

**Welcome to the Autumn issue of *Rural eSpeaking*.
We hope you find that the articles are both interesting
and useful to you.**

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Rural Dispute Resolution

Alternative dispute resolution methods

A significant number of contractual arrangements in the rural sector (including lease, sharemilking and contract milking agreements) now contain provisions to resolve disputes by alternative dispute resolution methods. What are these and what do they mean?

'Alternative dispute resolution' is a term that covers a wide range of processes used to resolve disputes. In a sense, they are all alternatives to going to court. We highlight seven different processes below.

Arbitration: A process for the settlement of disputes in which an independent and impartial decision-maker (the arbitrator) makes a decision to settle a dispute after hearing from the parties. The arbitrator issues a decision called an 'award'. This is normally final and binding on the parties and is enforceable by the courts. The Arbitration Act 1996 contains statutory provisions that govern the arbitration process. A contract may also specify an arbitration process.

Mediation: This method is a confidential and consensual dispute resolution process in which an independent and impartial mediator facilitates negotiation between the parties to assist them to resolve their dispute.

A mediator isn't a decision-maker; the process is based on achieving co-operation between the parties to make their own decisions and agreements.

Negotiation: A process of communication in which the parties and/or their representatives work to reach agreement.

Facilitation: Similar to mediation, a facilitator helps parties to resolve a dispute by negotiation, consultation, information-gathering and problem solving. Working with the parties to assist in managing communication and potential conflict, a facilitator won't provide answers. Their role is to question and help people to reach increased understanding, find answers and makes decisions for themselves.

Conciliation: Conciliation has the parties to a dispute, with the assistance of a neutral conciliator, identify the issues, develop options and try to reach agreement. A conciliator may have an advising role on the content of the dispute or the outcome but isn't there to make a ruling or binding decision.

Investigation: A dispute resolution process which may be carried out in response to an allegation or complaint. An investigator works within the policies and procedures of the organisation involved. After fully investigating a complaint or allegation an investigator submits an objective report which includes the investigator's conclusions and any recommendations. The investigator isn't a decision-maker but is engaged to provide objective information to assist a decision-maker.

Expert Determination: The parties instruct an expert to investigate and use his or her own expertise to determine the issues in dispute. The expert may make a ruling with or without submissions from the parties and acts within the terms of reference set out by the parties¹.

Alternative dispute resolution processes have many advantages including:

- » Confidentiality
- » The ability to tailor the process to the particular dispute
- » A choice of dispute resolver, ie: arbitrator, mediator, conciliator
- » Cost efficiencies
- » The parties 'own' the result
- » It's quicker than the court process, and
- » There's the ability to preserve relationships.

It's important that if you're entering into contractual arrangements you have an understanding of what the contract provides should a dispute arise. Many contracts specify a process to be followed, and also often specify timeframes, whether it be for raising a dispute or responding to a dispute raised by another party to the contractual arrangement.

If you'd like to know more about these alternative dispute resolution processes and how it can work in your contracts, please be in touch with us. ■

¹ The above definitions have been adapted from those provided by the Arbitrators and Mediators Institute of New Zealand (AMINZ).

Water

A natural resource or a commodity?

The management of fresh water is becoming an increasing concern for all New Zealanders, and especially for farmers. This article looks at water on farms and how regional councils are grappling with the issue of the finite commodity of water.

For farmers, particularly those with intensive operations such as cropping or dairying, the issues of water are twofold:

- » The ability to take the water they need from rivers, lakes and aquifers, and
- » Controlling what's then discharged from their farms back into those same water sources.

The control of both of the above rests in the Resource Management Act 1990 (the RMA).

There are a variety of measures and initiatives underway throughout the country attempting to deal with the above issues. These are generally initiated by regional councils which, under the RMA, have responsibility for fresh water. Some of these initiatives are quite high profile such as the 'One Plan' of the Horizons Regional Council (Manawatu/Wanganui) and the proposed Ruataniwha Dam project in neighbouring Hawke's Bay.

With all these proposals there is an element of contentiousness. The most basic issue is the tension between the economic benefits that flow from the intensification of agriculture against the finite amount of water that's available, the degradation of waterways and the consequent issues for other users of water and the environment generally.

One of the problems regional councils are grappling with when trying to manage water is gathering accurate information as to how much water is actually being taken, how it's being used and whether or not current consent conditions are being complied with. The Resource Management (Measurement and Reporting of Water Takes) Regulations 2010 came into effect on 10 November 2010. These Regulations require holders of certain water consents to keep and provide records of fresh water taken under consents in order to provide data to assist in the management of water. These Regulations apply to the holders of all consents to take water unless:

- » The take under the consent is less than 5 litres per second, or
- » The water taken is returned to the same source with no significant delay.

Consent holders need to comply:

- » If the consent was granted before 10 November 2010 (or if it was granted after 10 November 2010, and it was a renewal of an existing consent to take the same amount of water from the same place), the deadline for compliance depends on your allowed rate of take, ie:
 - 20 litres per second or more by 10 November 2012
 - 5-10 litres per second by 10 November 2016
 - 10-20 litres per second by 10 November 2014
- » For all other consents issued after 10 November 2010 compliance must begin immediately the consent is issued.

Once the Regulations apply to you then you need to measure and record your water take. You must:

- » Take continuous measurements
- » Take daily records of cubic metres taken (or weekly if you have written approval from the regional authority)
- » Record when no water is taken
- » Keep records in an auditable format
- » Use a water meter device or system that meets certain conditions, and
- » Provide the water record for each year no later than one month after the end of the year.

The measuring obligations apply notwithstanding any conditions on the consent, although regional authorities can add additional requirements.

For most farmers, measuring or reporting requirements mean further cost with the installation of water metering systems and more time spent to measure, record and report. While the stated intention of the Regulations is to provide data to allow informed decision-making, there's a suspicion that the Regulations are a first step towards a commoditisation of water, laying the ground work for the ability for regional councils to make an economic charge for water based on consumption rather than for monitoring and compliance which is the current situation. ■

Over the Fence

NAIT update: deer tagging now mandatory

NAIT (National Animal Identification and Tracing) is now mandatory for cattle and deer. Deer became mandatory on 1 March 2013. To comply with the NAIT scheme you need to:

- » Have a NAIT number
- » Tag your cattle and deer with NAIT-approved ear tags
- » Register your cattle and deer in the NAIT system, and
- » Record all movements of cattle or deer (including deaths) on or off the farm in the NAIT system.

To find out more on NAIT requirements go to: www.nait.co.nz ■

Timeframe for redundancy consultation

In a recent case² the Employment Relations Authority has held that an employer's redundancy process was unfair because the timeframe for consultation was too short and the employee wasn't offered redeployment despite being able to do the job.

Ms Lowe was employed as a finance manager. Ms Lowe was visited by her manager to tell her the company, George Weston Foods (NZ) Ltd, was considering relocating her role to Auckland; a deadline of five days was given for feedback. This timeframe fell over a public holiday and weekend. Ms Lowe was then away from work unwell for two days. Subsequently Ms Lowe was made redundant.

The Employment Relations Authority determined Ms Lowe's manager was correct to deliver the news to the employee in person. It was just a proposal at that point and the company genuinely wanted feedback. The company wasn't required to make some other kind of announcement about the proposal before the meeting. The manager delivering the news in person was not a breach of good faith or fair process.

The Authority held, however, that the redundancy process was unfair. Firstly, the timeframe was too short. Giving affected staff such a short timeframe for feedback was likely to be close to the line on adequacy of time. The company should have extended its timeframe for feedback, especially because three of the five days weren't working days. Her employer should have phoned Ms Lowe at home when she was unwell and offered an extension to the time for feedback before a decision was made on the finance roles.

Secondly, in cases of redundancy, an employer needs to consider whether it could redeploy an employee to an alternative position if one exists and the employee is able to perform it. Ms Lowe's finance manager's role didn't change to any great extent; it was merely the location of the role that had changed. The company acknowledged Ms Lowe was capable of performing the role, but said she wasn't offered the role because they didn't think she would accept it.

The Authority held the decision that the employee wouldn't accept the offer of the relocated role was not one for the company to make; it was a decision for Ms Lowe to make. Ms Lowe wasn't given any opportunity to decide whether she would apply for, or take up, the relocated role. The failure to offer her the role, or invite her to apply through the internal application process, or give her any information at all about the application process for the role, meant the company failed to act the way a fair and reasonable employer could.

It was held that Ms Lowe's dismissal was unjustified and she was entitled to lost remuneration and \$6,000 compensation for hurt and humiliation.

This case is a reminder for employers in relocation and redundancy situations to ensure that they use robust consultation for their employees. ■

² *Lowe v George Weston Foods (NZ) Ltd* [2012] NZERA Christchurch 284, 21 December 2012