

Transit New Zealand’s contractors required to act responsibly under terms of their contract

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| Legislation | Ombudsmen Act 1975 |
| Agency | Transit New Zealand |
| Ombudsman | John Robertson |
| Case number(s) | W26742 |
| Date | 1992 |

Roading reconstruction-affecting drainage on adjacent private property—damage to property by contractor during reconstruction—liability of Transit New Zealand for contractor’s action

The complainant was a land owner who lived adjacent to a State Highway. His complaint was two-fold: that the construction of the passing lane outside his property materially affected the drainage and run-off onto his property and second, he complained that the contractors engaged by Transit New Zealand (previously National Roads Board) had damaged his property during the construction phase. It was the complainant’s belief that Transit New Zealand had taken inadequate action to rectify the damage to his property. Transit New Zealand had attempted to resolve the issue and negotiate settlement with the complainant. However, the complainant did not believe the settlement offered was satisfactory and continue to seek redress to a standard acceptable to him.

In respect of the first part of this complaint, Transit New Zealand reported the road surface had only been raised by the thickness of the overlay. It did not believe that action would have significantly altered the run-off onto the complainant’s property. However, on investigation Transit New Zealand found the drainage channel which collected the run-off on the highway prior to the contract, no longer existed. The removal of the channel was not part of the contract. Transit New Zealand therefore offered to construct another drainage channel to collect the run-off from the highway and alleviate the complainant’s drainage problems. Transit New Zealand also offered the complainant an ex-gratia payment of \$500 by way of compensation for its share of the problem caused by the lack of the drainage channel. The ex-

gratia payment was contingent on the complainant accepting it as final settlement of the claim.

The second aspect of this complaint related to damage to the complainant's property allegedly caused by the contractor engaged to construct the passing lane. The complainant alleged the contractor entered his property and adversely altered the condition of his land.

In this particular case all the work designated under the contract was on the road reserve and no land entry arrangements were sought by Transit New Zealand with the complainant. The contract made no reference to the complainant's property. No access to, or use of, the complainant's property was envisaged by Transit New Zealand when the contract was drawn up. Furthermore, the distance between the legal boundary and the highway was sufficient that access to, or entry onto, the complainant's property was not necessary to effect the contract.

The investigation revealed that Transit New Zealand is not liable for the acts of an independent contractor who allegedly caused damage while implementing a contract.

Although the Ombudsman accepted Transit New Zealand is not legally liable for the actions of independent contractors, he believed such contractors acting on behalf of a government agency should not be able to act without thought or regard to the private members of the public whilst a contract is being fulfilled. The Ombudsman believed such contractors have the potential to damage the public image of a government agency. Few members of the public would accept the responsibility of the legal situation and are likely to take the simplistic view that the contractor is the government agency in operation.

The Ombudsman suggested to Transit New Zealand that it consider adding a clause to its standard contract to allow it the right of review, and some sanction to be applied, if contractors are found to have damaged property owners' rights or interests whilst fulfilling a contract.

In view of administrative actions Transit New Zealand proposed regarding the complainant's drainage problems, the Ombudsman considered a satisfactory remedy had been achieved and that the complaint did not warrant further enquiry. To avoid the risk of a similar case in the future, the Ombudsman suggested Transit New Zealand give consideration to altering its standard contract.

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