

diseases was presented by Jan Volney of the Canadian Forest Service (Edmonton, Alberta). Between 1982 and 1987 the average annual allowable cut in Canada was 299 million m<sup>3</sup>, but of this only 54% was actually harvested, while 34% was lost to insects and diseases (the remainder was lost to fire). I have offered to organise a meeting of this IUFRO group in New Zealand in 2004, and this was well received.

## Acknowledgements

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# Waste, what waste? A question of liability

James Carnie/Brian Joyce  
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So you think you have got rid of your waste? Have you? How about each of your resource consents – are you sure that your contractors are complying with those?

It is amazing to us that ten years into the life of the RMA, with its profound economic implications on land use, including forestry, there appears to be little awareness of the serious potential liability faced by business owners and managers, for offences arising from the activities of their contractors.

Those offences include unlawful discharges and non-compliance with consent conditions. As is well known, the liability for offences under the RMA ranges from enforcement orders to prosecutions, penalties and potential imprisonment. Maximum penalties for unlawful discharges are \$200,000 or imprisonment up to two years, and although Courts have traditionally been reluctant to impose significant penalties, recent decisions have been signalling an increased willingness to do so.

Certain offences committed in the course of "producing a commercial gain" can result in an additional penalty of three times the gain achieved, and an order requiring the reparation of any environmental effects of an offence could also be made.

The notion that a party might be liable for an act of its agent is not a novel concept at all, but it is now embodied



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in the RMA for any offences under that Act.

In this article we examine the circumstances in which this type of liability might arise and identify steps that might be taken by business owners and managers to take advantage of the statutory defences available to this kind of exposure.

## Section 340 RMA

When first enacted, this provision imposed liability for RMA offences committed by a party's "agent or employee". In August 1998, the words "including any contractor" were added after "agent", representing a significant expansion in the type of circumstances subject to s 340.

Both "agent" and "employee" have relatively specific meanings in law, with necessary qualities that are required to establish the status of the relationship: an agent must be vested with power and authority, however limited, to act on behalf of its principal, while an "employee" has a well defined meaning and status by virtue of recent employment legislation.

However, "contractor" is not defined in the RMA. It normally means any entity that contracts independently with another for the provision of services.

The potential repercussions of the 1998 amendment are evident if a typical forest management arrangement

is considered, in which a forest owner contracts with a forestry consultant/manager to maintain and manage the forest (often pursuant to a forest management plan), and to contract out many activities such as roading, spraying, pruning and harvesting.

In that situation, the potential for contractors to breach resource consents or unlawfully discharge “contaminants” can be significant, especially given that “contaminant” is widely defined in the RMA, and a “discharge” can occur not only by positive emissions, but also where a party fails to take sufficient steps to prevent a substance from escaping.

A discharge of fuel, oil or pesticide onto ground that drains into a nearby natural watercourse can have widespread effects on the surrounding environment. The result, of course, can be an expensive clean up operation and, unless the forest managers have taken the pre- and post-discharge steps discussed below, there is potential for a criminal conviction, fine and considerable harm to the business reputations of all involved.

There is also significant evidence emerging of an interest by insurers in examining (by way of environmental audit) the potential exposure of the insured to risks of this kind, when assessing whether to provide cover for these risks.

Since the enactment of the RMA, there has been a series of cases of this ‘agency exposure’ coming before the Courts.

An example is *Augustowicz v Puketutu Island Timber Company Ltd*<sup>1</sup>. Puketutu contracted with Machinery Movers to empty and remove three tanks of contaminated water from a timber yard. Instead of emptying the tanks into the specified drain as directed by Puketutu, Machinery Movers unlawfully discharged the contents of the tanks onto an adjacent yard, and consequently breached s 15 of the RMA. A highly toxic substance seeped into a nearby stream, killing wildlife and affecting the health of nearby residents.

The Court determined that Puketutu was liable as a principal under s340 of the RMA for the unlawful discharge by Machinery Movers, unless Puketutu could establish a defence under s 340(2) (which we shall examine further below).

It is important to note, though, that forest owners would not necessarily be liable for the acts of the subcontractors engaged by the forest managers/consultant.

Although “subcontractors” were initially proposed to be added to s 340, the 1998 RMA amendment included only “contractors” when finally concluded.

It seems to us that, in the light of case law prior to 1998<sup>2</sup> (which confirmed that subcontractors were generally not “agents” under s 340), and the apparently deliberate omission of the word “subcontractor” from the 1998 amendment, forest owners (but not of course the managers/consultants themselves) can take some comfort in the ‘sheltering’ effect of using forest managers to engage forestry subcontractors.

However, where a forest owner enters into a contract itself, then risks arise.

In *Crown v Kemp*, Mr Kemp entered into a direct written agreement with Helilogging New Zealand Ltd, whereby the latter had rights to cut, remove and sell certain millable native timber on his land. Although Mr Kemp had a resource consent for limited logging, and provided a copy of the consent to Helilogging’s director (together with a request that he read it), Helilogging unlawfully removed 120 trees. The Crown sought to prosecute Kemp as a “principal” under s 340 RMA, for Helilogging’s breach of the resource consent.

The decision was in May 1998, therefore the case was determined before the words “(including any contractor)” were added to s 340. The Court was concerned solely with whether a ‘principal - agent’ relationship existed, and concluded that the agreement between Mr Kemp and Helilogging was essentially one for the sale and purchase of trees, and did not create any relationship of “agency” in substance or form.

It seems likely, given that conclusion and the circumstances of the case, that Helilogging would have been found to be Kemp’s “contractor” if the case were considered under the revised s 340, meaning that Kemp would have been as liable for the offence as if he “*had personally committed the offence*” (s 340(1)).

### Defences

If a contractor unlawfully discharges contaminants or otherwise commits an offence under the RMA, then the ‘principal’ that engaged the contractor (eg. the forestry managers or consultants) could also be liable under s 340(1) of the RMA, unless it could take advantage of one of the defences available under s 340(2) RMA.

To be entitled to those defences, the principal (assuming it is a company) would need to take “*all reasonable steps to remedy any effects of the act*”, and establish that either:

- (i) “*Neither the directors nor any person concerned in the management of the body corporate knew or could reasonably be expected to have known that the offence was to be or was being committed*”; or
- (ii) “*The body corporate took all reasonable steps to prevent the commission of the offence*”

However, where a party has not taken all reasonable steps to prevent the commission of the offence, the Court is likely to find that some-one in the management of the Company could have been expected to know that the offence would be committed.

In *AFFCO v Auckland Regional Council*<sup>3</sup>, the Environment Court determined that due to the obvious inadequacies in the waste disposal procedures adopted by AFFCO and its contractor, “*AFFCO was aware of facts from which a reasonable person would recognise that escape would occur*”, and therefore that “*the management of AFFCO should have known that the offence was likely to be committed*.” The Court concluded that AFFCO was liable, under s 340, for the unlawful discharges carried out by its contractor.

Therefore, in order to avail itself of a defence under s 340, a principal must take “*all reasonable steps*” to:

- (a) “*Prevent the commission of the offence*”; and

<sup>1</sup> District Court, CRN 2090012515-6, 2 April 1993.

<sup>2</sup> See, for instance, *McKnight (Auckland Regional Council) v Horticultural Processors Ltd & Ors* District Court, CRN 2090016530, 26 November 1993

<sup>3</sup> 29 September 2000, 5 NZED 832.

- (b) *“Remedy any effects of the act or omission giving rise to the offence”*

Dealing with each:

- (a) Steps that a principal should take to prevent an offence

*These steps include contractual and practical measures designed to ensure that the contractor or agent is clearly aware of its responsibilities, and in fact abides by those.*

*Practically, the principal can establish effective procedures to prevent offences (including effective management procedures), as well as contingency plans and backup procedures.*

The principal should ensure that there is a formal and robust contract in place that, among other things, requires notification of any offences by the contractor and requires the contractor to take all steps necessary to contain, minimise and remedy the effects of an offence.

Although not a preventative step, the contract should also require the contractor to indemnify the principal for any costs, fines etc arising from the contractor's failure to comply with the statutory requirements.

- (b) Steps that a principal should take to remedy any effects of an offence

A recent Court of Appeal decision<sup>4</sup> has confirmed that section 340(2) requires a principal to take all reasonable steps to remedy any effects on natural and physical features – *“One remedies the effects of the infringing act by restoring the physical damage done by it.”*

Despite the fact that its contractor has committed the offence, the principal would still need to take positive steps, where reasonably necessary, to determine the remedial action required, and ensure that occurs. It may well be that the principal is only required to assist in a supporting role, if the contractor has agreed to assume the prime remedial responsibility. However, even in that situation, the principal must be pro-active in the remedial efforts.

In summary, the potential liability of a forestry ‘principal’ does not end where it contracts with a firm to dispose of its waste, nor does that potential liability cease where a resource consent is obtained and the contractors are given precise instructions in accordance with that consent. The principal will remain liable for any offences committed by the contractor, unless it can prove that it has satisfied the defence under s 340(2) of the RMA.

Proving that defence would not be easy, in the absence of evidence that established pro-active steps taken by the principal, both before and after the offence, that were designed to prevent the offence and remedy its environmental effects.

<sup>4</sup> *Canterbury Regional Council v Newman* (CA) 182/00

## Compulsory Professional Indemnity Insurance – Yes or No?

**Tim Thorpe**  
Members Representative,  
NZIF Registration Board

### Introduction

The Articles of Association of the New Zealand Institute of Forestry (NZIF) require applicants to provide proof of professional indemnity insurance (PI) before they can obtain registration as a Registered Forestry Consultant (RFC). In response to concerns raised about the cost and relevance of PI, the Registration Board recently surveyed RFCs about whether the NZIF should continue to require this compulsory insurance.

The pros and cons of compulsory PI were outlined to RFCs in the survey, as shown in Table 1.

A limited survey of five other professional bodies – law, accountancy, primary industries, engineers, and valuers – was also undertaken. None of these bodies require mandatory PI except in certain specified circumstances, eg in a limited liability company

**Table 1: Arguments for and against Compulsory Professional Indemnity Insurance.**

Pros	Cons
Protection for RFC's clients	<ul style="list-style-type: none"> <li>The Board's function is to maintain professional standards. The requirement for indemnity insurance is a commercial decision for individual RFCs.</li> <li>The Board does not wish to be in a position to determine what level or type of insurance is appropriate.</li> <li>The insurance is expensive. Some forestry consultants are not prepared to register as forestry consultants because of this. This reduces the ability of the NZIF to maintain standards across the forest consultancy sector.</li> </ul>
Protection for RFCs	<ul style="list-style-type: none"> <li>Same arguments as above apply</li> <li>Some organisations, particularly those overseas, neither require nor expect indemnity insurance (although they may be no less willing to sue in the event of professional misconduct).</li> </ul>
Enhances usefulness and standing of registration	<ul style="list-style-type: none"> <li>Being registered is about meeting professional standards, not about having appropriate insurance</li> <li>Some insurance companies do not wish the fact that RFCs have indemnity insurance to be advertised</li> </ul>