Regional Council v Hopper Construction Ltd and S & L Consultants Ltd[12],

Hopper Construction Ltd undertook subdivision work in the Coromandel. Charges were laid relating to soil disturbance and vegetation clearance. The conditions of the resource consents had not been adhered to. There was no identified adverse effect on the environment, although there was the potential for that to occur.

S & L Consultants were the engineers who became involved in the project as project manager after plans were drawn up by another engineer. Resource consents had been granted and works had commenced. Although S & L Consultants identified that a redesign of the controls may be necessary, it determined that it was better, under the circumstances, to allow the contractor to continue.

Heavy rainfall resulted in significant volumes of surface water running across the land. It was considered that the erosion and sediment controls were inadequate and departed from the requirements of the consent, and the earthworks should not have continued in those circumstances. An abatement notice was issued, following which appropriate erosion and sediment controls were installed. The prosecution related to these events.

There were no identified adverse effects but the potential for them was noted. It was accepted by all parties that the resource consent conditions were not adhered to. There was acceptance that parties were caught by circumstances but that they were not entirely unforeseeable.

S & L Consultants relied on advice from the contractor and inherited shortcomings in design but it had to accept responsibility for its decision to continue with work rather than stopping work and redesigning the controls. Despite emphasising to the contractor that it needed to comply with the consent, it did not take active steps to ensure this. It was also caught out by the weather conditions.

A starting point of $30,000 divided equally between the parties was adopted. Each received discounts for guilty pleas, and were fined $10,000.

Essentially, care needs to be taken at all stages of a project to ensure that the RMA is met. Reliance on others carries risk.

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[12] 13 August 2007, DC Huntly, Judge B P Dwyer

WHAT CAN YOU DO?

It is common for consultants and contractors to rely on assurances from others, including the developer and tenderer, that all consents and permissions have been obtained. It is clear that each consultant needs to make their own inquiries in order to protect themselves against prosecution. Regardless of how many others are involved in the project, and of how many assurances you are given by others, you must take responsibility for your own position. That is how the Court will view it. This will have cost implications and these will likely need to be factored into project costs.

Once an offence has been committed and a prosecution is brought, the options for defending it are limited. It is much better to make your own inquiries prior to the commencement of the works as to matters such as:

- Whether a resource consent is required (including whether the activity is allowed by, or breaches, any rules of regional or district plans);
- Whether a resource consent or a certificate of compliance has been obtained;
- What the conditions of any resource consent or certificate of compliance are;
- Whether the resource consent or certificate of compliance covers all, or just part, of the work that is to be carried out.

Reliance on the advice of others such as the developer or principal, is not enough to prevent a prosecution being brought against you. You need to make your own inquiries.

Once a project starts, compliance should be checked on an ongoing basis. Often the project goes slightly differently than envisaged. It may be necessary to stop work to rectify the situation. The motivating factor to continue work, in these cases, is often penalties and other pressures to complete projects on time. However, potential prosecution fines may be greater and, for individual engineers, a conviction under the RMA may have professional ramifications.

If you do not take a proactive approach to resource management matters before work commences and as it progresses, and something does go wrong, you risk being faced with a prosecution. Often the prosecution relates to what is considered to be an accident, but that is no excuse. Once the "accident" or event has occurred, it is too late. There is little opportunity to take back what has happened or to avoid a conviction. Take the time to address these issues to ensure that you do not become the next unsuspecting offender.