

**SUPPLEMENTARY PAPER – For Discussion Purposes only**

**Wednesday, 21 January 2009**

<b>Subject:</b>	<b>Damages, costs and the RMA</b>
<b>Purpose:</b>	To provide an overview of the purposes of damages and costs awards and consider whether damages awards could be introduced under the RMA.
<b>Summary:</b>	There would be difficulties with introducing a private law power to award damages into a public law statute such as the RMA.
<b>Recommendation:</b>	We do not recommend that damages awards be introduced under the RMA against those proved to have a trade competition motive, but rather that the Environment Court be enabled specifically to award indemnity (or full) costs to any applicant or council where the Court considers that the appellant's dominant motive in the proceedings is anti-competitive. This should include trade competitors who have wholly or partly financed the bringing of such proceedings.

**Background**

***Damages***

In New Zealand, damages awards are a monetary sum awarded by the Court to the victim of a tort (or civil, common law wrong) and for breach of a contract to compensate for losses suffered. Damages in tort are awarded generally to place the claimant in the position in which he would have been had the tort not taken place. Damages for breach of contract are generally awarded to place the claimant in the position in which he would have been had the contract not been breached.

In some instances, compensation may be awarded by the Court for some infringements of rights of a public nature under statute, for example under the New Zealand Bill of Rights Act (NZBORA). However in the case of compensation for infringement of public rights, an award will be in the discretion of the Court, and in exceptional cases.

In order to award damages in tort, damage or loss must first be proved. The damage or loss must have a causal link with the wrongful act. In some instances, losses do not have to be proved, but in those cases, the level of damages is usually nominal.

The types of damages that can be awarded in tort are:

- Special
- General
- Aggravated
- Nominal
- Contemptuous
- Exemplary (or punitive)

Special damages compensate the claimant for the quantifiable and provable monetary losses suffered. Special damages can include direct losses (such as amounts the claimant had to spend to try to mitigate problems) and consequential or economic losses resulting from lost profits in a business.

General damages compensate the claimant for the non-monetary aspects of the harm suffered. In the case of businesses, this may include loss of use of an asset or business interruption.

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Aggravated damages are awarded to compensate for injury to feelings, for example, in defamation cases, but this does not generally apply to corporations.

Nominal damages are very small damages awarded to show that the loss or harm suffered was technical rather than actual.

Contemptuous damages are a derisory amount awarded to show disapproval at the bringing of a claim.

Punitive damages are generally called exemplary damages in New Zealand. Their function is to punish or to make an example of outrageous or high handed behaviour, rather than to compensate. The New Zealand courts have held that exemplary damages are available in appropriate but exceptional cases. Claims for exemplary damages need to plead specific particulars. Awards are generally modest and at a level to mark the Court's disapproval.

Damages can serve the dual purpose of both sanctioning the wrongful act and recovering losses from the unlawful act. The Court has recently stated that there is nothing unprincipled about including a punitive element in tortious remedies. However, the person asserting a right to damages must show that they have mitigated their losses. Damages are also likely to be limited to what was reasonably foreseeable by the defendant.

The RMA does not address civil law remedies, but instead provides for a range of enforcement procedures that have virtually supplanted tortious actions such as nuisance by interference with quiet enjoyment of land. This is partly due to the width of the word 'environment,' and the fact that enforcement action can be commenced by local authorities at no direct cost to the affected parties. Enforcement orders are a remedy to enforce public law duties.

### **Costs**

In New Zealand, costs awards generally enable a successful litigant to recover a proportion of their legal fees and disbursements and some witnesses expenses.

For most courts, a scale of costs is prescribed by regulation to enable parties to more readily assess the amount of costs that they are likely to be awarded or incur as a result of litigation.

However, the Environment Court provides an exception whereby costs are not generally allowed to a successful party, and there is no scale.

Instead, the Court retains a full discretion to determine the level and quantum of costs and works from principles that:

- costs are to be awarded where it is just
- the court has a public interest role and costs are not a penalty
- costs are to reasonably compensate a party where it has been put to unnecessary expense
- are derived from case law

Although the Court has issued a practice note which provides some guidance to parties of where they may expect costs to arise, principles are often departed from, creating uncertainty of outcome. The proportion of costs awarded varies significantly from two thirds to fifty percent, but this is not followed by all divisions of the Court. This can be seen as arbitrary.

There is little incentive for parties to agree to pay costs to settle a dispute, and an incentive to continue litigating and to argue that no costs should be awarded. This is not in the interests of general public policy that litigation should be settled, nor does it encourage a more collaborative way of working through environmental issues.

Indemnity costs are provided for under the High Court Rules. Rule 48C of the High Court Rules provides that the Court may order an award of indemnity costs to cover the actual (full) costs, disbursements, and witness expenses reasonably incurred by any party. Rule 48C(4) sets out the grounds on which the Court may order a party to pay indemnity costs. Indemnity costs may

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be ordered if the party has acted vexatiously, frivolously, improperly, or unnecessarily in commencing, continuing, or defending a proceeding or a step in a proceeding. However, indemnity costs are awarded rarely.

In the Environment Court, improper, negligent or unreasonable conduct is normally a factor in determining the amount of costs of any kind, including indemnity (or punitive) costs. For example, the Environment Court in its Practice Notes has indicated that it will consider whether a party has been required to prove undisputed facts which in the Court's opinion should have been admitted by other parties. An anti-competitive motive is not specifically considered by the Environment Court in awarding costs.

The Environment Court has occasionally awarded indemnity costs in cases where the appeal was clearly frivolous or other parties were required to incur unnecessary costs. (For example, *Steve Clark Engineering Ltd v Rodney District Council A195/2005*, and *Auckland Regional Council v Cash for Scrap Limited A5/2007*). However, in *Te Kura Pukeroa Maori Incorporation v Thames-Coromandel District Council W037/2008*, for example, the appellant was found to have put the Council to unnecessary expense, and all the grounds for strike out were met. Yet the Court only awarded fifty percent of the Council's costs, not the full indemnity costs claimed.

### **Comment**

There is no provision for any kind of damages awards to be made under the RMA to compensate for interference with a private property right. Alternative 'public law' remedies are provided, which include a power in section 314(1)(d) to require a person to pay money to, or reimburse another person for any actual or reasonable costs and expenses in avoiding remedying or mitigating any adverse effect on the environment where a Court order is not complied with.

Furthermore, if a 'private law' right to seek damages were to be introduced against those proved to have a trade competition motive, this would be contrary to the general 'public interest' nature of the RMA, which does not deal with private litigation. On the other hand there would be a need to consider mitigation of losses in calculating damages, so litigants would be forced to consider other methods of settling litigation provided for by the RMA, including arbitration and mediation.

There would also be a need to define 'trade competition' for the purposes of enabling applications for damages awards to be made. This is because the RMA does not discourage competition for the use of resources, but in fact promotes that competition. Moreover, it is relatively easy for trade competitors to mask their true intent in submitting under the guise of a genuine concern for the environment. In some instances, these concerns are vindicated on appeal, such as failure to notify, and trade competition issues do not need to be determined (e.g. *Progressive Enterprises Ltd v Northcote Mainstreet Incorporated v North Shore City Council & the National Trading Company of New Zealand Limited CIV 2004-404-7319*). If there were more than one party (including the appellant and the applicant) found to have trade competition motives, determining or apportioning damages would be quite difficult.

### **Alternatives**

The Environment Court could be enabled specifically to award indemnity (or full) costs to any applicant or council where the Court considers that the appellant's dominant motive in the proceedings is anti-competitive. This would be likely to require a full hearing on the costs issue, as it could be difficult to make findings on the motive of the trade competitor on the papers.

This should include those trade competitors found to have financed in whole or part, or otherwise encouraged the bringing of proceedings by another person (this is known as champerty or maintenance and is contrary to public policy).

### **Conclusions**

We do not recommend that damages awards be introduced under the RMA against those proved to have a trade competition motive, but rather that the Environment Court be enabled specifically to award indemnity (or full) costs to any applicant or council where the Court considers that the

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appellant's dominant motive in the proceedings is anti-competitive. This should include trade competitors who have wholly or partly financed the bringing of such proceedings.