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Editorial

Non-notification of Resource Consent Applications

Non-notification of resource consent applications has been the subject of an important Court of Appeal decision for local government –*Bayley v Manukau City Council* [1998] NZRMA 513.

In the 11th Compendium of Case Notes of the Ombudsmen, published earlier this year, a comment was made in Case No C3944 that an increasing number of complaints related to the manner in which local authorities were interpreting their power to process applications for resource consents on a non-notified basis, pursuant to Section 94 of the Resource Management Act, 1991.

Attention was drawn in the Case Note to the fact that, before deciding to dispense with notification, not only must the effect on the environment be considered to be minor, but written approval must also be obtained *"from every person whom the consent authority is satisfied may be adversely affected by the granting of the resource consent."*

This requirement may be dispensed with only in those cases where *"the authority considers it is unreasonable in the circumstances to require the obtaining of every approval."*

The recent Court of Appeal decision has explained the importance of notification and has identified the proper approach that must be applied by consent authorities when considering whether an application may be processed on a non-notified basis. It states at p 521:-

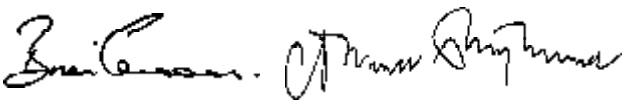
"There is a policy evident upon reading Part VI of the Act, dealing with the grant of resource consents, that the process is to be public and participatory. Section 94 spells out exceptions which are carefully described circumstances in which a consent authority may dispense with notification. In the exercise of the dispensing power, and in the interpretation of the section, however, the general policy must be observed.

"Care should be taken by consent authorities before they remove a participatory right of persons who, by reason of proximity or otherwise, assert an interest in the effects of the activity proposed by an applicant on the environment generally or themselves in particular.

*"Before s 94 authorises the processing of an application of a resource consent on a non-notified basis the consent authority must satisfy itself, first, that the activity for which consent is sought will not have any adverse effect on the environment which is more than a minor effect. The appropriate comparison of the activity for which the consent is sought is with what either is being lawfully done on the land or could be done there as of right…Then, at the second stage of its consideration, the authority must consider whether there is **any** adverse effect, including any minor effect, which **may** affect any person.*

"It can disregard only such adverse effects as will certainly be de minimis*, of which the minimal intrusion of … closets into … yard space may be an example, and those whose occurrence is merely a remote possibility. With no more than a very limited tolerance, the consent authority must require the applicant to produce a written consent from every person who may be adversely affected. It should not be overlooked also that "effect" in s 3 includes a temporary effect, which requires the authority to consider adverse effects which may be created by the carrying out of construction work."*

This appears to be a judgment of considerable importance to local government. Consent authorities should ensure that the appropriate decision-makers are fully aware of these requirements when considering any application to have a resource consent processed on a non-notified basis.



Sir Brian Elwood
Chief Ombudsman

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NOT ALL INFORMATION ON EMPLOYER/EMPLOYEE RELATIONSHIPS IS PRIVATE

While relationships between employers and employees will often concern matters of privacy, there are circumstances where public interest considerations require disclosure of certain details.

A journalist suspected that a staff member at a university was receiving a salary while not being required to perform any duties. She had held a position that had been disestablished some months previously, and no appointment to another role had been announced.

The requester asked the university:

(a) whether the person in question was still being paid by the university;

(b) if so, the nature of her duties; and

(c) the total of any salary paid since her previous position was disestablished.

The university confirmed that the subject was still an employee, but declined to answer the second and third questions, relying on Section 9(2)(a) of the Official Information Act.

It transpired that although the woman had recently been appointed to another position, she had received a full salary for some 10 months without being required to perform any specific duties during that time.

After consultation with the Privacy Commissioner, it was accepted that s9(2)(a) applied. Relevant considerations included that information on remuneration is normally considered private to the recipient.

However, in terms of s9(1) of the Act, the university was accountable for how it spent public funds. The public interest in accountability was seen to be particularly strong in this instance, where funds had been used for the salary of an employee who had not been required to perform any duties.

After balancing the competing interests, the view reached was that the university ought to disclose that the relevant staff member had not been required to perform any specific duties during the period, but without disclosing the level of salary received during that time.

It was said that such a statement would meet the public interest in disclosure while at the same time limiting the infringement of individual privacy, and the university agreed to that.

Bear justice?

A complainant who had bought two bear skin rugs while in Canada discovered first, that she could not import them into New Zealand, and then, that Canada would not accept them back, so that she could not obtain a refund either.

Bears and parts of bears are items covered by the Trade in Endangered Species Act, 1989. Both New Zealand and Canada are signatories to CITES (the Convention on International Trade and Endangered Species of Wild Fauna and Flora) so specimens of listed species, or bits of them, cannot be exchanged.

The complainant found herself in a situation where she could neither keep the bear skins nor return them, and referred the matter to an Ombudsman. But in this case, as in other cases, the role of the Ombudsman relates to matters of administration and not to decisions of Parliament in adopting particular laws. The refusal to allow entry was lawful.

So the two bear skins were in a kind of limbo – legally suspended somewhere between Canada and New Zealand. However illogical the complainant's situation might seem to have become, the Ombudsman could not intervene.

It is understood, though, that subsequently the skins have been donated to an educational institution, which is permitted.

ONUS ON GOVERNMENT AGENCY TO GET THE FACTS RIGHT

A complainant was surprised to get notification from the Inland Revenue Department that she had been overpaid child support for her grandson for a period of three and half years when she had not been caring for him.

IRD failed to respond satisfactorily to her questions to it over a further period of three years.

She was told repeatedly that her queries would be investigated and that staff would get back to her, but neither happened.

Finally, she was told it did not matter how or why she had been overpaid. The fact was that the overpayment existed and so she was liable to repay the debt and the penalties that were accruing.

On investigation the IRD acknowledged that the complainant had done everything required of her to advise of her circumstances so her correct entitlement could be determined.

The problem had arisen initially when files were transferred from the DSW to the IRD, which latter organisation began to pay child support to the complainant without checking the information on the file properly.

As a result, she was paid child support for two children instead of just the one to which she was entitled.

Under the then system, since changed, notices of assessment did not carry the name(s) of the children.

The IRD also acknowledged that responses by its staff to the approaches from the complainant had not been appropriate. It apologised to her and wrote off her debt.

Charges for Prisoners on Escorted Leave

A prisoner claimed that prison management had overcharged him for travelling expenses to attend his father's funeral.

When a prison vehicle is used to escort an inmate for such purposes, inmates are liable to be charged for transport costs as well as officers' wages and other incidental expenses.

In this instance, the prison charged him for the cost of fuel on top of the standard charge of 61 cents per kilometre for the use of their vehicle.

It was subsequently acknowledged that such a charge was inappropriate as the fuel costs had been built into the charge per kilometre. The prisoner was subsequently reimbursed.

Prison Manual Should Be Available

There is no reason why inmates of a prison should not have access to the Prisons Procedure Manual (PPM).

As a result of a complaint, it was found that some prisons were allowing individual prisoners differing access to parts of the PPM when there was no reason why all prisoners should not have access to all those parts of it referring to national procedures.

This situation prompted the Department to issue a permanent instruction to all public prisons clarifying the situation.It described the PPM as a *"public document"* of which no part or parts of the nationally co-ordinated system need be withheld from inmates for security reasons.

What had been termed an *"abridged copy for inmates"* was no longer practicable, but local systems and plans might be withheld should appropriate grounds exist under the Official Information Act.

Actions must conform to reasonable standards

An action is *"unreasonable"* only *"if there is material to support the view that the relevant decision-maker had acted otherwise (than) in conformity with the standards reasonably to be expected of such an office-holder*."

This definition comes from an Australian case, but is consistent with the approach historically adopted by Ombudsmen in New Zealand.

An employee was killed in an accident in New Zealand that was unwitnessed. Because it had no actual evidence before it, the accident investigating authority considered the work history of the victim.

Its report found that the victim was *"particularly enthusiastic and supportive when working in a team situation towards defined deadlines, attributes which resulted in him occasionally placing himself at risk*" and that this attitude *"did not change following attempts at on-the-job correction."*

The victim's family sought a review of the investigating authority's finding that the accident most likely had been caused by the actions of the victim himself. However, the Ombudsman considered it was *"not unreasonable"* in the circumstances for the review authority to have considered the victim's previous work habits and history, and so had not itself acted unreasonably or contrary to law. Therefore, there was no ground to investigate the particular authority's decision.