Regulation risk – anticipating regulatory changes, a means of risk minimisation

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Introduction

The title of this paper 'Regulation risk – anticipating regulatory changes, means of risk minimisation' requires a consideration of a number of factors, namely:

- What is meant by regulation risk?
- What do we mean when we talk about regulatory changes?
- How can anticipating those regulatory changes result in risk minimisation?

Before considering these matters in more detail, we are going to focus on 2 statutes (Resource Management Act 1991 ('RMA') and the Health and Safety in Employment Act 1992 ('HASIE Act')) to illustrate:

- How they impact on the forestry sector.
- How anticipating changes to these statutes can result in risk minimisation.

Inter-relationship of Acts

In order to understand what risks may be posed by regulation, you need to understand what regulations apply to your business. The following diagram illustrates the various statutes, their interrelationship with all aspects of business, and their interrelationship with each other. Following this diagram, we have included a brief overview of each statute.

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**Resource Management Act 1991**

As members of the forestry sector, you will come into contact with the RMA virtually on a daily basis. The RMA sets out a regime whereby natural and physical resources are managed, either under the Act itself or by virtue of subordinate legislation in the form of localised policy statements and plans.

By way of example, the types of forestry activities that have RMA implications are as follows:

- Facilities to experiment with and develop tree stock.
- The planting of trees. (Generally a permitted activity under most district plans, however, there may be implications relating to tracks needed for access to land within which the planting is to take place, issues relating to the visual changes to the landscape, issues relating to run off etc.)
- The ongoing maintenance of the trees including pruning, spraying etc. (Generally these would be permitted activities. However, under regional plans it may be necessary to get consent for some spraying activities, particularly where there are likely to be adverse effects on adjoining neighbours' properties or on water courses.)
- The harvesting of the timber. (This is the one activity where both regional and district councils tend to have quite a strong control over what forestry companies can and cannot do. This includes dealing with tracks, run off into water courses, visual issues associated with harvesting and use of public roads for timber trucks.)
- The processing of timber. (Processing plants in themselves have a range of activities, all of which generally require resource consent such as the use of the land for the purposes of the facility itself, discharges into water courses, the taking of water particularly for cooling purposes back into...
the plant, discharges to air of steam, odour, particulates and other contaminants, the need to store chemicals [also will have implications under the HSNO Act (and its predecessors)].

Health and Safety in Employment Act 1992

As stated above, the purpose of the HASIE Act is to set out duties on persons in control of workplaces to ensure the health and safety of employees, contractors and the public. As with the RMA, every aspect of the forestry sector’s business which involves people will be subject to the HASIE Act including:

- Nurseries and tree development (e.g. biotechnology)
- Planting
- Silviculture
- Harvesting
- Production i.e. timber processing
- Transportation to end-user

Focus on the Resource Management Act

The statutory regime

The RMA is a broad piece of legislation focusing on sustainable management of natural and physical resources.

Key matters to be complied with

The key matters that have to be complied with are mostly contained in the rules of district and regional plans set up by the relevant local authority. In addition, there are wider obligations set out in Part III (sections 9-15) concerning activities in respect of land, coastal marine areas, rivers and lakes, water and discharges. Further, there are general duties regarding unreasonable noise and avoiding, remedying or mitigating any adverse effects of activities on the environment. The matters to be complied with in the planning instruments will vary according to the location and relevant local authority. The plan provisions provide the detail required to interpret these Part III sections.

Penalties

The RMA sets up a tiered structure for enforcement ranging from abatement notices, to enforcement orders, as well as more specialised orders (such as excessive noise directions or water shortage directions), to various levels of prosecution.

The penalties vary according to the type of offence. For the most serious category of offence (and the category most often prosecuted), the penalty is imprisonment for a term not exceeding two years or a fine not exceeding $200,000. If the offence is a continuing one, to a further fine not exceeding $10,000 for every day or part of a day during which the offence continues. For the next category, the penalty is a fine not exceeding $1,500, and if the offence is a continuing one, to a further fine not exceeding $1,000 for every day or part of a day during which the offence continues. The lowest category of offence invokes the penalty of a fine not exceeding $1,500. There is also provision to charge ‘instant fines’ under a new infringement notice regime that has only been in effect since 1 February 2000.

The Court also has the option, instead of or in addition to imposing a fine or a term of imprisonment, to make any of the orders specified in s314, which are in relation to enforcement orders. These orders can include requiring somebody to stop doing something, requiring them to do something, requiring money to be paid for clean-up costs, or other forms of punitive reparation to be made.

The penalties given to date are at the low end of the scale, a matter that has been the subject of some debate over the years, given the definite increase in the upper limit provided by Parliament in comparison with the previous statutory regimes that covered the matters the RMA now covers.

Highest fines so far

In this section we cover a few examples of the various fines that have been imposed to date.

In the case of Kivi Drilling v Queen [1997] 4 ELRNZ 23 which involved drilling water bores over a three year period. The activities involved a number of breaches of conditions of consent including conditions aimed at preventing contamination of the aquifer. No actual damage occurred but there was a real risk. Total penalties of $207,433 on company and director. Reduced to $45,000 by the Court of Appeal.

In the case of Taranaki Regional Council v Petrocorp Exploration CRN 5043008401, 8689 which involved gas, oil and drilling mud erupting up to 30 m into the air. It took 35 hours to regain control of the well. The effects were mainly to the nearby stream and the company’s clean-up costs totaled $945,311. Under the Health and Safety legislation, the company was convicted and fined $20,000 in order to pay solicitors’ costs of $226 and Court costs of $95. The maximum fine of $25,000 had recently been imposed on the company in 1995, however in that case a fatality had been involved at the relevant work site.

In relation to the RMA charge, the company was convicted and fined $50,000 and ordered to pay solicitors’ costs of $226 and Court costs of $95. In arriving at the fines, the Court looked at the totality of the offending (i.e., over both of the Acts). This case shows the interrelationship between the HASIE Act and the RMA through prosecution.

In the case of Canterbury Regional Council v Doug Hood Ltd CRN 707600426, 6424 which involved a dam which overtopped in flood conditions sending substantial quantities of mud and water downstream. In deciding the level of penalty, the Court had regard to the Petrocorp Exploration case. The Court found that the present case was in the same category of offending...
and so proposed to impose overall the same level of penalty. The company director was fined $20,000 and the company $30,000 and was ordered to pay costs and disbursements totaling $66,254. Both the company and the director were given 12 months to pay.

Custodial sentences

Custodial sentences are very rarely used, and no one has actually served time in prison as a result of being convicted of an offence under the RMA.

Who is being prosecuted?

A wide variety of defendants appear in the District Court under RMA prosecution proceedings. While prosecuting Councils tend to focus on the company if one is involved, there are a number of prosecutions against individuals, particularly in the area of dairy effluent discharge. Also, there are no qualms about prosecuting the director of a company, as well as the company in suitable cases (making use of s341(3) RMA).

Fines seem to be higher against companies, given the consideration of their ability to pay.

Why Comply?

The reasons to comply with the RMA are pretty self-evident and include:

- The financial penalties
- Prospect of imprisonment
- Poor publicity/professional standing and reputation
- Loss of management time
- Consequential costs (legal costs etc)
- Environmental insurance costs and obligation
- Ease of obtaining future consents
- Avoid future regulation by central government
- Corporate obligations (especially driven by overseas management)
- Compliance with ISO type requirements/audits

How to Comply

In terms of how to comply with the RMA, it is important to:

- Identify the areas of responsibility for compliance which requires looking at the Act and planning instruments at the regional and territorial level.
- Determine whether or not a resource consent is necessary for the activities that are being undertaken or are proposed to be undertaken, or whether or not they are permitted and therefore a certificate of compliance might be able to be sought. The options for compliance are broader than resource consents and have to include a consideration of matters such as designations, global consents, any variations to existing plans and certificates of compliance.
- Set up base standards to work from which ensure compliance and these standards need to link in to other statutory regimes as mentioned above in terms of the interrelationship of the various Acts. An example or such base standards include legal compliance programmes and environmental management systems.

Health and Safety in Employment Act

The HASIE Act provides that all employers have a duty to take all practical steps to ensure the safety of employees while at work.

In general, employers must:

- provide and maintain a safe working environment
- provide and maintain facilities for the safety and health of employees at work
- ensure that machinery and equipment of the workplace is designed, made, set up, and maintained to be safe for employees
- make sure employees are not exposed to hazards or health risks when doing their work
- develop procedures for dealing with emergencies which may arise while employees are on the job
- establish ongoing systems to identify any significant health or safety hazards at the workplace and then take all practical steps to eliminate those hazards
- safeguard workers by providing suitable protective equipment, monitoring employees' exposure to risk and, if possible, monitoring employees' state of health
- provide safety information and training to employees – and property supervise them to minimise the risks of injury or illness
- maintain accident registers and other details of their workers' health and safety record.

South Wairarapa District Council v Riddiford CRN 5035065704-06 which involved a substantial unlawful excavation on the defendant’s farm. The defendant was sentenced to 6 months periodic detention was awarded and the defendant was ordered to pay Court costs of $95.

Auckland City Council v Smith CRN4004060455-459 which involved the renowned incident where the pine tree on One Tree Hill was attacked with a chainsaw. The defendant was convicted and sentenced on each charge to 6 months periodic detention to be served concurrently. Periodic detention with its comparatively structured regime was favoured over community service because the former would be more likely to guarantee the defendant made a clear and positive community contribution.

Franklin District Council v McCollum [1994] NZRMA 407, which involved a breach of an enforcement order by the defendant who continued to operate his pig farm in an unlawful manner. The defendant was given a suspended sentence of 6 months imprisonment and fined $5,000 and costs of $750.
Anyone in control of a workplace must take all practical steps to ensure the safety of all people in or around the workplace (including visitors to the site, the public and employees of other organisations working on the site).

The Penalties Five Years Ago and Today

The HASIE Act has resulted in a substantial increase in the number of prosecutions of companies for failing to meet the required safety standards. Many of the resulting fines include amounts to be paid to the injured person. And of course there has been a rise in exemplary damage claims. Since the Act came into force, we have seen a wide variety of prosecutions. We have also seen a continuing increase in the average level of fine and in the total fines awarded.

Since 1993, there have been 1,864 prosecutions (as at 31 October 1999).

The average fine is $4,265. The highest total fine imposed so far is $60,000 ($20,000 on each of 3 charges) in a case where a worker lost a leg, a total fine of $45,000 has been imposed in two cases, one where a worker was badly burned and one where a worker lost toes on one foot and suffered damage to the other foot, and a total fine of $50,000 where a worker had an arm amputated after a conveyor machinery accident. The highest fine imposed for a single charge is $35,000. This was in two cases in 1999, both of which involved fatalities.

Who is Being Prosecuted?

Ranges of people are being prosecuted under the Act including employers, the self-employed, principals, persons in control and employees.

Prosecutions often arise when:
- management have shown that they are not serious about compliance
- incriminating statements have been made to OSH
- the hazard was self evident but nothing had been done to manage it
- the company failed to have any procedures in place to deal with an incident which resulted in employees being exposed to a hazard
- a warning had been given but nothing done about it, or the attitudes of the company or defendant effectively encourage the prosecution

What to do after an accident?

After an accident involving ‘serious harm’ employers must:
- not remove anything relating to the accident from the scene, and ensure that no one else does
- tell the Department of Labour’s Occupational Safety and Health Service about the accident as quickly as possible
- give the Occupational Safety and Health Service written notice of the circumstances of the accident within seven days.

After a more minor accident, the employer must record the accident in their register. They should also investigate the cause of the accident, re-evaluate the hazard, update their procedures and prepare an action plan to minimise the hazard in future. In all cases, consultation with employees is essential. If OSH is involved, the employer may want to seek professional advice, and, if insured, should notify their broker.

Why comply?

Clearly there are three principle advantages of compliance:
- It reduces the financial risks associated with non-compliance.
- The company has already worked through how to deal with an accident and with OSH – ahead of time.
- The commitment of a company to complying with the Act is a significant mitigating factor in any prosecution. It may even provide the basis for OSH withdrawing the prosecution.

Key criteria

There are a number of key criteria which need to be considered and met for a company to successfully manage its health and safety risks. These include:
- A written policy which spells out the company’s safety philosophy.
- Setting health and safety goals.
- Management must be committed, from the top down, to achieving the safety goals (particularly middle in line management). This involves the motivating of employees to raise their standards and to become safety conscious.
- A structured approach to safety responsibility involving the different layers of management/supervisors/shop managers/fore persons:
  - management at each level must know what they are responsible for, including ensuring those in their team carry out their responsibilities
  - management must be accountable for carrying out their responsibilities
  - Accountability which includes both the routine auditing of safety compliance in disciplinary procedures.
- Employee involvement in the initial and then continuing identification of hazards and proactive action taken to deal with the identified hazards.
- Ongoing training of all employees (including the training of new staff or transferred staff before they start work).
- A system in place to monitor, investigate, report on accidents/near misses, the taking of corrective action and audits to ensure this is done.
Anticipating Regulatory Changes
- Risk Minimisation

We have specifically been asked to consider the importance of anticipating regulatory changes as a means of risk minimization. As we outlined at the outset, this means we need to consider what is meant by regulation risk, what do we mean when we talk about regulatory changes, and how can anticipating those regulatory changes result in risk minimisation?

What is meant by regulation risk?

Business must always be vigilant in terms of the range of regulation that affects it. Failure to comply with regulatory requirements is, as can be seen from our case studies, potentially very serious in terms of impacts on people and the environment and the penalties that may ensue.

What do we mean when we talk about regulatory changes?

Regulatory changes occur quite frequently, although under MMP the rate of getting changes through Parliament has slowed down. Statutes can only be changed by Parliament and subject to the urgency provisions that exist (and have been used to get the tax rate changes through, for example) the process generally involves:

- The preparation of a draft bill (usually by the relevant government department and the Parliamentary Counsel’s Office (the Government’s legal drafts people)
- Consultation on the draft bill with key stakeholders
- Preparation of a final bill
- First and second readings in the House
- Referral to Select Committee
- Select Committee calls for submissions
- Select Committee hears submissions
- Select Committee reports back to the House
- Third reading
- Committee stage
- Legislation agreed to be passed
- Legislation assented to by Governor General

Regulations are subordinate legislation that are promulgated by Ministers and then agreed to by the Governor General by Order in Council. Although regulations do not need to be so widely consulted on in practice they are. A special committee of the House called the Regulations Review Committee has an overseeing role in terms of the promulgation of regulation. Regulations generally do not come into force until 28 days from the date the Order in Council is made.

In the RMA context there are also local regulations in the form of regional and district plans. These undergo extensive consultation and judicial processes. Such plans are reviewed every 10 years.

How can anticipating those regulatory changes result in risk minimisation?

As part of your overall business strategy it is important to keep abreast of changes to the law. Failing to do so could result in systems being out of date and wrong procedures being followed. Being prepared and familiar with the changes to the key statutes and regulations that affect you is also important in terms of being able to have a role in such changes.

As mentioned above, most regulation changes have public consultation elements in them and getting involved and making submissions and/or contacting the officials working on the changes can have a real impact on the overall outcome. We now consider some of the key changes that have been proposed to the statutes and related regulations that we have identified impact on the sector.

Proposed Changes – RMA and HASIE

Both the RMA and HASIE are currently being reviewed.

The process of reviewing the RMA began over three years ago when the then Minister for the Environment (Hon. Simon Upton) commissioned Owen McShane to do a think piece. An amendment bill was produced and considered by the House of Representatives prior to the election last year. Currently there is a bill being considered by the Local Government and Environment Select Committee. It is likely that key aspects of the bill relating to the compulsory use of independent commissioners to consider resource consents, direct referral to the Environment Court and contestable consent processing will not survive into the final legislation.

The Minister of Labour (Margaret Wilson) has indicated that she is undertaking a review of HASIE. There have been no formal discussion papers promulgated as yet.

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