Chapter 19

COMPLIANCE AND ENFORCEMENT

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19.1 Introduction

In a legal context, “compliance” is often used to mean adherence to rules and regulations and seen, in practice, as the enforcement of command and control regulation. But “enforcement” is an inaccurate metonym for “compliance”. If compliance is concerned with the effective implementation of environmental policy goals, the enforcement of statutory rules is only one small part of compliance. Rather, the design and implementation of the whole regulatory response is critical, and thus institutional and regulatory design, monitoring and enforcement strategies — and indeed the continuing availability of common law remedies — are all elements that will impact upon compliance. If entities do not comply with the regulatory rules, policy aims are unlikely to be achieved. More critically, if the regulatory regime is not the best response to the problem, even full compliance with the rules and regulations may not ensure the behavioural change necessary, and the regulation will be ineffective.

Compliance can then be considered through two lenses. The wider lens considers the best regulatory response to the particular problem and how to achieve the necessary behavioural change; the narrower concern is how best to ensure compliance with the regulatory rules once the correct regulatory response has been designed and is in place. To reflect these different foci, this chapter is in two parts.

The first part of the chapter provides an introduction to the main concepts relevant to compliance. It addresses the different types of regulatory design employed in New Zealand environmental law, teases out reasons for non-compliance as explained by theory, and explains the plurality of enforcement

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1 See, for example, Compliance Common Capability Programme Steering Group Achieving Compliance: A Guide for Compliance Agencies in New Zealand (Department of Internal Affairs, June 2011).
mechanisms apparent. It highlights the inherent tension in giving regulators sufficient flexibility to respond to discrete reasons for non-compliance while ensuring legitimacy and adherence to administrative law requirements. This chapter will not address in any detail common law actions that may be used to enforce environmental imperatives; readers interested in this issue should consult ch 5 of this treatise.

Once the regulatory regime is in place, the focus switches to securing compliance with the regulatory rules, and the second part of the chapter considers specific enforcement mechanisms in more detail. It focuses primarily on the mechanisms contained in the Resource Management Act 1991 (RMA). This is because the RMA is the enactment governing the management of all land, air and water in New Zealand and contains the broadest range of enforcement mechanisms, encompassing both civil and criminal enforcement measures. The RMA enforcement cases also provide an interpretative guide for similar provisions in other environmental and natural resource-focused legislation. For additional references to the specific enforcement mechanisms contained within other legislative regimes, readers should consult the relevant chapters in this book.

19.2 Compliance

19.2.1 Promoting compliance through regulatory design

Deciding which regulatory approach to use is a critical component in ensuring compliance with the collective goals expressed in policy. Given the complexity of environmental problems, there is a need for regulatory pluralism in environmental law, and regulatory responses must be appropriately tailored to the relevant causes, contributors and effects of environmental harm.⁴ This need is explicitly acknowledged in government policy documents such as Achieving Compliance: A Guide for Compliance Agencies in New Zealand.⁵ This guidance sets out a principled framework to help assess which type of regulatory response is the

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most appropriate in the given circumstances. In simple terms, however, there are three general regulatory categories employed in New Zealand environmental management: “formal law”, “substantive law” and “reflexive law”.

This section provides an overview of these main forms of regulatory design, and then highlights a number of generic features that are important for securing compliance regardless of the regulatory approach adopted.

19.2.2 Regulatory categories

(1) Formal law

So-called “formal law” is value-neutral law that “facilitates private ordering”. Examples of formal law relevant to environmental management include the common law tort actions of nuisance and trespass. Rather than providing ex ante prescriptive rules to direct behaviour, these forms of law impose ex post facto civil liability. Thus formal law regulates the management of the environment in an indirect manner by supposedly acting as a deterrent to harmful behaviour, with the law appearing as a “neutral and autonomous source of normative guidance”.

Given the increase in statute-based law, formal law now plays a relatively minor role in environmental management in New Zealand. However, common law actions are still available to individuals seeking to prevent environmental harm, and may be used in conjunction with, or instead of, statutory remedies.

Ex post facto civil liability is still seen as a valuable tool for promoting compliance with environmental goals, and has now been incorporated into a number of statutory regimes. Particular examples of note include the regulation

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10 Ports of Auckland Ltd v Auckland City Council [1999] 1 NZLR 601 (HC). The use of common law remedies in the environmental context is considered in ch 5.

11 Note, however, the contrasting arguments in Peter Cane “Are Environmental Harms Special?” (2001) 3(1) JEL 3 and M Wilde “The EC Commission’s White Paper on Environmental Liability” (2001) 3(1) JEL 21.
of oil tankers by the Maritime Transport Act 1994 and the management of genetically modified organisms under the Hazardous Substances and New Organisms Act 1996. The civil liability mechanisms in these statutes purport to act as a deterrent to harmful behaviour while ensuring that environmental damage from high-risk activities will be remedied, often by imposing a requirement that actors have in place adequate insurance provision. Other forms of ex post facto liability instruments include bonds and deposits that are required to be paid before any activity commences, retained by the regulator, and forfeited in the event of non-compliance.

(2) Substantive law

In contrast to formal law, “substantive law” is explicit law used by the state to actively direct behaviour. Sometimes categorised as “command and control regulation”, substantive law consists of primary and subordinate legislation and generally contains a command backed by a negative sanction. This form of high-level state intervention became the dominant form of environmental regulation in New Zealand from the 1970s onwards.

Policy guidance suggests that explicit government regulation should be considered when:

- the problem [requiring management] is high risk, with high impact or significance — for example, a major public health and safety issue;
- the community requires the certainty provided by rules and legal sanctions;
- the regulation needs to apply universally, or at least to one or more entire sectors of society; or
- there is a systemic compliance problem with a history of intractable disputes and repeated or flagrant breaches, and no possibility of effective sanctions being applied.”

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14 For example: under the Maritime Transport Act 1994, oil tankers; and under the Hazardous Substances and New Organisms Act 1996, transporters of hazardous waste require mandatory insurance.


Substantive law may take different forms. For example, regulations may contain technical rules and performance or ambient-based controls, but will also encompass monitoring and enforcement of those rules. With technical regulations, the rules describe how something must be done, or how an activity must be carried out. Technical design standards for woodburners and for the collection and destruction of landfill gas at large landfill sites provide an example. In contrast, performance regulations focus on results or outcomes and include rules expressed as principles, duties and standards. Examples of performance-based legislation include rules that prescribe pollution levels. The means to achieving these levels are left up to the regulated entity. Ambient-based controls focus upon and regulate the quality of the receiving environment.

Substantive law responses include permitting and licensing schemes, which are widely deployed within New Zealand environmental management. Permits and licences are used to regulate access to, and the rate of exploitation of, “public” or scarce resources, and to control any environmental harm that may flow from the development and use of those resources. The theory underpinning the use of this form of environmental regulation, and more specifically the use of quantitative permitting or licensing, is relatively simple. Once the regulator has determined the extent to which a resource may be exploited, permits are allocated to individuals, enabling them to take and use the resource, and the totality of take permitted should not exceed the set limit.

Such schemes constitute an “ex-ante enforcement mechanism … designed primarily to prevent, or at least minimise, a particular type of harm.” In Aoraki Water Trust v Meridian Energy Ltd the High Court likened water management under the RMA to a licensing system, and referred to the Australian High Court decision of Harper v Minister for Sea Fisheries where the rationale for utilising this regulatory approach in environmental management was explained as follows:

“The statutory licensing system’s] basis lies in environmental and conservational considerations which require that exploitation,
particularly commercial exploitation, of limited public natural resources be carefully monitored and legislatively curtailed if their existence is to be preserved. Under that licensing system, the general public is deprived of the right of unfettered exploitation of the Tasmanian abalone fisheries. What was formerly in the public domain is converted into the exclusive but controlled preserve of those who hold licenses. The right of commercial exploitation of a public resource for personal profit has become a privilege confined to those who hold commercial licenses. This privilege can be compared to a profit à prendre. In truth, however, it is an entitlement of a new kind created as part of a system for preserving a limited public natural resource in a society which is coming to recognise that, in so far as such resources are concerned, to fail to protect may destroy and to preserve the right of everyone to take what he or she will may eventually deprive that right of all content.”

Examples of permitting and licensing regimes are to be found in regulations governing, for example: the allocation of mineral resources; fresh water, Crown-owned forestry land, and fisheries. Permits are used to regulate space in the coastal marine area, and a form of permit — concessions — are granted to enable activities to be carried out in the conservation estate. Permitting schemes are also used to regulate pollution. Holders of discharge permits, for example, will be allowed to emit pollutants, but only at a level prescribed in the permit. A similar approach underlies the emissions trading scheme. Participants will be allowed to emit greenhouse gases, but only to a level equating to the emissions units they hold. The use of permitting regimes can provide a clear-cut approach to enforcement. For example, within the Crown Minerals Act 1991 regime it is an offence to undertake activities that require a permit without having obtained the necessary permit.

23 “Minerals permits” are granted by the Minister for Energy and Resources under the Crown Minerals Act 1991.
24 “Water permits” are granted by regional or unitary councils under the Resource Management Act 1991 [RMA].
26 Possessing an “individual transferable quota” (ITQ) entitles the holder to take a proportion of the total allowable catch (TAC) set annually by the Minister for Fisheries under the Fisheries Act 1996.
27 “Coastal permits” are granted by regional councils under the RMA.
28 Granted by the Department of Conservation in accordance with the Conservation Act 1987.
29 RMA, s 15.
30 Participants in the scheme must hold emissions trading units in accordance with the Climate Change Response Act 2002.
Permits may have conditions attached to them aimed at mitigating any environmental harm associated with the development of the resource, or holders may be required to obtain additional environmental permits. Holders of Crown Minerals Act permits, for example, will also have to obtain environmental consents under either the RMA or (for activities outside the territorial waters) the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012.

Permits and licences provide an extremely effective way of retaining oversight of environmental management and compliance. In particular, this form of regulation allows the regulator to act as a gatekeeper, and to use:32

“... the entry process to communicate fully to the applicant its duties and the agency’s expectations; and to] monitor ongoing compliance with any restrictions or conditions attached to a licence or other grant of approval, and with relevant statutory requirements and policy objectives ...”

Non-compliance can lead to the cancellation of the permit altogether,33 and the legislative framework may also envisage and provide for an incremental reduction and ultimate phasing-out of the rights granted under a permitting regime. This has occurred with the ozone protection regime,34 and there is the potential for this to happen with fisheries and emissions trading schemes. The statutory framework may also empower the regulator to reduce or remove altogether the rights granted under the permit if the environmental conditions deteriorate and can no longer support the allocated level of use. Both the Fisheries Act 199635 and the RMA,36 for example, provide for this possibility in certain circumstances.

Regulatory scholars suggest that substantive law has been relatively effective in securing good environmental outcomes, and provides “predictability, a clear set of rules by which to operate and a level playing field”.37 But there are disadvantages. These forms of regulation have been criticised for being too resource-intensive, increasing administrative costs and leading to a proliferation of law, and they do not encourage actors to go beyond compliance. Prescriptive regulations in particular have been criticised as being too inflexible, dating quickly and being unable to keep up with technical and managerial

33 For example, see ss 128 and 132(4) of the RMA.
34 See ch 15.
35 Fisheries Act 1996, pt 3, and in particular s 11.
36 RMA, s 128.
developments. Outcome-based regulation brings another level of complexity. If the rules are expressed in qualitative terms as opposed to providing for quantitative assessment, and drafted as standards rather than prescriptive rules, this can raise compliance issues for agencies. If a subjective evaluation is required, it can often be difficult to determine an acceptable level of compliance. For example: when does the behaviour become inadequate; what can be tolerated; and how do we determine this? Discretion complicates compliance evaluation and has ramifications for administrative law, as explained at [19.2.8] below.

(3) Reflexive law

In contrast to actively directing behaviour, the government can use regulation to provide inducements or disincentives with the aim of incentivising behavioural change. This form of regulation is categorised as “reflexive law”. Reflexive law does not compel actors to achieve policy objectives, but rather encourages the regulated to reflect upon how to behave. The inducements offered usually correlate to the actors’ best economic interests, and, of course, encourage behavior that accords with government policy objectives. Reflexive law became prevalent from the 1980s onwards, and accords with liberal political ideologies. It aims to internalise costs or “externalities” by the use of economic and financial mechanisms, such mechanisms ranging from taxes, charges and royalties to subsidies and loans, and the creation of markets for trading instruments such as permits, quotas and licences.

Reflexive law is seen as a better mechanism to address highly complex environmental problems that have multiple, heterogeneous contributors, for example diffuse-source pollution such as greenhouse gas emissions. Proponents suggest that it has a number of advantages over other forms of regulation. In

particular, it is said to be more administratively efficient and that it encourages the regulated to go beyond mere compliance, while promoting autonomy and personal liberty. The New Zealand government issued a policy statement in 2009, titled Better Regulation, Less Regulation, which is supportive of the use of reflexive law methods where possible.

The use of reflexive law in New Zealand environmental management has been growing incrementally since the 1980s, particularly with the creation of market mechanisms to promote trading in instruments such as fisheries quota, water-take permits and emissions trading scheme units. The relevant statutory frameworks may contain additional flexible market mechanisms, designed to aid compliance. By way of example, the New Zealand emissions trading scheme allows participants to use some international emissions credits in the national scheme, and to “bank” certain credits for use in later compliance periods. A similar “banking” scheme applies to the fisheries quota system.

The ability to trade in permits is seen, theoretically, to facilitate efficient resource use by ensuring that resources move to the users who value them the most. Certain theorists suggest that the ensuing holders will manage the resources with care, and that this indirectly supports environmental policy goals. Whether this form of management does actually promote the best use of resources from the perspective of socio-cultural and ecological concerns is contestable.

There are other examples of flexible compliance mechanisms that might be considered part of reflexive law. In the context of the RMA, the courts have approved the use of environmental compensation and biodiversity offsets (that entail the trading of ecological values). Local authority resource management

44 See, for example, s 16 of the Climate Change Response Act 2002; and see ch 15.
45 Fisheries Act 1996, s 67A.
46 For an example, see Kevin Guerin Property Rights and Environmental Policy: A New Zealand Perspective (New Zealand Treasury, Working Paper 03/02, March 2003).
49 See, for example, Royal Forest and Bird Protection Society of New Zealand Inc v Buller District Council [2013] NZHC 1346, [2013] NZRMA 293.
plans have also provided for the use of transferable development rights, by which a development right at one location can be traded for another one elsewhere.\textsuperscript{50}

(4) Voluntary actions

The government may encourage certain sectors of the economy to comply with environmental policy aims by facilitating industry self-regulation or co-regulation. This form of regulation minimises the costs to government, and facilitates creative problem-solving by allowing the entities that have the greatest skills and knowledge of the relevant industry to determine how to effect change. Compliance with environmental goals may be encouraged by the threat that binding regulations will be imposed if the industry does not adequately regulate itself. The \textit{New Zealand Packaging Accord 2004}, which is an agreement between industry and government to promote sustainable packaging, provides a good example.\textsuperscript{51} The Accord notes that if the initiative fails to make progress, the government will consider introducing binding regulation. Other examples of note include the Codes of Practice developed under the Hazardous Substances and New Organisms Act 1996. The Codes can be developed and proposed by the specialised and highly technical industry, but need ultimately to be approved by the Environmental Protection Authority.\textsuperscript{52}

Other forms of voluntarism occur where the actor undertakes “to do the right thing”, without any basis in coercion, with the government playing the role of co-ordinator and facilitator.\textsuperscript{53} A good example in the environmental sphere concerns QEII covenants that are available to help private landowners protect significant natural and cultural features on their land.\textsuperscript{54}

19.2.3 Promoting compliance through inclusion and information

Regardless of the type of regulatory approach adopted, there are generic factors relevant to the design and introduction of regulation that will help to secure compliance.\textsuperscript{55} First, and critically, research emphasises the importance of

\textsuperscript{50} See, for example: Western Bay of Plenty District Council \textit{Operative Plan 2012} (September 2013) at section 12: Subdivision and Development, rule 12.3.8(q); and Waipa District Council \textit{Operative District Plan 2011} (June 2011) at pt 1, ch 8: Subdivision Policies, objective HGS, policy SU16C, and rule 10.6.1. For a discussion on the issue by the Environment Court, see \textit{Golden Bay Marine Farmers v Tasman District Council} EnvC W042/01 27 April 2001 at 210–211. For a further discussion on transferable development rights, see Environmental Management Services Ltd \textit{Waikato District Council Transferable Development Rights Prepared for: Waikato District Council} (September 2010).

\textsuperscript{51} Ministry for the Environment \textit{New Zealand Packaging Accord 2004} (July 2004).

\textsuperscript{52} See Environmental Protection Authority “Codes of Practice” <www.epa.govt.nz>.

\textsuperscript{53} Compliance Common Capability Programme Steering Group \textit{Achieving Compliance: A Guide for Compliance Agencies in New Zealand} (Department of Internal Affairs, June 2011) at 56.

\textsuperscript{54} Pursuant to the Queen Elizabeth the Second National Trust Act 1977; and see QEII National Trust <www.openspace.org.nz>.
maintaining the political acceptability of regulatory responses to environmental problems.\textsuperscript{56} Regulation is more likely to be complied with if it reflects societal norms, or if community support has been gathered for the policy objectives underpinning the regulatory response, and if the costs of compliance are affordable. Undertaking consultation with regulated communities and responding to community concerns is therefore an important component in promoting compliance. If regulation is novel, or at odds with existing market practices or cultural norms, or if it necessitates technological advances, this points to the need for a staged degree of adjustment. The initial regulatory response in these circumstances should contain aspirational aims, a transition period and measures to develop capacity, an approach that has generally been adopted with emissions trading schemes, for example. In order for the public to know what is expected of them, regulators need to ensure that compliance is facilitated by simple rules where possible, combined with accessible information, technical support and education if necessary. Effective monitoring and public reporting on activities, by creating public registers for example, also aids understanding.

It is possible to see how this drive towards community acceptance, clarity and transparency permeates New Zealand environmental law. For example, the RMA contains a number of structural design features that aim to legitimise regulation by facilitating community buy-in, and to make what is inherently complex legislation more understandable. The significant opportunities for public participation in plan creation and resource consent decision-making provides an example.\textsuperscript{57} In terms of transparency, pt 3 of the RMA contains clear duties, setting out what activities are legal or illegal; plan provisions and resource consents are public documents (and most are readily accessible online); and the Environment Court has the power to make a declaration, clarifying any issue that arises in respect of the RMA regime.\textsuperscript{58} All of these features promote understanding and facilitate a soft form of compliance that attempts to ensure the Act’s purpose is met without direct confrontation. In terms of monitoring, local authorities have a statutory duty to collect information, monitor compliance and keep records in relation to all their resource management functions, including records of all applications for resource consent, decisions, transfers of consents and complaints.\textsuperscript{59}

Other legislative schemes promote transparency and accountability by requiring actors to report on their activities and making this information publicly available.


\textsuperscript{56} Neil Cunningham “Enforcing Environmental Regulation” (2011) 23(2) JEL 169 at 199.

\textsuperscript{57} RMA, sch 1; and see ch 11.

\textsuperscript{58} RMA, s 310.

\textsuperscript{59} RMA, s 35.
by, for example, including it in a public register (participants in the emissions trading scheme, fisheries quota holders, and sites of historic importance are all included in public registers).  

19.2.4 The implementation gap

Despite a proliferation of environmental policies and laws, the Organisation for Economic Co-operation and Development (OECD) Secretariat reports that compliance with environmental goals remains a major challenge for many OECD countries. It has described this problem as the “implementation gap”.  

A major report in 2009 recommended that OECD nations review their compliance assurance systems and address compliance promotion, monitoring and enforcement. In particular, the OECD has suggested that it is critical for nations to better understand the reasons for non-compliance.  

Certainly, securing compliance with environmental regulation remains a challenge for regulators in New Zealand. For instance, local authorities report that approximately a third of resource consent-holders do not comply with consent conditions, necessitating some form of intervention by authorities. Identifying the reasons for non-compliance will enable policy-makers to appropriately craft and refine regulatory regimes. However, there have been no thorough studies conducted in New Zealand as to the reasons for non-compliance with national environmental laws, and regulators must therefore draw on theory and empirical research from overseas.


19.2.5 Identifying reasons for non-compliance

Classical economic theory suggests the need for optimal compliance “where the social benefits of compliance are equal to the social costs of achieving that level of compliance”.67 This theory suggests that entities will comply when it is in their economic interests to do so, and the presumption is that non-compliance will flow from a cynical and deliberate disobedience based on a cost-benefit analysis. Categorised as the “rational-actor theory”, neo-classical theorists suggest that if breaking the rule creates a high reward and low probability of detection, or the penalties do not outweigh the rewards, rational actors will not comply.68 Such calculated disobedience points to the need for increased monitoring and prosecutions, the use of more severe enforcement tools, and ensuring that the penalties outweigh any gains for non-compliance.69

However, whilst the rational-actor theory might accord with lay beliefs, proponents of behavioural law and economics describe it as an incomplete theory, applicable to some but not all scenarios. As early as 1955, Herbert Simon first proposed the notion of “bounded rationality”.70 Bounded rationality suggests that people often fail to operate logically; rather, they are influenced by biases, irrelevant or false information, and have a limited ability for collating all the necessary information and processing it to achieve an economically rational decision. Behavioural economists question the degree to which non-compliance will be based purely on a cost-benefit analysis, primarily because it is often too difficult for regulated entities to make this assessment.71 Much empirical work conducted internationally supports the theory of bounded rationality,72 and in the context of compliance this suggests that a mono-causal approach is impoverished, and that there are many reasons for non-compliance.73

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71 Anthony Ongus Regulation – Legal Form and Economic Theory (Oxford University Press, Oxford, 1994) at 71–74. Note that Ongus suggests it may be more efficient simply to comply than to calculate the benefits of the non-compliance, particularly as businesses will find it difficult in trying to calculate the economic benefits that flow from being seen as a good citizen.
Non-compliance may well be wilful, but it may be underpinned by a myriad of different reasons. If entities do not comply because of perceived procedural injustices, this suggests the need for greater transparency, clearer guidelines and equitable treatment — all strong administrative law mores. If disobedience flows from a lack of monitoring, this may have implications for resourcing enforcement officers, or widening those involved in monitoring the resource use. It is worth noting that New Zealand resource management law has adopted a novel approach to monitoring for compliance. In particular, any person (with some minor exceptions) may make an application to the Environment Court for an enforcement order under the RMA.\textsuperscript{74} Further, in a number of cases Māori have been placed in a special role, having oversight of another entity’s resource use where that resource is of importance to iwi.\textsuperscript{75}

Aside from wilful non-compliance, entities may fail to comply through a lack of capacity to do so, or through ignorance. If the reason for non-compliance is a genuine lack of capacity, a coercive, punitive regime based on strict prescriptions may prove counterproductive, whereas an iterative, co-operative process focused on bringing entities gradually into compliance may prove more successful. Likewise, the best way to resolve non-compliance through ignorance will not be to introduce harsher, punitive sanctions, but to provide clarity and certainty as to responsibilities. This may include greater transparency, dissemination of information and educative programs.

Understanding this theoretical base is important. It suggests that in order to secure compliance, agencies will need to have a range of enforcement tools at their disposal. It also suggests that agencies will require a large amount of discretion, as inevitably the best enforcement response will be context-sensitive.

19.2.6 The purpose of enforcement in environmental law

The underlying purpose of enforcement in environmental law clearly has ramifications for the approach taken to enforcement, because what enforcement officers are trying ultimately to achieve will influence their response to non-compliance. The fundamental aim of enforcement is to meet the policy goals


\textsuperscript{74} RMA, s 316. See also Criminal Procedure Act 2011, s 15 (any person may commence a proceeding). Offences under s 338(1), (2) and (3) of the RMA are offences to which the Criminal Procedure Act 2011 applies. Therefore private prosecutions are possible for offences under the RMA.

\textsuperscript{75} For examples, see: 
underpinning the legislation — generally, to prevent unacceptable environmental harm as defined in the legislation. The High Court in *Machinery Movers Ltd v Auckland Regional Council* considered that the purpose of environmental legislation necessitated an enforcement approach premised upon the need for general deterrence as opposed to punitive sentencing. In respect of the RMA, the Court noted that the wide enforcement powers evinced a deliberate move to encourage “a flexible and innovative approach to sentencing, which seeks not only to punish offenders but also to achieve economic and educative goals”. According to the Court, the economic goals of the legislation included: the need to internalise the costs of pollution; the educative goals focused on achieving the sustainable management purpose of the RMA; and fostering environmentally responsible corporate citizens. This focus suggests the need for careful thought as to which tool to employ, and the ability for compliance agencies to use different approaches if initial efforts fail.

### 19.2.7 Enforcement strategies

Compliance can be seen as an iterative, systemic process — a continuum, with each stage reinforcing the need for and promoting the objective of achieving the end goal. An influential study by Ayres and Braithwaite demonstrated how enforcement tallies with this process by depicting enforcement strategies as a pyramid. The wide base of the pyramid reflects a managerial model of enforcement that emphasises negotiation, problem-solving, co-operation and inducement. These mechanisms should be commonly used in environmental management. The middle section includes mild administrative sanctions, and the pyramid builds to an apex of formal coercive methods that threaten punishment and ultimately impose punitive sanctions. While criminal punishment is seen as a last resort, the efficacy of the managerial tools is predicated on the ability to call upon an increasing severity of sanctions to deter non-compliance.

Once again, the RMA provides a good example of how New Zealand law facilitates a pyramid-based approach to enforcement. Local authorities may use informal means (such as inspections coupled with verbal or written warnings),

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76 *Machinery Movers Ltd v Auckland Regional Council* [1994] 1 NZLR 492 (HC) at 503–504, quoting *R v Bath Industries Ltd* (1992) 7 CELR (NS) 293 (ONC) (a sentencing decision of the Ontario Court of Justice (Provincial Division)).

77 *Machinery Movers Ltd v Auckland Regional Council* [1994] 1 NZLR 492 (HC) at 501.

78 *Machinery Movers Ltd v Auckland Regional Council* [1994] 1 NZLR 492 (HC) at 502. See also David Gristlinton “Sentencing Under the RMA” (2009) 8(3) BRMB 33 for an exploration of sentencing principles.


the media may be used to name and shame transgressors, or authorities may use mediation or other forms of alternate dispute resolution. More formally, where a transgressor is operating in accordance with a permit, the conditions on the permit may be either renegotiated by consent or altered by the local authority or court if consent was granted on the basis of inaccurate information. Administrative penalties may be imposed, including infringement notices, abatement notices and excessive noise directions. If authorities need to resort to litigation, they may choose whether to bring civil enforcement actions or criminal prosecutions. The High Court has noted that the "primary object [of the offence sections] is to ensure that the offending activity ceases and that remedial action is undertaken", and that in order to achieve this the Environment Court has the ability to issue special remedies that are not available to other courts or tribunals. If, following a criminal prosecution, a defendant is found guilty, the choice of penalty is a matter for the Court and may include a fine or imprisonment or the imposition of a civil enforcement order. Immediate custodial sentences are rarely imposed. The development of restorative justice has been an important feature in resource management prosecutions; this approach enables a court to take into account voluntary reparations made to the community by the defendant when considering the appropriate sentence to impose.

The fact that criminal prosecutions are seen as a last resort is reflected in the statistical information. In 2010–2011 a reported 139 RMA prosecutions were taken nationwide. By far the vast majority of compliance was dealt with by informal means. However, securing compliance can prove challenging for authorities with persistent transgressors. The directors of "Cash for Scrap" (a

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82 On the efficacy of reputational risk in the context of competition law but applicable more widely, see K Yeung "Is the use of informal adverse publicity a legitimate regulatory compliance technique?" (paper presented to the Australian Institute of Criminology Conference "Current issues in regulation: Enforcement and compliance", Melbourne, 3 September 2002).
83 RMA, ss 99A and 267–268.
84 RMA, s 127.
85 RMA, s 128(1)(c), and see ss 17 and 319 (see ch 11 for an explanation of s 17).
86 RMA, ss 343A–343D.
87 RMA, ss 322–325B.
88 RMA, ss 326–328.
89 Conway v Auckland Regional Council [2007] NZRMA 252 (HC) at [49].
90 RMA, s 339(5); and see Waikato Regional Council v Price DC Thames CRN5075003143, 16 July 1996.
91 For comment on this, see R v Conway [2005] NZRMA 274 (CA) at [48]. See also R v Barrett [2004] NZRMA 248 (CA) and Thames-Coromandel District Council v May DC Auckland CRI-2008-004-7940, 5 June 2008 for other examples of cases where immediate custodial sentences were imposed for breaches.
92 See Auckland City Council v B & C Show Ltd [2006] DCR 425 (DC) for a good example of restorative justice.
scrap metal business) troubled the courts, including the Supreme Court, in various guises for over a decade.\textsuperscript{95} The company and its directors received various fines and ultimately custodial sentences.

The Supreme Court has confirmed that the choice of enforcement response, and what mechanism to use, is entirely a matter of “prosecutorial judgment” for the local authority.\textsuperscript{96} This freedom of judgement must, however, be exercised in a manner that does not breach administrative law principles.

19.2.8 Tempering discretion in enforcement

The need for public bodies to adopt a flexible and informal approach to enforcement creates an inherent tension, and such discretion is constrained by public law principles. As Yeung cautions, “there may be a real risk that the values of due process, transparency, accountability and substantive fairness may be marginalised or overlooked.”\textsuperscript{97} If fairness, relative equality of treatment and transparency are perceived to be lacking, the public will lose respect for the law, and this in turn will hinder compliance efforts. Authorities also face the prospect of their acts and omissions being subject to judicial review.

The difficulties that authorities may face in adopting informal and flexible approaches to dealings with the public have manifested in a number of resource management cases. In \textit{Waiakere City Council v Estate Homes Ltd} the Supreme Court acknowledged that the lawfulness of the Council officials’ stance in pre-applications discussions could be susceptible to proceedings for judicial review.\textsuperscript{98} Depending on the particular facts of the case, officials may find their decisions challenged for illegality, unfairness or unreasonableness.

To address these difficulties, government guidance contains models for accountable decision-making.\textsuperscript{99} Examples in the \textit{Achieving Compliance} guidance include the process established by Manukau City Council (now merged into

\textsuperscript{93} Ministry for the Environment \textit{Resource Management Act: Survey of Local Authorities 2010/2011} (September 2011) at 63. Every two years the Ministry for the Environment carries out a survey of local authorities which includes the collection of information about the use of the enforcement mechanisms under the RMA.

\textsuperscript{94} Ministry for the Environment \textit{Resource Management Act: Survey of Local Authorities 2010/2011} (September 2011) at 54: “If excessive noise directions are excluded, 14 per cent of compliance was achieved through formal means, 86 per cent through informal means.”

\textsuperscript{95} For a brief explanation of the “Cash for Scrap” litigation, see AC Wamock \textit{“Down v The Queen [2012] NZSC 21”} (2012) 9(11) BRMB 133. For another example of a difficult enforcement case, see \textit{Mariton v Auckland Regional Council [2005] NZRMA 473 (EnvC)} (15 years of attempts at enforcement with multiple court cases).


\textsuperscript{98} \textit{Waiakere City Council v Estate Homes Ltd [2006] NZSC 112, [2007] 2 NZLR 149 at [38]; see also Reuters Homes Ltd v Wansons District Council [2011] NZRMA 357 (HC) at [20]–[36].

\textsuperscript{99}
Auckland Council) in its “Enforcement Assessment and Decision-Making Guide”.

This guide circumscribed the discretion that enforcement officers had by requiring them to consider all the criteria on the form (such as previous non-compliance, attitude, potential adverse effects on the environment, et cetera) before making a decision on how to proceed, and then having it approved by a manager. The Ministry of Fisheries has developed the “VADE Model” (Voluntary, Assisted, Directed, Enforced), which provides a framework for intervention that takes account of the reasons for non-compliance, the attitude and capability of the regulated entity, and the degree of environmental risk, and then describes the appropriate intervention.

19.3 Enforcement

19.3.1 Introduction

This part of the chapter considers the enforcement mechanisms in the RMA. There are five enforcement mechanisms available under the RMA: abatement notices; infringement notices; excessive noise directions; enforcement orders; and criminal prosecution. The provisions for these mechanisms are contained in pt 12 of the RMA. Water shortage directions, declarations, and the power to undertake emergency works, are also included in pt 12 and, while relevant to enforcement, are not strictly enforcement mechanisms. All of these enforcement mechanisms are discussed below from a practical perspective.

Other enforcement methods used to ensure compliance with resource management law but which are found outside the RMA, such as judicial review, are also considered. The enforcement mechanisms contained within other environmental legislation — such as the Local Government Act 2002, the Biosecurity Act 1993 and the Hazardous Substances and New Organisms Act 1996 — are not considered in this part. For discussion of the specific enforcement mechanisms in other legislative regimes, readers should consult the relevant chapters in this book.

19.3.2 Aim of enforcement

Cheryl Wasserman, in a paper on the theory and practice of enforcement in the United States, defines compliance and enforcement as follows:102

“Compliance is defined as the ultimate goal of any enforcement programme. Compliance is essentially a state of being, when a regulated source is achieving required environmental standards, regulations, or permit conditions by meeting expected behaviours in processes and practices. Enforcement is defined as a set of legal tools, both informal and formal, designed to compel compliance.”

Wasserman includes informal and formal tools in the definition of enforcement and notes: 103

“The timely and appropriate enforcement response system is built on the willingness of government officials to follow through on less-costly enforcement responses and to escalate responses in a timely manner that gives weight and force to lesser responses.”

The enforcement mechanisms in pt 12 of the RMA are formal mechanisms. Informal mechanisms include verbal and written warnings.

The Ministry for the Environment undertakes a survey of local authorities every two years to examine key aspects of the RMA. The Resource Management Act: Survey of Local Authorities 2010/2011, covering activity from 1 July 2010 to 30 June 2011, reports that in this period 47 per cent of compliance was achieved through formal means and 53 per cent through informal and other means. 104 If excessive noise directions are excluded, 14 per cent of compliance was achieved through formal means and 86 per cent through informal means. 105 The data below is from the 2010/2011 survey and shows the number of times each formal enforcement option was used by local authorities in the period between 1 July 2010 and 30 June 2011: 106

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104 Ministry for the Environment Resource Management Act: Survey of Local Authorities 2010/2011 (September 2011) at 54. At the time of writing the Ministry’s Resource Management Act: Survey of Local Authorities 2012/2013 (April 2014), covering activity between 1 July 2012 and 30 June 2013, had been published. However, the data from the 2010/2011 survey is included in the above text because the latest survey does not include information on the number of excessive noise directions. The survey reports are available at Ministry for the Environment “Publications” <www.mfe.govt.nz>.


Table 1: Summary of results from the Ministry for the Environment’s Resource Management Act: Survey of Local Authorities 2010/2011

<table>
<thead>
<tr>
<th>Enforcement option</th>
<th>Number</th>
<th>Number of local authorities who used this option</th>
</tr>
</thead>
<tbody>
<tr>
<td>Infringement notices</td>
<td>1,800</td>
<td>46</td>
</tr>
<tr>
<td>Abatement notices</td>
<td>1,290</td>
<td>56</td>
</tr>
<tr>
<td>Enforcement orders</td>
<td>32</td>
<td>13</td>
</tr>
<tr>
<td>Prosecutions</td>
<td>135</td>
<td>17</td>
</tr>
<tr>
<td>Excessive noise directions</td>
<td>19,567</td>
<td>50</td>
</tr>
</tbody>
</table>

19.3.3 Who can bring enforcement actions?

Action to enforce compliance with environmental law can be taken by the relevant authorities in accordance with the statutory powers granted to them, and in certain circumstances by private individuals.

Any person may, under the enforcement mechanisms in pt 12 of the RMA, apply for an enforcement order\(^{107}\) or a declaration\(^{108}\) (subject to some limitations), or commence a private prosecution.\(^{109}\) Enforcement orders under the RMA are (for the most part) in the nature of injunctive relief.

Where the RMA enforcement order provisions do not apply, injunctive or other public law remedies may be sought in proceedings in the civil courts. There are three main types of civil proceedings that can be brought to address non-compliance with environmental laws:

1. Proceedings of an injunctive nature can prevent an anticipated non-compliance or put a stop to an existing one.

\(^{107}\) RMA, s 316(1).

\(^{108}\) RMA, s 311.

\(^{109}\) Section 15 of the Criminal Procedure Act 2011 allows any person to commence a prosecution with some provisos, including that the person commencing the prosecution must have good cause to suspect that the defendant has committed the offence specified in the charge (s 16(2)(c)); and a person commits an offence who includes false or misleading information in a charging document knowing that the information is false or misleading (s 23). The Criminal Procedure Act applies to offences under the RMA, therefore private prosecutions are possible for offences under the RMA. The Summary Proceedings Act 1957 applied to criminal prosecutions under the RMA prior to the introduction of the Criminal Procedure Act. The Summary Proceedings Act likewise allowed private prosecutions. Most of the Summary Proceedings Act has been repealed and the provisions that remain now deal mainly with the enforcement of court-imposed fines.
(2) The traditional damages claim, in which compensation is sought following the breach. Damages claims are brought in the general courts, either the District Court or the High Court depending on the monetary value of the claim.\textsuperscript{110}

(3) An action for judicial review may be brought before the High Court, if it is alleged that a decision, action or omission by a public authority is unlawful or invalid.

The most common of these is an application for judicial review.\textsuperscript{111}

19.3.4 Low-level enforcement mechanisms

Abatement notices, excessive noise directions and infringement notices are regarded by local authorities as “low-level enforcement mechanisms”.\textsuperscript{112} These three mechanisms are quick and inexpensive for the local authority. If the recipient complies with the notice/direction and does not contravene the RMA after receipt of the notice/direction, there are no ongoing consequences.

(1) \textit{Abatement notices}

(a) Procedure, scope and form

The procedure for abatement notices is set out in ss 322–325B of the RMA. Abatement notices may only be issued by an enforcement officer who is authorised by a local authority.\textsuperscript{113} An abatement notice may be made subject to such conditions as the enforcement officer serving it thinks fit.\textsuperscript{114} The enforcement officer must have reasonable grounds to issue an abatement notice,\textsuperscript{115} and these reasons must be stated in the notice.\textsuperscript{116}

Section 322 sets out the scope of an abatement notice. The scope falls into three broad categories. The first category allows issue of a notice which requires a person to cease, or prohibits a person from commencing, anything that contravenes or is likely to contravene the RMA, regulations, a rule in a plan or a resource consent, or that is likely to be noxious, dangerous, offensive, or objectionable to such an extent that it has or is likely to have an adverse effect on the environment.\textsuperscript{117}

\begin{footnotes}
\item[110] District Courts Act 1947, s 29. District Courts may hear civil actions with a value up to $200,000. For further discussion, see [19.3.4(8)].
\item[111] Judicial review is discussed in more detail at [19.3.4(7)] and also at [6.5].
\item[112] Note that the term “low-level enforcement mechanisms” is not used in the RMA. There is no hierarchy specified in the RMA.
\item[113] RMA, ss 38 and 322.
\item[114] RMA, s 322(3).
\item[115] RMA, s 322(4).
\item[116] RMA, s 324(b).
\item[117] RMA, s 322(1)(a).
\end{footnotes}
The second category allows the issue of a notice which requires a person to do something that is necessary to comply with the RMA, regulations, a rule in a plan or proposed plan, or a resource consent. The action required to be taken must also be necessary to avoid, remedy or mitigate actual or likely adverse effects on the environment (1) caused by or on behalf of the person or (2) relating to land of which the person is the owner or occupier.

The third category applies where a person is contravening s 16 of the RMA, which relates to unreasonable noise. A notice may be issued requiring either the occupier of the land concerned, or (if in respect of water or the coastal marine area) the person carrying out the activity, to adopt the best practicable option to ensure the noise does not exceed a reasonable level.

The circumstances in which a person can be ordered to “cease an activity” were considered by the High Court in Zdrahal v Wellington City Council. Zdrahal painted a large swastika on the outside wall of his house and a smaller swastika on a window. The Council issued an abatement notice ordering him to cease his activity. Basing his argument on the necessity for an abatement notice to be extremely precise, Zdrahal argued that as he had already painted the swastikas his actions had ended and therefore he could not be ordered, in the words of s 322, to “cease” doing something or “not commence” doing something. Greig J explained the meaning of the section as intending to apply to the continuing effects of the activities, as the RMA is entirely focused on the effects of activities on the environment. Greig J also found that what is “offensive or objectionable” is an objective test, and that the Court must “transpose itself into the ordinary person, representative of the community at large” to determine this. There could be little doubt, as the Planning Tribunal had noted at first instance, that “the Nazi regime undoubtedly changed a peaceful symbol to one associated with racism and hatred and that perception remains to the present day.” Zdrahal was therefore required to cease the continuing, offensive display.

In Oman Holdings Ltd v Auckland City Council the Environment Court held that the Council did not have the power to direct the recipient to apply for a resource consent, because it is for a recipient to decide whether or not it wishes to apply

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118 RMA, s 322(1)(b)(i).
119 RMA, s 322(1)(b)(ii).
120 RMA, s 322(1)(c).
122 Greig J’s test was adopted in Watercare Services Ltd v Minchinick [1998] 1 NZLR 294 (CA) at 304–305.
123 Zdrahal v Wellington City Council [1995] 1 NZLR 700 (HC) at 708. Note that freedom-of-expression arguments based upon the New Zealand Bill of Rights Act 1990 also failed in this case.
126 Oman Holdings Ltd v Auckland City Council (2001) 8 ELR NZ 68 (EnvC).
for a resource consent. If someone is undertaking an activity without a consent, then the notice can require that the person cease the activity.

Section 324 sets out the form and content of an abatement notice. The Environment Court takes a robust attitude to arguments based on technical non-compliance with the form. It is a question in each case as to whether the notice, taken in its entirety, demonstrates adequate compliance and clearly and fairly informs the recipient of all necessary matters.

The time frame for compliance must be reasonable. If the notice is in respect of an activity that is noxious, dangerous, offensive or objectionable, and the activity is otherwise lawful in terms of the RMA, the time frame must not be less than seven days after service of the notice.

Roberts v Northland Regional Council concerned an appeal by a dairy farmer against conviction and sentence for offences of discharging dairy effluent in contravention of s 15(1)(b) and contravention of an abatement notice. The notice issued to Roberts stated: “You must comply with this abatement notice immediately. And continue to comply with this notice thereafter.” One of the grounds of appeal was that the notice was invalid because an abatement notice cannot require continuing compliance. However, the High Court held that an abatement notice can require continuing compliance if it is reasonable having regard to the particular circumstances. In this case a requirement for ongoing compliance was reasonable in the context of dairy effluent discharges. The Court also held that a requirement that the notice be complied with immediately does not preclude the need for ongoing compliance.

The recipient can ask for the notice to be changed or cancelled under s 325A of the RMA. Section 325A also allows the local authority to cancel the abatement notice at any time where the authority considers that an abatement notice is no longer required.

Under s 325 a recipient of an abatement notice has the right of appeal to the Environment Court and/or the right to make an application for a stay. The appeal has to be filed within 15 working days of service of the notice. The filing of an appeal does not automatically act as a stay unless the notice is in respect of an activity that is noxious, dangerous, offensive or objectionable and the activity is otherwise lawful in terms of the RMA. When considering an application for a stay the Environment Court must consider a range of factors,

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127 Resource Management (Forms, Fees, and Procedure) Regulations 2003, sch 1, form 48.
129 RMA, s 324(d).
130 RMA, s 324(d).
132 RMA, s 325(2)(c).
133 RMA, s 325(3).
including the likely effects of the stay on the environment, and whether it would be unreasonable for the person served to comply with the notice, pending the decision on an appeal. A stay can also be made subject to conditions.¹³⁴

In *Amor v Gisborne District Council*¹³⁵ an abatement notice had been issued to a poultry farmer requiring removal of all poultry. The reasons given in the notice were that this was necessary to avoid and remedy the actual and adverse effects on the environment of the effects of flies caused by the operation of the poultry farm. Amor applied for a stay. The Environment Court granted the stay and held that it was unreasonable for Amor to remove 17,000 birds. The imposition of less extreme fly-control measures would be more appropriate.

The recipient is responsible for payment of the costs and expenses of complying with the notice (unless the notice directs otherwise).¹³⁶

There is special provision for an abatement notice to be made under s 322(1)(c) (which relates to the emission of noise). If the recipient fails to comply with the notice, an enforcement officer may, without further notice, enter the place where the noise source is situated (with a constable if the place is a dwelling house) and take all such reasonable steps considered necessary to cause the noise to be reduced to a reasonable level; and when accompanied by a constable, seize and impound the noise source.¹³⁷

**(b) Prosecution for contravention of abatement notice**

Contravention of an abatement notice is an offence.¹³⁸

The maximum penalty for contravention of an abatement notice for unreasonable noise is $10,000, with an additional penalty of up to $1,000 per day for a continuing offence.¹³⁹ Contravention of any other type of abatement notice is subject to the highest maximum penalties under the RMA.¹⁴⁰

In *Waikato Regional Council v Huntly Quarries Ltd*¹⁴¹ the defendants were prosecuted for contravention of an abatement notice. The District Court held that the abatement notice (which had not been appealed) was invalid because the notice did not specify the elements of the paragraph of s 322(1) that were relied upon. The Court held that the defect was "a basic one, which affected the efficacy and operation of the notice".¹⁴²

¹³⁴ RMA, s 325(3E).
¹³⁶ RMA, s 323(1)(b).
¹³⁷ RMA, s 323(2).
¹³⁸ RMA, ss 338(1)(c) and 338(2)(d).
¹³⁹ RMA, s 339(2).
¹⁴⁰ RMA, s 339(1) applies: two years’ imprisonment or a maximum fine of $600,000 for a person other than a natural person, $300,000 for a natural person, and an additional maximum penalty of $10,000 per day for a continuing offence.
¹⁴¹ *Waikato Regional Council v Huntly Quarries Ltd* [2004] NZRMA 32 (DC).
In Thurston v Manawatu-Wanganui Regional Council, an appeal against sentence, the High Court held:

“Abatement notices are designed to allow a Council to put a stop immediately to unlawful discharges. If they are to work as intended the Court must treat non-compliance as inherently serious.”

When an abatement notice has been issued for prior (historical) non-compliance, the High Court regards this as an aggravating sentencing factor.

(c) Local authority usage/perspective

Abatement notices are a quick and inexpensive method of enforcement and are therefore widely used by local authorities. According to the Resource Management Act: Survey of Local Authorities 2012/2013 (as with previous survey periods), abatement notices are the second most commonly used form of enforcement. The total number of abatement notices issued in the 2010/2011 period was 1,290 and in the 2012/2013 period was 2,013.

Most abatement notices are complied with and very few appeals are filed. It would also appear that the majority of appeals against abatement notices are settled in full or in part, and most do not go to a full hearing.

In appeals against abatement notices the appellants often rely on technical points. The advantage (to the local authority) of the abatement notice process is that if the recipient appeals and the notice has flaws, the local authority can

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142 Waikato Regional Council v Huntly Quarries Ltd [2004] NZRMA 32 (DC) at [24] and [37].
143 Thurston v Manawatu-Wanganui Regional Council HC Palmerston North CRI-2009-454-24, 27 August 2010 at [41].
144 Sullivan v Taranaki Regional Council [2013] NZHC 1301 at [60].
145 Ministry for the Environment Resource Management Act: Survey of Local Authorities 2012/2013 (April 2014) at 69–70. The enforcement mechanism used the most is the excessive noise direction.
147 The Ministry for the Environment’s Resource Management Act: Survey of Local Authorities 2012/2013 (April 2014) does not include information on the number of appeals against abatement notices. The previous survey reported that in 2010/2011 only two per cent of the notices issued were appealed: Ministry for the Environment Resource Management Act: Survey of Local Authorities 2010/2011 (September 2011) at 62.
148 While there is no independent empirical evidence available on this point, this is the personal view of the author, Karenza de Silva, derived from working with a number of local authorities, discussion with local authority staff at conferences, and reading decisions on the outcome of abatement notice appeals. This view is consistent with the data in the Ministry for the Environment Resource Management Act surveys. For example, the 2010/2011 survey reported that, of the 1,290 abatement notices issued in that period, 26 per cent were withdrawn, two per cent were appealed to the Environment Court, and 72 per cent were still in force: Ministry for the Environment Resource Management Act: Survey of Local Authorities 2010/2011 (September 2011) at 62.
cancel the notice under s 325A and issue a fresh and correct notice, or instead use one or more of the other enforcement mechanisms.

(2) Excessive noise directions

(a) Procedure

The provisions for excessive noise directions are set out in ss 326–328 of the RMA.\(^{149}\) There is a broad and detailed definition of “excessive noise” in s 326. Section 327 allows an enforcement officer, or any constable acting upon the request of an enforcement officer, to investigate a complaint that excessive noise is being emitted from any place. If the enforcement officer or constable is of the opinion that the noise is excessive, he or she may direct the occupier of the place from which the sound is being emitted, or any other person who appears to be responsible for causing the excessive noise, to immediately reduce the noise to a reasonable level.

An excessive noise direction can be oral or written.\(^{150}\) The direction lasts for a maximum of 72 hours and there is to be no resumption of the excessive noise for the entirety of the period.\(^{151}\) There are no rights of appeal against an excessive noise direction,\(^{152}\) and if a person fails to comply the enforcement officer accompanied by a police constable, or a constable on their own, may enter the premises and put a stop to the noise by seizing and removing, rendering inoperable, locking or sealing any instrument or appliance, without notice if necessary.\(^{153}\) A police constable can also use “such force as is reasonable in the circumstances” to give effect to the order.\(^{154}\) In Frost v Police\(^{155}\) the High Court held that the deployment of police dogs in responding to a noise complaint situation may not constitute unreasonable force.

(b) Prosecution — contravention of excessive noise direction

Contravention of an excessive noise direction is an offence\(^{156}\) which attracts a penalty of up to $10,000, with an additional penalty of up to $1,000 per day for a continuing offence.\(^{157}\) There have only been three prosecutions for contravention of an excessive noise direction (two involve the same premises).\(^{158}\) The low number of prosecutions indicates that this mechanism is extremely effective.

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\(^{149}\) The powers under s 327 of the RMA are in addition to the power to issue abatement notices relating to unreasonable noise, and to the power to seek an enforcement order under s 316 for noise problems.

\(^{150}\) RMA, s 327(2).

\(^{151}\) Frost v Police [1996] 2 NZLR 716 (HC) at 719.

\(^{152}\) Jacques v Kapiti Coast District Council [2003] NZRMA 237 (EnvC) at [5].

\(^{153}\) RMA, s 328(3).

\(^{154}\) RMA, s 328(7).

\(^{155}\) Frost v Police [1996] 2 NZLR 716 (HC).

\(^{156}\) RMA, s 338(2)(c).

\(^{157}\) RMA, s 339(2).
(c) Local authority usage/perspective

Excessive noise directions are a quick and inexpensive method of enforcement. In 2010/2011, excessive noise directions were the most commonly used of all the enforcement mechanisms, with 19,567 directions issued.\(^{159}\)

(3) Water shortage directions

(a) Procedure

The provisions for water shortage directions are set out in s 329 of the RMA. A water shortage direction is not strictly an enforcement mechanism, as it is not targeted to a person and is not in response to non-compliance.

Where a regional council or unitary authority considers that at any time there is a serious temporary shortage of water in its region or any part of its region, it may issue a water shortage direction. Notice may be given to a person by serving it on the person or by publishing the notice in a local newspaper. A direction may relate to any specified water, to water in any specified area, or to water in any specified water body. The direction lasts for a maximum of 14 days but may be amended, revoked or renewed by a subsequent direction.

(b) Prosecution — contravention of water shortage direction

Contravention of a water shortage direction is an offence\(^{160}\) and is subject to the highest maximum penalties under RMA.\(^{161}\) There has only been one prosecution (to the time of writing) for contravention of a water shortage direction,\(^{162}\) which might suggest that the directions are extremely effective tools.

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158 Rodney District Council v Goffin DC Auckland CRN5044013469, 18 September 1995; Manukau City Council v Peau DC Auckland CRN6048006284, 10 September 1996 (charges against company dismissed after defended hearing, duty manager Peau was convicted and fined $500); and Manukau City Council v Longview Reception Lounge (1980) Ltd DC Auckland CRN10480044067, 18 May 1998.

159 Ministry for the Environment Resource Management Act: Survey of Local Authorities 2010/2011 (September 2011) at 56. The Ministry’s Resource Management Act: Survey of Local Authorities 2012/2013 (April 2014) does not include information on the number of excessive noise directions, but it notes at 65 that of complaints recorded in the 2012/2013 survey period, 82 per cent (133,621) were for excessive noise, and noise complaints increased by 34 per cent since the previous survey period.

160 RMA, s 338(1)(d).

161 RMA, s 339(1) applies: two years’ imprisonment or a maximum fine of $600,000 for a person other than a natural person, $300,000 for a natural person, and an additional maximum penalty of $10,000 per day for a continuing offence.

162 Waikato Regional Council v Annią Bhana and Hira Bhana Co Ltd (1995). There is no written decision. The judgment as recorded by the lawyer for the Waikato Regional Council (Karenza de Silva) is in the RMA Enforcement Manual on the Quality Planning website at <www.qualityplanning.org.nz>. The defendant company was convicted after a defended hearing and fined $12,000 and ordered to pay costs of $1,000. The company owned a market garden and had breached a water shortage direction. The charge against Mr Bhana was dismissed because there was insufficient evidence to link him to the offence.
(c) Local authority perspective

Being in the same class of “low-level enforcement mechanisms” as abatement notices and excessive noise directions, water shortage directions are a quick and inexpensive method of restricting the use of water when there is a serious temporary shortage of water.

(4) Emergency works and power to take preventive or remedial action

The provisions for emergency works and power to take preventive or remedial action are in ss 330–331 of the RMA. Although they are in pt 12 of the RMA, they are not enforcement mechanisms as such.

Section 330 allows emergency works in circumstances that come within the criteria in s 330(1)(d)–(f). These are:

“(d) an adverse effect on the environment which requires immediate preventive measures; or

“(e) an adverse effect on the environment which requires immediate remedial measures; or

“(f) any sudden event causing or likely to cause loss of life, injury, or serious damage to property[]”

An example of the limited ambit of the provision is Waikato Island Country Club Ltd v Auckland City Council,163 where the disposal of sewage sludge on a golf course was held not to constitute emergency works when the Council had known of the pending disposal problem for some considerable time.

Section 330(1) confers the powers only on certain people or bodies: any person with financial responsibility for any public work; network utility operators who are approved as requiring authorities under s 167; lifeline utilities (who provide any service or system within the meaning of s 4 of the Civil Defence Emergency Management Act 2002); and local or consent authorities with jurisdiction over the resource or area affected by the emergency.

Section 18(2) of the RMA provides a defence to prosecution for any person acting in accordance with s 330.

An example of an unsuccessful defence under s 18(2) is Doug Hood Ltd v Canterbury Regional Council.164 This was a prosecution against a contractor (Doug Hood Ltd) and the project manager (Mr Hollingum) where part of an earth dam under construction across the Opuha River was washed away following an attempted controlled release of water. Both defendants were convicted under s 15(1)(a) for discharging dam materials (clays, gravel, rip-rap and river gravel)

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into the river. They appealed to the High Court and argued as one of the grounds of appeal that they had a defence under s 18. The High Court found that the defence was not available because of the circumstances. While the Court accepted that the cutting of the release channel was an “activity undertaken” in the face of an emergency situation, nevertheless the possibility of a flood was an ever-present risk. During the construction phase the dam could not be safely overtopped in the event of a flood. When the flood occurred, no means existed to address that known risk. The activity of cutting the release channel was therefore a response to an emergency of Doug Hood and Hollingum’s own making.165

(5) Declarations

The provisions for declarations are found in ss 310–313 of the RMA. The Environment Court has specific jurisdiction to make declarations and any person can apply for a declaration, subject to some minor limitations.166

A declaration can be sought to clarify functions, powers, rights and duties under the RMA, including, for example, whether an act or omission is in breach of the Act or a resource consent, or whether it is covered by existing use rights.168 The Court has a wide jurisdiction in this regard. For example, a declaration can be made that an activity is inconsistent with a district plan even if a “certificate of compliance” for the activity been issued by the local authority.169

The Environment Court’s jurisdiction under s 310 is, however, specifically confined to the RMA. The Court does not have jurisdiction to determine the lawfulness of a proposed activity by reference to the general law or other statutory provisions that must be determined in the ordinary courts. Also, its jurisdiction does not extend to making declarations (or enforcement orders) relating to defects of an administrative law nature, such as claims of inadequate consultation, bias, legitimate expectation, breach of fiduciary duty and other such matters. To do so would pre-empt the High Court’s jurisdiction under the Judicature Act 1908.170

While a declaration can be declaratory of rights and obligations, it cannot, of itself, order action to be taken or refrained from being taken. If the person

165 Doug Hood Ltd v Canterbury Regional Council [2000] 1 NZLR 490 (HC) at [46].
166 RMA, s 311.
167 Palmerston North City Council v New Zealand Windfarms Ltd [2012] NZEnvC 133, (2012) 17 ELRNZ 10. The Court granted declarations sought by the Council as to whether a wind farm was operating in accordance with certain noise conditions in its consent. The Court noted that the declaration procedure, when compared to the consequences of abatement or enforcement proceedings, was the most benign process the Council might have taken to resolve the issue. See [1]–[2], [6]–[7], [13]–[17] and [20].
168 RMA, s 310.
170 Berryman v Wintakere City Council EnvC A046/98, 4 May 1998 at 5.
against whom a declaration is made refuses to abide voluntarily, further orders, such as enforcement orders, may be sought from the Environment Court. As a general proposition, it is not appropriate to seek a declaration when the factual position is unclear or in dispute.\(^{171}\)

(6) **Enforcement orders**

(a) **Procedure**

The provisions for enforcement orders are set out in ss 314–321 of the RMA. Enforcement orders can be made by the Environment Court. They can also be imposed as a sentence by the District Court when a person is convicted of any offence under s 338.\(^{172}\)

Any person can apply for an enforcement order, except for orders under s 314(1)(da) (requiring “a person to do something that, in the opinion of the court, is necessary in order to avoid, remedy, or mitigate any actual or likely adverse effect on the environment relating to any land of which the person is the owner or occupier”) or s 314(1)(e) (changing or cancelling “a resource consent if, in the opinion of the court, the information made available to the consent authority by the applicant contained inaccuracies relevant to the enforcement order sought which materially influenced the decision to grant the consent”), which can only be applied for by a local authority or consent authority.\(^{173}\)

Section 314 sets out the extensive scope of an enforcement order. An enforcement order can require a person to cease an activity, or it can require that something be done. The orders can also be anticipatory, in that they can be required to avoid, remedy or mitigate likely adverse effects, and so may require a person not to commence, anything or to be done that may contravene the RMA, regulations or instruments made under them, including plans, resource consents, designations, heritage orders and existing use rights.\(^{174}\) An enforcement order may also require a person to cease, or not to commence, anything that is likely to be “noxious, dangerous, offensive, or objectionable to such an extent that it has or is likely to have an adverse effect on the environment”.\(^{175}\) As stated above, what is offensive or objectionable is an objective test,\(^{176}\) and the court must

\(^{171}\) *Re Trollope PT Christchurch* C052/94, 8 June 1994.

\(^{172}\) Section 339(5)(a) of the RMA provides that the District Court may, instead of or in addition to imposing a fine or a term of imprisonment, make any of the enforcement orders that could be made under s 314. This is done by the District Court exercising its criminal jurisdiction and not by the Environment Court, albeit that the judge sitting in the District Court must be an Environment Judge except where otherwise directed by the Chief District Court Judge (s 309(3)).

\(^{173}\) RMA, s 316(1)–(2).

\(^{174}\) RMA, s 314(1)(a)(i).

\(^{175}\) RMA, s 314(1)(a)(ii).

\(^{176}\) *Waterscare Services Ltd v Minihinuine* [1998] 1 NZLR 294 (CA) at 304–305.
"transpose itself into the ordinary person, representative of the community at large" to determine this. In *Watercare Services Ltd v Minchinwick* the Court of Appeal rejected the contention that where wāhi tapu was involved, the offensiveness test in s 314(1)(a)(ii) was whether a Māori person would be offended. Rather:

"The Court must weigh all the relevant competing considerations and ultimately make a value judgment on behalf of the community as a whole. Such Māori dimension as arises will be important but not decisive even if the subject matter is seen as involving Māori issues."

An enforcement order can be made requiring a person to take steps to avoid, remedy or mitigate any adverse effects on the environment caused or likely to be caused by or on behalf of that person, or relating to any land of which that person is the owner or occupier, even if that person was not responsible for the state of affairs giving rise to the adverse effects. It is important to note, however, that an enforcement order cannot be made if the person is acting in accordance with a rule in a plan, a resource consent or a designation and the adverse effects were expressly recognised at the time the rule was made or the consent or designation approved.

Enforcement orders can be applied for in an emergency and made on an interim basis without the Environment Court hearing the full case. In deciding whether to make an interim order, the considerations for the Court are set out in s 320(3)(a)–(d). The first consideration is "what the effect of not making the order would be on the environment". The application has to be very precise in this regard. The general principles pertaining to injunctions will also apply, in that the applicant will have to: present a prima facie case that the respondent has acted in contravention of the law or the applicant’s rights; show that there is a serious question to be tried; and show that irreparable harm to the environment will or is likely to ensue if an interim enforcement order is not made. It is at the discretion of the Court as to whether an undertaking as to damages will be required or security for costs ordered. It is possible to apply for an interim

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177 Zdeniuk v Wellington City Council [1995] 1 NZLR 700 (HC) at 708.
178 Watercare Services Ltd v Minchinwick [1998] 1 NZLR 294 (CA) at 304–305.
179 Watercare Services Ltd v Minchinwick [1998] 1 NZLR 294 (CA) at 305.
180 RMA, s 314(1)(b)(ii) and (c).
181 RMA, s 314(1)(da).
182 RMA, s 319(2).
183 RMA, ss 320 and 314(3).
184 See, for example, *Walden v Auckland City Council* (1992) 1 NZRMA 101 (PT) and *Berkhamstead Residents Asoc Inc v Wellington City Council* (1992) 1 NZRMA 41 (PT).
185 Walden v Auckland City Council (1992) 1 NZRMA 101 (PT) at 103.
186 District Courts Rules 2009, r 4.20. Note that the section which had prevented the Environment Court from imposing security for costs (RMA, s 284A) was removed by the Resource Management (Simplifying and Streamlining) Amendment Act 2009.
enforcement order on an ex parte basis, but the test is a high one: the applicant has to show, for example, that serving the notice on the respondent would frustrate the application.\(^\text{187}\)

The Environment Court can also make an enforcement order requiring payment or reimbursement of actual and reasonable costs and expenses where the person against whom the order is sought has failed to comply with an earlier enforcement order, an abatement notice, a rule, a resource consent or any other obligation under the RMA. The payment is to reimburse the person applying for the order for the costs incurred or likely to be incurred by that person in avoiding, remedying or mitigating the adverse effects resulting from the non-compliance.\(^\text{188}\)

Enforcement orders can also be directed at the local authority itself, and may, for example, be used to remedy a procedural defect.\(^\text{189}\) This mechanism reduces the need for aggrieved persons to apply to the High Court for judicial review of the authority’s actions, and to this end facilitates a quick and cheaper method of securing compliance. Declarations may also be used to ensure that local authorities comply with their duties to the environment.\(^\text{190}\)

If the person against whom an enforcement order is made fails to comply with the order, any other person may, with the consent of the Environment Court, comply with the order on their behalf and recover the costs of so doing as a debt. In the course of doing so, that other person may enter onto land or into structures (with a constable in the case of a dwelling house), and may sell or dispose of any structure or materials salvaged in complying with the order.\(^\text{191}\)

\[^{187}\text{Manawatu-Wanganui Regional Council v Fuggle [2011] NZEnvC 315. The Council applied ex parte for an interim enforcement order requiring remedial works against Fuggle, in relation to earthworks which were being undertaken on a subdivision site without adequate erosion and sediment controls. The Environment Court considered that the effect on the environment of not making the order sought would be to continue the discharge, which was having substantial adverse effects on water bodies. Further, the Court did not consider it necessary to require the Council to provide an undertaking as to damages, as it was seeking compliance as part of its public law functions. It was not necessary either to hear from Fuggle in light of the need to make the order urgently. Although the Court was conscious of having heard only the Council’s side of the story, the significant and long-standing adverse effects on water bodies should not be visited on the environment until such time as Fuggle’s possible views were heard. Similarly, the Court acknowledged that there was a long-standing failure by the Council to adequately monitor the earthworks for a number of years, but again these failings should not be visited on the environment. The interim order was granted.}\]

\[^{188}\text{RMA, s 314(1)(d); “actual and reasonable costs” is defined in s 314(2).}\]

\[^{189}\text{See, for example, Hartford Group Ltd v Auckland City Council (1998) 4 ELRNZ 342 (EnvC) (applicant not actually notified when there was no dispute that he should have been).}\]

\[^{190}\text{See, for example, Donaldson v Board of Trustees of Sandyhills Normal School [1997] NZRMA 342 (PT) (declaration made against Minister of Education).}\]

\[^{191}\text{RMA, s 315(2).}\]
An enforcement order can be made subject to conditions. If the action that the order requires to be taken is one that first requires a resource consent, the order cannot override the need for such consent. Instead, the Environment Court can order that all necessary steps are taken to obtain the consent as a condition of the enforcement order, or it could suspend the operation of the order pending the respondent fulfilling a task (for example, applying for the requisite resource consents).\(^\text{192}\) In determining whether to suspend the operation of the order, the Court should start from the premise that an enforcement order could be quite a draconian measure, particularly where businesses and people’s employment are concerned. The Court should consider the interests of the respondent in deciding whether to delay the imposition of the order, not the interests of the applicant.\(^\text{193}\) One factor that might support a suspension would be if the respondent had proceeded on an honestly-held but incorrect assumption that a resource consent was not necessary.\(^\text{194}\) Other considerations for the Court include the respondent’s behaviour once it had been suggested that they were in breach, and whether the respondent made efforts to, or was in the process of, rectifying the illegality and reducing any effects on the environment that their activity might cause. If so, these matters would point towards delaying the operation of an enforcement order.\(^\text{195}\)

(b) Prosecution — contravention of enforcement order

Contravention of an enforcement order is an offence\(^\text{196}\) and is subject to the highest maximum penalties under RMA.\(^\text{197}\) A recent example that illustrates this is *Christchurch City Council v Owaka Holdings Ltd*,\(^\text{198}\) where the defendant was charged with two offences of failing to comply with an interim enforcement order by permanently depositing unauthorised material in a pond and failing to engage a surveyor to carry out a survey of the site prior to depositing material. The prosecution was successful and the defendant was fined a total of $18,000.

Where an enforcement order is not complied with, there is also the remedy of contempt proceedings under s 278 of the RMA, s 79 of the District Courts Act 1947 and r 17.3 of the High Court Rules, which gives the Environment Court

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192 *Manukan City Council v Russell* [1996] NZRMA 508 (PT) (accountancy business established in dwelling house contrary to District Plan provisions).


196 RMA, ss 338(1)(b).

197 RMA, s 339(1) applies: a fine of up to $600,000 for a corporation, or up to two years’ imprisonment or a fine of up to $300,000 for a natural person, and an additional maximum penalty of $10,000 per day for a continuing offence.

198 *Christchurch City Council v Owaka Holdings Ltd* DC Christchurch CRI-2012-009-5597, 27 May 2013.
the power to enforce its orders by warrants to arrest and imprison if the situation calls for it. 199

An enforcement order can be made to apply to the personal representatives, successors and assigns of the person against whom the order is made. 200 The requirement to comply with an order is following service of the order on that person, 201 so successors or assigns are not liable for breach of an order to which they were not a party unless the order is served on them.

In the case of a corporation or unincorporated organisation which does not comply with an enforcement order, that failure can result in prosecution against the directors and persons involved in the management of the corporation or organisation. 202

Section 286 of the RMA provides that an order for costs made by the Environment Court may be filed in the District Court and then becomes enforceable as a judgment of the District Court in its civil jurisdiction. There is no case law at the time of writing, but it appears that prosecution may still be an option for contravention of an enforcement order requiring payment of costs under s 314(1)(d) of the RMA.

(c) Local authority usage/perspective

In 2010/2011 and 2012/2013, applications for enforcement orders were the least commonly used method of enforcement by local authorities, with only 32 applications for enforcement orders in the period between 1 July 2010 and 30 June 2011 203 and 22 in the period between 1 July 2012 and 30 June 2013. 204

(7) Public law actions: judicial review

Judicial review is a public law remedy available in the High Court. 205 It is a process whereby the High Court exercises its inherent jurisdiction to review the decisions of public bodies for legality. 206 As well as reviewing the decisions of statutory bodies, the supervisory powers of the High Court extend to requiring public authorities to act or refrain from acting so as to comply with their

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199 Northland Regional Council v Bird [2012] NZEnvC 212.
200 RMA, s 314(5).
201 RMA, s 315(1).
202 RMA, s 340(3).
205 Judicial review is discussed further at [6.5].
206 The Judicature Amendment Act 1972 placed the grounds of review on a statutory footing, but this does not distract from the fact that the power of review derives from the inherent jurisdiction of the High Court (see Philip Joseph Constitutional and Administrative Law in New Zealand (3rd ed, Brookers, Wellington, 2007) at 822).
statutory and other obligations. The single remedy known as judicial review has replaced the ancient writs of certiorari and mandamus, by which the Crown or other public authority could be ordered respectively to cease or take action.\footnote{Judicature Amendment Act 1972, s 4; and see Philip Joseph \textit{Constitutional and Administrative Law in New Zealand} (3rd ed, Brookers, Wellington, 2007) at 1106–1108.}

Anyone who has a sufficient interest in the matter may apply for judicial review. The New Zealand courts adopt a liberal approach to locus standi, as such an approach ensures that matters of genuine public interest, warranting judicial consideration, are properly addressed.\footnote{For example, see \textit{Environmental Defence Society Inc v South Pacific Aluminium Ltd (No 3)} [1981] 1 NZLR 216 (CA) at 221; and see the plethora of cases confirming this approach cited in Matthew Smith \textit{New Zealand Judicial Review Handbook} (Brookers, Wellington, 2011) at 515–525.}

Judicial review has been used in many disputes concerning the management of the environment where the relevant, governing statute does not provide for rights of appeal. It is a particularly prevalent form of litigation in fisheries management, where fishing interests have sought to challenge any limitation that may impact on their take, imposed by government for environmental reasons.\footnote{By way of example, see Nicola R Wheen \textit{"How the Law Lets Down the ‘Down-Under Dolphin’ – Fishing-Related Morality of Marine Animals and the Law in New Zealand"} (2012) 24(3) JEL 477 for a review of cases challenging the fishing-related mortality limits set by the Minister of Conservation.}

In a different context, the Minister for Energy and Resources and the Environmental Protection Authority have both been challenged via judicial review in respect to the procedures adopted to assess and grant permits for petroleum development.\footnote{See, for example, \textit{Greenpeace of New Zealand Inc v Minister of Energy and Resources} [2012] NZHC 1422 and \textit{Greenpeace of New Zealand Inc v Environmental Protection Authority} [2013] NZHC 3482, [2014] NZRMA 112.}

In the context of the RMA, judicial review may be sought if the Act does not provide for a right of appeal against a decision, and if the relief sought is outside the jurisdiction of the Environment Court. It is important to note that the RMA states that judicial review will not be available if an alternate remedy is provided by the Act and these alternatives have not been exercised.\footnote{RMA, s 296.}

As stated above, however, most failures by an authority may be amenable to a declaration or enforcement order. In some circumstances, such as requiring certification for an existing use right,\footnote{RMA, s 10(1).} there is the right to formally object and seek a review by the authority, with a right of appeal against the decision made on the objection.\footnote{RMA, ss 357–358.}

The decisions most commonly challenged in judicial review proceedings are those made at local authority level not to notify a resource consent application.
The decision not to notify an application is important, as it deprives many of those who may be opposed to or potentially affected by the intended activity of the opportunity to participate in the decision-making process: opponents will not be able to make a submission on an application and will have no right to appeal the grant of consent or any conditions. However, the RMA has never provided a right to appeal against non-notification, and the Act expressly prevents a declaration being made on the matter. In terms of reviewable conduct, the High Court has confirmed that while it may often be desirable for the authority to conduct a hearing in relation to the decision whether to notify, there is no general duty to do so. Even if a hearing is held, there is no duty on the authority to hear from any person other than the applicant.

It is usual to join as respondents to an application for judicial review both the authority by whom the impugned decision or action was made or taken, and the applicant or other party who received the benefit of the decision or action and would be prejudiced by a successful review.

As judicial review is an exercise of the inherent jurisdiction, the High Court has an overriding discretion whether or not to exercise its powers to grant relief. Therefore, even if the invalidity or unlawfulness of the impugned decision, action or inaction is established, the Court has the discretion not to set it aside or otherwise invalidate it.

Judicial review is a complex and specialist area, and is covered in more detail at [6.5].

(8) *Private law claims*

There is ample scope for individual members of the public to enforce the rights and duties conferred by the RMA. A private individual may bring an application under pt 12 of the RMA for a declaration or for enforcement orders, with some limited exceptions. Further, any person can commence a prosecution for an

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214 Note that s 310(gg) of the RMA, enacted by the Resource Management Amendment Act 2005 but not brought into force, would allow the Environment Court to declare invalid a decision not to notify an application for resource consent. For the meantime, however, the only recourse available to a dissatisfied would-be submitter is to seek judicial review in the High Court.

215 RMA, s 310(b); and see *Aro Valley Community Council Inc v Wellington City Council* (1992) 1 NZRMA 221 (PT).

216 *Aley v North Shore City Council* [1999] 1 NZLR 365 (HC) at 375.

217 *Northwest Mainstreet Inc v North Shore City Council* [2006] NZRMA 137 (HC) at [207]–[210].

218 See, for example, *Aley v North Shore City Council* [1999] 1 NZLR 365 (HC) at 380 and *Murray v Whakatane District Council* [1999] 3 NZLR 276 (HC) at 479.

219 Readers are also advised to consult the relevant texts and treatises on the subject, such as Philip Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Broekers, Wellington, 2007) and Matthew Smith *New Zealand Judicial Review Handbook* (Broekers, Wellington, 2011).
offence against the RMA, and individuals or corporations commonly bring applications for judicial review.

In the event that a local authority fails to enforce the provisions of the RMA, a plan or a resource consent, it will be difficult to succeed in a private law action for damages for breach of statutory duty against that authority. The courts have been reluctant to allow such a claim where the authority is exercising its powers for the benefit of the public generally, and where the relevant enactment provides alternate remedies. In Attorney General v Birkenhead Borough Council the Supreme Court (now the High Court) rejected a claim for damages against a local authority for failing to prevent the building of an apartment block that breached the district plan. The Court stated that the plaintiff had a right to compel the authority to perform its duties under the Town and Country Planning Act 1953 via an injunctive remedy. In order to succeed in a claim for damages, the plaintiff would have had to show that there had been an interference with some private right vested in them and recognised by law. This was not the case on the facts.

It is important to note that common law remedies such as nuisance may also be available to individuals. The predominant remedy will be injunctive. Common law environmental remedies are covered in more detail in ch 5.

19.3.5 Criminal prosecutions

(1) RMA criminal offences

Most environmental statutes include a provision making it an offence to breach duties imposed by the statute. The statute will also prescribe the maximum penalties for the offences, which may differ according to the type of offence. Offences under the RMA fall into three categories:

(1) Section 338(1)–(1B) offences, which include breaches of the duties and restrictions set out in ss 9 and 11–15 in pt 3 (concerning the use and development of land, the coastal marine area, the beds of certain rivers

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220 See s 311(2)–(3) of the RMA for declarations and s 316(2) and (5) for enforcement orders that can be sought only by the relevant consent authority or minister.

221 Criminal Procedure Act 2011, s 15 (any person may commence a proceeding). Offences under s 338(1), (2) and (3) of the RMA are offences to which the Criminal Procedure Act applies. Therefore private prosecutions are possible for offences under the RMA.

222 For further discussion, see Kenneth Palmer Local Authorities Law in New Zealand (Brookers, Wellington, 2012) at 153–156.


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and lakes, water, and discharges of contaminants), and breaches of an enforcement order, an abatement notice (other than one for unreasonable noise) and a water shortage direction.

(2) Section 338(2) offences, which include breaches of an abatement notice for unreasonable noise, an excessive noise direction, and an Environment Court order other than an enforcement order.

(3) Section 338(3) offences, which include breaches of miscellaneous matters going to the administration of the RMA, including obstruction of enforcement processes.

The s 338 subsections represent three classes of offences of diminishing seriousness, and the penalties in s 339 reflect this.225 Section 338(1)–(1B) offences are subject to the highest maximum penalties, being: a fine of up to $600,000 for a person other than a natural person; a fine of up to $300,000 or up to two years’ imprisonment for a natural person; and a further maximum fine of $10,000 per day for a continuing offence. Lesser offences in s 338(2) have maximum fines of $10,000 and a further maximum of $1,000 per day for a continuing offence, and s 338(3) offences have a maximum fine of $1,500.

The Court of Appeal in Canterbury Regional Council v Newman referred to the hierarchy of offences in s 338:226

“It is a condign feature of s 338 that for the most part, although not entirely, the offences created relate to adverse repercussions on land, water, or air; in short, on natural or physical features. Section 338(1), which in penalty terms creates the most serious offences, refers back to contraventions of s 9, 11, 12, 13, 14 and 15. These impose duties and restrictions in relation to land, subdivisions, the coastal marine area, the beds of certain rivers or lakes, water, and the discharge of contaminants (the present prosecution alleges breach of s 9). Certain paragraphs in relatively lesser offences under s 338(2) and (3), for example those relating to failure to provide information and to obstruction of the exercise of powers, do not; but they are minor and exceptional.”

(2) Offences of strict liability

The prosecution in a case of general criminal law has the burden of proving beyond reasonable doubt both the actus reus (actions) and the mens rea (intent behind them).


226 Canterbury Regional Council v Newman [2002] 1 NZLR 289 (CA) at [86].
A cornerstone of the enforcement of regulatory statutes, including those concerning environmental duties and obligations, is the imposition of strict liability. While the prosecution must prove the actus reus, there is often no requirement to prove mens rea\(^{227}\) (that is, that the defendant intended to commit an offence).\(^{228}\) This demonstrates that the focus of enforcement in environmental law is not to punish a defendant for their faulty behaviour, but rather to ensure that action is taken to facilitate compliance with the goals underlying the regime. This rationale applies equally to the RMA.

In *McKnight v NZ Biogas Industries Ltd* the Court of Appeal stated that s 341 of the RMA “may be seen as, in the environmental field, an adoption and codification by Parliament”\(^{229}\) of the principles evolved in cases concerning public welfare regulatory offences, such as *R v City of Sault Ste Marie*,\(^{230}\) *Civil Aviation Department v MacKenzie*,\(^{231}\) *Hastings City Council v Simons*\(^{232}\) and *Miller v Ministry of Transport*.\(^{233}\)

The Court went on to say:\(^{234}\)

> “The statutory structure enacts strict liability subject to the statutory defences which reflect the absence of fault defence evolved in the cases already cited. ... It is entirely consistent with the importance attached to protection of the nation’s natural and physical resources in the Resource Management Act.”

Section 341(1) provides:

> “In any prosecution for an offence of contravening or permitting a contravention of any of sections 9, 11, 12, 13, 14, and 15, it is not necessary to prove that the defendant intended to commit the offence.”

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\(^{227}\) *McKnight v NZ Biogas Industries Ltd* [1994] 2 NZLR 664 (CA), following the strict liability nature of the offence under s 341 of the RMA, the Court of Appeal held that it was not necessary to prove the defendant intended to commit the offence, which required proof that the person had caused the relevant contaminant to be discharged.

\(^{228}\) There is one exception to this in the RMA offence provisions, s 338(3)(a), where the wording is “wilfully obstructs, hinders, resists, or deceives any person in the execution of any powers conferred on that person by or under this Act” thus importing the requirement of mens rea in this one offence subsection.

\(^{229}\) *McKnight v NZ Biogas Industries Ltd* [1994] 2 NZLR 664 (CA) at 669 per Gault J for the Court.

\(^{230}\) *R v City of Sault Ste Marie* [1978] 2 SCR 1299. In *Sault Ste Marie* the Supreme Court of Canada considered s 32(1) of the Ontario Water Resources Commission Act RSO 1970 c 332. The decision generally is referred to for the identification of categories of offences, including public welfare offences of strict liability subject to proof by the defendant that all reasonable steps were taken to avoid the offence.

\(^{231}\) *Civil Aviation Department v MacKenzie* [1983] NZLR 78 (CA).

\(^{232}\) *Hastings City Council v Simons* [1984] 2 NZLR 502 (CA).

\(^{233}\) *Miller v Ministry of Transport* [1986] 1 NZLR 660 (CA) at 668–669.

\(^{234}\) *McKnight v NZ Biogas Industries Ltd* [1994] 2 NZLR 664 (CA) at 672.
Section 341(1) thereby imposes strict liability for the specified offences. This leaves open the question whether intention is an element in the other offences under the RMA.

Judge McElrea in *Waikato Regional Council v Huntly Quarries Ltd* 235 considered whether contravention of an abatement notice is a strict liability offence. Judge McElrea noted that offences not included in s 341 might still be considered strict liability matters as they are “broadly within the ‘public welfare’ category of offences for which strict liability is often adopted by the courts,” 236 and that there are “three categories of offences, not two: ‘mens rea’ offences, those of ‘strict liability’ within s 341, and ‘strict liability’ offences of the *MacKenzie* type.” 237 Judge McElrea held that contravention of an abatement notice is an offence of omission 238 and is one of strict liability in the *MacKenzie* sense, and noted:239

“If it was sufficient in an abatement notice case for a defendant merely to raise some evidence of lack of intention, and for the informant then to have to prove intention affirmatively beyond reasonable doubt, this would in my view be asking the prosecution to prove matters that are often peculiarly within the province of the defendant, and would be unrealistic. It would also serve to defeat the purpose of the legislation by making abatement notices for offences of omission very difficult to enforce.”

The RMA contains statutory defences in ss 340(2) and 341(2). Section 340(2) contains a general statutory defence for “principals” in relation to the “acts of agents”, and this defence is discussed in [19.3.5(3)] below under the heading “Vicarious liability”. Section 341(2) contains the statutory defences applicable to the statutory strict liability offences in s 338(1)(a) (that is, contraventions of ss 9 and 11–15). Section 341(2) provides two defences of necessity or accident, with some additional requirements, as follows:

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235 *Waikato Regional Council v Huntly Quarries Ltd* [2004] NZRMA 32 (DC) at [56]–[67]. See also *Auckland City Council v Selyn Mews Ltd* DC Auckland CRN2004067301, 18 June 2003 at [96]–[100], where Judge McElrea treated a contravention of an enforcement order as a strict liability offence of the *MacKenzie* type. The *Huntly Quarries* case sets out in more detail the reasons for treating the offence as a strict liability offence because the point was argued by the defendant, whereas in the *Selyn Mews* case the point was conceded by defence counsel.


237 *Waikato Regional Council v Huntly Quarries Ltd* [2004] NZRMA 32 (DC) at [57].

238 *Waikato Regional Council v Huntly Quarries Ltd* [2004] NZRMA 32 (DC) at [66], where Judge McElrea drew a distinction between “Miller” and “MacKenzie” type offences of strict liability by noting that the offence in *Miller v Ministry of Transport* [1986] 1 NZLR 660 (CA) was an offence of commission (driving whilst disqualified), not omission.

239 *Waikato Regional Council v Huntly Quarries Ltd* [2004] NZRMA 32 (DC) at [66].
“(2) … it is a defence to prosecution of the kind referred to in subsection (1), if the defendant proves—

“(a) that—

“(i) the action or event to which the prosecution relates was necessary for the purposes of saving or protecting life or health, or preventing serious damage to property or avoiding an actual or likely adverse effect on the environment; and

“(ii) the conduct of the defendant was reasonable in the circumstances; and

“(iii) the effects of the action or event were adequately mitigated or remedied by the defendant after it occurred; or

“(b) that the action or event to which the prosecution relates was due to an event beyond the control of the defendant, including natural disaster, mechanical failure, or sabotage, and in each case—

“(i) the action or event could not reasonably have been foreseen or been provided against by the defendant; and

“(ii) the effects of the action or event were adequately mitigated or remedied by the defendant after it occurred.”

The High Court considered s 341(2) in Fuggle v Civie. In that case, and in contravention of s 13 of the RMA, the defendant scraped clean the bottom of a trout-spawning river and placed infill in the river to divert the flow away from his property. He attempted to claim that his actions were both “necessary” and “reasonable”. The High Court confirmed that the onus of proving one of the statutory defences exists is on the defence, and that the standard of proof is on the balance of probabilities. Further, the test is an objective one and “does not depend upon defendant’s beliefs”. In interpreting s 341, the Court had regard to the underlying scheme of the RMA and said that the onus is upon people to apply for the necessary resource consents to undertake work that would contravene pt 3 of the Act. Applications for consent could then be given careful consideration by the relevant local authority. Only in situations of real emergency should the underlying scheme of the Act be subverted. Thus, to succeed in claiming a defence pursuant to s 341, the action had to be immediately necessary.

(for example, in this case the defendant would have had to show that his house was at imminent risk of flooding). Fugle failed on the facts and was duly convicted.

It is important to note that a different approach to the availability of defences is taken to the lesser offences in s 338. Section 338(1)(b)–(d) and (2) offences are considered classic strict liability offences. As there are no statutory defences set out in respect of these offences, the common law criminal defences to strict liability discussed in the cases mentioned above are available — primarily, a total absence of fault. Further, for some of the offences listed in s 338(3) it is clear that mens rea is a requisite element. In allegations of “wilful obstruction” or “deception” the defendant’s state of mind is relevant, and the prosecution must establish the requisite mens rea beyond reasonable doubt.

As with some other regulatory offences (for example, civil aviation, road traffic offences) the regime differs from traditional criminal liability: the most serious offences are tightly-defined, strict liability offences and therefore the easiest offences for the prosecution to prove, while some of the lesser offences are harder to prove as mens rea comes into play. This is contrary to the traditional approach of the criminal law where the defendant is protected by the requirement that the prosecution must prove both mens rea and actus reus beyond reasonable doubt. Thus a defendant in a prosecution for breach of s 338(1) of the RMA, for example, may face imprisonment for up to two years but has a lower level of protection than defendants facing prosecution for offences under the Crimes Act 1961. On the other hand, it can be argued that the offence sections operate to support the underlying purpose of enforcement in environmental law, focusing on compliance with the main environmental policy goals rather than creating a punitive regime per se.

The majority of the prosecutions since the RMA came into force are for s 338(1) offences. There have only been a few prosecutions for the lesser offences. The local authorities that are prosecuting are thus focusing on the serious offences.

(3) **Vicarious liability**

The RMA imposes vicarious liability on principals for the actions of employees and agents. Such broad liability is a common element in the enforcement of

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242 See the classic Canadian case *R v City of Sainte Marie* [1978] 2 SCR 1299 (discussed at n 230 above) for an explanation of these common law defences.


244 A total of 429 prosecutions were completed in the period 1 July 2008–30 September 2012, and three of these were for the lesser offences: Ministry for the Environment *A Study into the Use of Prosecutions under the Resource Management Act 1991: 1 July 2008–30 September 2012* (October 2013) at 12.
environmental compliance, so as to incentivise responsible work practices. In the case of a corporation, both the corporation and the directors, and those involved in management, are liable to prosecution.\textsuperscript{246}

It is not necessary to prosecute both the company and the directors.\textsuperscript{247} This decision is a matter for the prosecutor.

Section 340(2) provides a defence to the principal/employer:

\texttt{“(2) Despite anything in subsection (1), if proceedings are brought under that subsection, it is a good defence if—

“(a) the defendant proves,—

“(i) in the case of a natural person (including a partner in a firm),—

“(A) that he or she did not know, and could not reasonably be expected to have known, that the offence was to be or was being committed; or

“(B) that he or she took all reasonable steps to prevent the commission of the offence; or

“(ii) in the case of a person other than a natural person,—

“(A) that neither the directors (if any) nor any person involved in the management of the defendant knew, or could reasonably be expected to have known, that the offence was to be or was being committed; or

“(B) that the defendant took all reasonable steps to prevent the commission of the offence; and

“(b) the defendant proves that the defendant took all reasonable steps to remedy any effects of the act or omission giving rise to the offence.”

The defence in s 340(2) provides some “amelioration”, as noted by the Court of Appeal in \textit{Canterbury Regional Council v Newman}.\textsuperscript{248}

\textsuperscript{245} RMA, s 340.

\textsuperscript{246} See, for example, \textit{Counta United Corp v Canterbury Regional Council} [2007] NZRMA 266 (HC).

\textsuperscript{247} \textit{R v Lowney} [2004] NZRMA 24 (DO) at [19]–[21].

\textsuperscript{248} \textit{Canterbury Regional Council v Newman} [2002] 1 NZLR 289 (CA) at [82]–[83].

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“As to legislative purpose, s 340, read with the offence section, s 338, is intended to impose absolute liability offences on a principal for the acts of an agent. (Those acts must, of course, be acts within authority in the sense which has come to be recognised in the principal and agent and employment field.)

“Absolute criminal liability, especially on a vicarious basis, is a harsh regime. Parliament justifies such a regime in the public interest, but has provided some amelioration in s 340(2). Absolute criminal liability is not to be imposed where the defendant principal establishes reasonable lack of knowledge, or reasonable precautions, plus the taking of ‘all reasonable steps to remedy any effects of the act or omission giving rise to the offence’.”

There are three limbs to the s 340(2) defences: (A), (B) and (b). (A) and (B) are alternatives, which is helpful for a defendant who relies on the defence. The defence has to be proved on the balance of probabilities.\(^{249}\)

In *Northland Regional Council v Sutton*\(^{250}\) the defendant had engaged a drilling company to drill under a road in order to lay a water pipeline. The drill hit a sewer line, the contents of which erupted onto the road and ran down towards a nearby shop. The defendant immediately diverted the sewage into a roadside culvert and thence under the road to the beachfront nearby. He then ordered a water tanker with chlorinated water to wash down the shop and road. The District Court held that, while not pleasant, diverting the sewage onto the beach in these circumstances was better than allowing it to run through shops and houses. The defendant had done all that could reasonably be expected, and had taken all reasonable steps to remedy the effects of the discharge.\(^{251}\)

In *Southland Regional Council v Cando Fishing Ltd*\(^{252}\) the company faced multiple charges relating to discharge of fish-processing waste from its factory to land, and it was unable to establish the defence under s 340(2). The District Court said that even if it accepted (which it did not) that the company was unaware of what was going on, there was no evidence that the factory manager had been supervised, and nor had the company monitored the performance of his duties. There was no evidence that it took all reasonable steps to prevent the offending.\(^{253}\)

\(^{249}\) *Northland Regional Council v Sutton* (2007) 13 ELRNZ 320 (DC).

\(^{250}\) *Northland Regional Council v Sutton* (2007) 13 ELRNZ 320 (DC).

\(^{251}\) *Northland Regional Council v Sutton* (2007) 13 ELRNZ 320 (DC) at [5], [16]–[19] and [22].

\(^{252}\) *Southland Regional Council v Cando Fishing Ltd* DC Invercargill CRI-2012-025-1636, 10 July 2013,

\(^{253}\) *Southland Regional Council v Cando Fishing Ltd* DC Invercargill CRI-2012-025-1636, 10 July 2013, at 2, 5, 25, 54–59 and 61.
There have been a significant number of prosecutions under the RMA for discharge of effluent from dairy farms. In a number of these cases the farm owner has relied on a defence under s 340(2) without success. One example is *Sullivan v Taranaki Regional Council*. The farm owner appealed his conviction and sentence on the basis that he did not know that the events that gave rise to liability were occurring, and that he could not reasonably be expected to have known that they were occurring. The High Court upheld the District Court finding that the defence had not been established. The High Court rejected Sullivan’s argument that he was entitled to assume that all was well until put on notice that it was not. The Court held that Sullivan’s construction of the defence “would result in farm owners facing a lower risk of criminal liability if they stepped back from any active role in the management of the farm”.

The High Court in *Wallace Corp Ltd v Waikato Regional Council* agreed with the finding in the District Court that a lower-tier manager with knowledge of an offence may qualify as a person concerned in the management of the defendant company and therefore prevent reliance on s 340(2)(a)(ii)(A). The charge in this prosecution was against Wallace Corp Ltd (WCL) and two of its employees (Messrs Cross and Dew) for burial of capacitors containing polychlorinated biphenyls (PCBs are a toxic pollutant and a hazardous substance). The High Court quashed the convictions of WCL and Mr Cross and allowed Mr Dew’s appeal against sentence. Mr Dew had not appealed his conviction. The High Court found that the District Court was correct in interpreting s 340(2) so as to achieve the aims of the RMA and noted:

“Restricting those ‘concerned in the management of’ WCL to those ‘directing the mind and will’ of WCL (the Tesco test) would not be the purposive interpretation called for by s 5 Interpretation Act 1999. Lower level managers such as Mr Dew are exactly the sort of people who make, for companies, decisions which effect the environment. It is not realistic to suggest that the decision to bury these capacitors would be taken by WCL at Board level. If the lower level managers

255 The defence was not established for a number of reasons, including: Sullivan was the farm owner and holder of the resource consent; he was therefore responsible to ensure that the discharge of effluent was being undertaken properly; he was entitled to delegate operation of the effluent system to someone else but the obligation to comply with the RMA remained with him; he took no steps during the period to check on the sharemilker’s operation of the effluent system and did not give the sharemilker any training; and the effluent system had certain identified deficiencies of which Sullivan knew or ought to have been aware, and he should have checked on the system’s operation at the time.
256 *Sullivan v Taranaki Regional Council* [2013] NZHC 1301 at [22].
257 *Wallace Corp Ltd v Waikato Regional Council* HC Hamilton CRI-2008-404-404, 7 October 2010.
258 *Wallace Corp Ltd v Waikato Regional Council* HC Hamilton CRI-2008-404-404, 7 October 2010 at [84].

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who make those sort of decisions (and in this case did make the decision) are excluded for the purposes of the s 340(2) defence, then the purposes of the RMA will be thwarted."

A defendant who wishes to preserve a position under s 340(2)(b) can formally offer to carry out the remedial work required, or to pay the actual and reasonable costs of the injured party or council doing the remedial work. A defendant is also entitled for the purposes of s 340(2)(b) to take advantage of remedial work that may have been carried out by anyone else, including an injured party, although they may be required to reimburse the costs under s 314 or at common law. 359

Section 340(3) sets out the matters that the prosecution has to establish to get a conviction against the defendant’s director or manager:360

“(3) If a person other than a natural person is convicted of an offence against this Act, a director of the defendant (if any), or a person involved in the management of the defendant, is guilty of the same offence if it is proved—

“(a) that the act or omission that constituted the offence took place with his or her authority, permission, or consent; and

“(b) that he or she knew, or could reasonably be expected to have known, that the offence was to be or was being committed and failed to take all reasonable steps to prevent or stop it.”

This would appear to set a high test for the prosecution, however, in most cases this does not appear to have created a stumbling block for the reason, as noted by the District Court in R v Lorenzen. 361 The Court noted that s 340(3) does not mean that a defendant or manager can only be charged if the company is charged. The section creates an extended liability for directors and managers (subject to the defences in s 340(2)), and it is not itself a limitation of the liability that they would have as principals under s 338. In effect, s 340(3) broadens the pool of prospective defendants, while s 340(2) limits the basis upon which prospective defendants are able to oppose conviction. 362

259 Canterbury Regional Council v Newman [2002] 1 NZLR 289 (CA) at [107]–[109].
260 The usual position applies and the prosecution has to prove these matters beyond reasonable doubt.
(4) **Exception, exemption or proviso**

Under s 67(8) of the Summary Proceedings Act 1957 there was a reverse onus on a defendant in summary proceedings to prove that any exception, exemption, provision, excuse or qualification applied. For example, with the offence of contravention of s 15 of the RMA, the reverse onus was on the defendant to prove that a discharge was “expressly allowed by a rule in a regional plan and in any relevant proposed regional plan, a resource consent, or regulations”.[263] The Criminal Procedure Act 2011, which came into force in July 2013, repealed s 67(8) of the Summary Proceedings Act 1957. The defendant now only bears an evidential burden to raise the exception, after which the informant has a legal burden of disproving that the exception applies (that is, the burden of proving a negative).

(5) **Form of proceedings**

Proceedings for offences under the RMA and other environmental legislation are now governed by the Criminal Procedure Act 2011.[264] There are four categories of offences under the Criminal Procedure Act.[265] Offences under s 338(1) of the RMA are category 3 offences, and there is a judge-alone trial in the District Court unless the defendant elects jury trial. The lesser offences under s 338(2) and (3) are category 1 offences, and there is a judge-alone trial in the District Court with no right to elect jury trial.

The usual six-month limitation within which a prosecution must be commenced is modified so that the period runs from the time the contravention giving rise to the offence first became known, or should have become known, to the relevant authority.[266]

The judge presiding in a prosecution under the RMA, including jury trials, must be an Environment Judge except where otherwise directed by the Chief District Court Judge.[267] As an RMA prosecution constitutes criminal proceedings in the District Court, the relaxation of the rules of evidence in hearings by the Environment Court does not apply.

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263 Bay of Plenty Regional Council v Bay Milk Products Ltd [1996] 3 NZLR 120 (HC) at 128. In R v Sheriff DC Timaru CRI-2004-076-1165, 4 April 2008, the Court held that under indictable jurisdiction a reverse onus does not apply.

264 The Criminal Procedure Act 2011 came into force on 1 July 2013. Prior to this the Summary Proceedings Act 1957 applied.

265 The categories of offences are defined by the maximum penalties for the offences and s 6 of the Criminal Procedure Act 2011. Sections 54–57 of the Criminal Procedure Act 2011 prescribe the procedure that will be followed for each category.

266 RMA, s 338(4).

267 RMA, s 309(3).
(6) *Restorative justice*

The opportunity to use restorative justice was made possible by the introduction of the Sentencing Act 2002. Section 10 and a number of other sections in the Sentencing Act give explicit recognition to and encouragement of “restorative justice”.

There is no definition of “restorative justice” in the Sentencing Act. Judge McElrea in a paper titled “The Role of Restorative Justice in RMA Prosecutions” points out that the omission of a definition was deliberate, as the Select Committee recognised that restorative justice is a developing concept.268 The Ministry of Justice in *Restorative Justice: Best Practice in New Zealand* includes the following definition from Dr Zehr, one of the leading writers on restorative justice:269

> “Restorative justice is a process to involve, to the extent possible, those who have a stake in a specific offence and to collectively identify and address harms, needs and obligations, in order to heal and put things as right as possible.”

In his paper on the matter, Judge McElrea notes that there are three categories of victims whose rights are relevant in the RMA context: those who suffer loss or damage to property; those who suffer physical injury (this includes effects from odours such as headaches); and those who are disadvantaged by an offence.270 Almost anyone can initiate a restorative justice conference. The process is voluntary and requires a guilty plea. A trained restorative justice facilitator is required, the defendant usually pays for the cost of the facilitator, and this may be taken into account as part of the overall penalty.

Restorative justice has been used in 33 prosecutions under the RMA between 2002 and September 2012.271 Two of these prosecutions are *Auckland Regional Council v Times Media Group Ltd* and *Mannukau City Council v Cai.*

The offence in the *Times Media Group* case was discharge of contaminants from a printing plant resulting in offensive odour in contravention of s 15(1)(c) of the RMA. There

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were substantial effects on the victims, including sore throats and sinus irritations. The outcome of the restorative justice process was a private and public apology, a dispersion-modelling report at a cost $6,284, tree-planting at a cost of $693, and a donation of $5,724 to a local school. Times Media Group Ltd was convicted and fined $5,000 and ordered to pay $656 to the Council for investigation costs. The director of the company was convicted and fined $2,500. In Cai the defendant was developing a property and instructed a contractor to remove vegetation, including a protected tree. She pleaded guilty to two charges for removal of the tree in contravention of s 9(1) of the RMA. The outcome of the restorative justice process was an apology to neighbours, an agreement to a programme of reinstatement work to be enforced through enforcement order, publication of an apology in a local newspaper, payment for publication by the Council of educative articles about trees at a cost of $2,800, and reimbursement of Council costs of $6,000. Cai was convicted and discharged.

In Auckland City Council v McArthur\(^274\) — a prosecution for construction of a building in breach of s 9 of the RMA — the defendant claimed that it had used a restorative justice process. Judge McElrea did not agree with that contention for the following reasons:\(^275\)

“Counsel have suggested that there has been restorative justice processes followed here, but in discussion with the Bench it is agreed that what happened cannot be said to be a restorative justice process. That process involves a meeting of parties and is described in a number of publications including the Salmon Lecture 2004 published by the Resource Management Law Association. No such meeting or process occurred here, in part because the Council officer involved could not see how it would be easy to define the parties that might attend such a meeting. I have said to counsel that in future if such a process is considered and the Court is advised, the Court can assist in appointing a restorative justice facilitator with appropriate training and that person would help bring together the relevant parties.

“The other benefit of the restorative justice process when it is followed is that the Court receives an authenticated report from an independent person rather than having to rely on what is said by the parties to the case about what happened.”

(7) Penalties and sentencing

As already mentioned, the maximum penalty under the RMA is a fine of $600,000 for a person other than a natural person and $300,000 or two years’

imprisonment for a natural person, with a further $10,000 per day for a continuing offence.

In addition to imposing a fine or a term of imprisonment, the District Court may make an enforcement order under s 314, and this once again demonstrates the great flexibility of the RMA regime. *Bay of Plenty Regional Council v Riverlock Farms Ltd*\(^{276}\) was a prosecution for discharge of dairy farm effluent in breach of s 15(1)(b) of the RMA. In addition to a fine of $40,000, the Court imposed an enforcement order requiring a contingency plan for operation of the effluent system.

The Sentencing Act 2002 applies following a successful prosecution under the RMA and other environmental legislation. The Court has the discretion to discharge without conviction,\(^{277}\) or to convict but not to impose a penalty.

The objectives of the RMA were discussed in *Machinery Movers Ltd v Auckland Regional Council*,\(^{278}\) which was the first appeal to reach the High Court under the Act. A full Court\(^{279}\) found that a “distinctive range of factors” are relevant in sentencing under the Act, which must be “inferred from a consideration of the broad legislative objectives.”\(^{280}\) These factors have been discussed in [19.2.6] above.

Following the enactment of the Sentencing Act 2002, the Court of Appeal in *R v Conway* confirmed that whilst *Machinery Movers* was still relevant, the focus had been modified somewhat by the Sentencing Act.\(^{281}\) The Court confirmed that the RMA and the Sentencing Act were intended to be read together: the sentencing court is entitled to have regard to the policies underpinning the RMA, because this will assist in identifying the matters that Parliament consider to be significant where breaches of the Act are alleged. This will help the court to assess the gravity of the offence.

The High Court in *Thurston v Manawatu-Wanganui Regional Council* referred to *Conway* and summarised the position as follows:\(^{282}\)

“*[Machinery Movers]* remains relevant principally because it focuses attention on the objects of the Resource Management Act and

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276 *Bay of Plenty Regional Council v Riverlock Farms Ltd* DC Tauranga CRI-2010-047-111, 14 July 2011.


278 *Machinery Movers Ltd v Auckland Regional Council* [1994] 1 NZLR 492 (HC).

279 Barker and Williams JJ.

280 *Machinery Movers Ltd v Auckland Regional Council* [1994] 1 NZLR 492 (HC) at 501.


emphasises that polluters should be forced to internalise the costs of pollution. That remains an important object of sentencing. The costs, which for the most part are borne by the community at large, may include remedial work and regulatory costs of monitoring and enforcement, which are a social cost of pollution. Remedial work may be treated, at least initially, as reparation and the fine quantified independently, with the sentencer then checking that the overall sentence is not disproportionate."

The High Court in *Thurston* listed the following factors that “frequently assume relevance in pollution sentencing”:\textsuperscript{283}

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“a) the offender’s culpability. Deliberate or reckless conduct is an important aggravating feature of the offence. Inadvertence may earn leniency if appropriate efforts have been made to comply.

“b) any infrastructural or other precautions taken to prevent discharges.

“c) the vulnerability or ecological importance of the affected environment.

“d) the extent of the environmental damage, including any lasting or irreversible harm, and whether it was of a continuing nature or occurred over an extended period of time. Where no specific lasting harm can be identified, an allowance for harm may be made on the assumption that any given offence contributes to the cumulative effect of pollution generally.

“e) deterrence. Penalties should ensure that it is unattractive to take the risk of offending on economic grounds.

“f) the offender’s capacity to pay a fine.

“g) disregard for abatement notices or Council requirements. Abatement notices are designed to allow a Council to put a

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\textsuperscript{283} *Thurston v Mosamatu-Wanganui Regional Council* HC Palmerston North CRI-2009-454-24, 27 August 2010 at [41] (footnotes omitted). The High Court noted at [42] (footnote omitted):

“Remedial steps taken to mitigate the offending or prevent future offending may or may not be treated as a mitigating factor. Where remedial action was taken quickly and the offender cooperated with the informant, the work may be seen as evidence that the offender has taken full responsibility, which may be a powerful mitigating factor under the Sentencing Act. In other cases, the Court has reasoned that the offender should not receive credit for remedial action that ought to have been taken in the first place.”

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stop immediately to unlawful discharges. If they are to work as intended the Court must treat non-compliance as inherently serious.

“h) co-operation with enforcement authorities, and guilty pleas.”

Section 10 of the Sentencing Act requires the court to take into account offers, agreements, or actions by the offender to make amends to the victim and any other remedial action taken by the offender.284

19.3.6 Costs in prosecutions under the RMA

The local authority prosecuting receives 90 per cent of the fine.285 The defendant, in addition to being fined, may be ordered to pay the costs incurred by the prosecuting authority for investigation, supervision and monitoring of the adverse effect on the environment, and the costs of any actions required to avoid, remedy or mitigate the adverse effect under s 314(1)(d) of the RMA.286

The Costs in Criminal Cases Act 1967, the scale costs under the Costs in Criminal Cases Regulations 1987 and the Witnesses and Interpreters Fees Regulations 1974 apply to all prosecutions, including prosecutions under the RMA.

The High Court in Interclean Industrial Services Ltd v Auckland Regional Council287 considered the scope of s 314(1)(d) and held that the provision did not empower the District Court to order the defendant to pay the legal costs of bringing a prosecution. The Costs in Criminal Cases Act 1967 provided the basis for legal costs orders in the RMA context, and scale costs (in accordance with the Costs in Criminal Cases Regulations 1987) could only be exceeded where the case is one of special difficulty, complexity or importance. Acknowledging that this decision would reduce the quantum of legal costs able to be charged to the defendant, the High Court remitted the matter back to the District Court for a ruling as to whether the fines should be increased as a result of the ruling. Thus, following Interclean, a sentencing court has a discretion to award a higher fine in order to wholly or partially compensate the council for its expenses in bringing the prosecution. Where costs have been awarded in excess of the scale, the courts have considered the appropriateness of the total penalty in terms of the

284 The District Court in Wainuiariki District Council v Woburn DC Christchurch CRN14061500003, 25 November 2014 noted that the defendants had agreed to pay $270,000 to the QEII Trust towards restoration of the ecosystem, and the payment was a matter that would need to be brought into account under s 10 of the Sentencing Act 2002. The offence in this case was in contravention of s 9(3) of the RMA, clearance of kānuka trees from an area of indigenous vegetation protected by a rule in the district plan. The trees were removed so an irrigator could pass over the area.

285 RMA, s 342.

286 Interclean Industrial Services Ltd v Auckland Regional Council [2000] 3 NZLR 489 (HC).

287 Interclean Industrial Services Ltd v Auckland Regional Council [2000] 3 NZLR 489 (HC).
sum of the fines and costs imposed, and have also taken into account that 90 per cent of the fine is payable to the prosecuting council.

In Roberts v Northland Regional Council\(^{289}\) the High Court held that the fact that the scale can only be described as inadequate is irrelevant to the determination of whether a case is of special difficulty, complexity or importance.

(1) **Local authority usage/perspective**

While any person can commence a prosecution under the RMA,\(^{290}\) there has, at the time of writing, been only one private prosecution\(^{290}\) and one prosecution brought by Maritime New Zealand.\(^{291}\) Thus local authorities commence virtually all prosecutions.\(^{292}\) Because a prosecution has the most serious consequences for the offender (including the prospect of high fines and the possibility of loss of liberty), prosecutions are seen as the most effective of deterrents. Prosecutions are also, usually, the most expensive enforcement mechanism for a local authority. However, as the prosecuting authority receives 90 per cent of any fine imposed, this makes prosecution an affordable option.

The Ministry for the Environment has published four reports on prosecutions under the RMA.\(^{293}\) The latest report covering the period 1 July 2008–30 September 2012 (the fourth period) includes the following information:\(^{294}\)

(1) Otago, Waikato, Southland and Canterbury Regional Councils brought 50 per cent of the prosecutions.\(^{295}\)

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289 Section 15 of the Criminal Procedure Act 2011 allows any person to commence a prosecution. The Criminal Procedure Act applies to offences under the RMA, therefore private prosecutions are possible for offences under the RMA.
290 Whisang v Rodney District Council DC North Shore CRN7044004690, 7 May 1997.
291 Maritime New Zealand v Daina Shipping Co DC Tauranga CRI-2012-070-1872, 26 October 2012. The prosecution was brought by a central government agency (Maritime New Zealand) rather than a local authority. See further details in [19.3.9(2)] below.
292 If the defendant elects trial by jury then the file is transferred to a Crown Prosecutor and the Crown pays for the prosecution from the stage the file is transferred. The local authority that commenced the prosecution is entitled to receive 90 per cent of any fines imposed even if there is election of a jury trial.
295 Ministry for the Environment *A Study into the Use of Prosecutions under the Resource Management Act 1991*: 1 July 2008–30 September 2012 (October 2013) at 15. Otago Regional Council undertook 17 per cent of prosecutions (73), Southland Regional Council undertook 12 per cent (50) of prosecutions, Waitakere Regional Council undertook 11 per cent (49) of prosecutions, and Canterbury Regional Council undertook 10 per cent (41) of prosecutions.
(2) Auckland Council (and it predecessors) undertook nine per cent of prosecutions.\textsuperscript{296}

(3) Sixty-two per cent of prosecutions have been in the agricultural sector. Offences arising from the discharge of dairy effluent make up 48 per cent of all prosecutions.\textsuperscript{297}

(4) Eighty-five per cent of defendants entered a guilty plea.\textsuperscript{298}

(5) Convictions were obtained in 92 per cent of the prosecutions.\textsuperscript{299}

(6) Fourteen defendants were discharged without conviction.\textsuperscript{300}

(7) In seven cases the charges were dismissed by the District Court, and in one case the charges were dismissed by the High Court after an appeal.\textsuperscript{301}

(8) The average total fine imposed per prosecution increased from $6,500 in the first period to $21,622 in the fourth period ($339 of the RMA was amended to increase the maximum fines for offences during the fourth period).\textsuperscript{302}

19.3.7 Infringement notices

The procedure for infringement notices is set out in ss 343A–343D of the RMA and the Resource Management (Infringement Offences) Regulations 1999. The RMA infringement process has been in force since 1 February 2000. The option of issuing an infringement notice is an alternative to prosecution and should be used for less serious offences.

Infringement notices can only be issued by a local authority enforcement officer. The activities that can constitute infringement offences and the correlating fines

\textsuperscript{296} Ministry for the Environment A Study into the Use of Prosecutions under the Resource Management Act 1991: 1 July 2008–30 September 2012 (October 2013) at 15. All of the prosecutions brought by the predecessors of the Auckland Council are classified as “Auckland Council” prosecutions because the time frame of the report is pre- and post- the formation of the Auckland Council. The Auckland Council began operating on 1 November 2010, combining the functions of the Auckland Regional Council, Auckland City Council, Manukau City Council, Waitakere City Council, North Shore City Council, Papakura District Council, Rodney District Council and most of the Franklin District Council.


are listed in the Resource Management (Infringement Offences) Regulations 1999. Infringement notices cannot be used for contravention of an enforcement order. No conviction is imposed by the use of the infringement process.

Following service of an infringement notice, the person served may either pay the infringement fee or contest the notice by either disputing commission of the alleged offence, or accepting liability but disputing the level of penalty. The matter then goes to the District Court for determination, either as a sentencing matter or a defended hearing. Section 309(3) of the RMA applies (as it does with a prosecution), and the presiding judge must be an Environment Judge except where otherwise directed by the Chief District Court Judge.

In *Otago Regional Council v Bloom* 303 the District Court held that if the defendant requests a hearing and is found guilty, or pleads guilty, the Court may impose a penalty which is different from the infringement fee set out in the infringement notice. In these circumstances the maximum fine for the offence in s 339 applies. The Court also held that the local authority should point this out to the defendant if the defendant requests a hearing. 304

In *Down v R (on appeal from Wallace Corp v Waikato Regional Council)* the Supreme Court held that the infringement notice procedure under the RMA is a stand-alone regime and not subject to the provisions of the Summary Proceedings Act 1957 that apply to other infringement notice regimes. 305 In particular, the requirement that a prosecuting authority seek the District Court’s leave before laying an information for an offence that could otherwise be prosecuted by way of an infringement notice does not apply to offences under the RMA.

(1) **Local authority usage/perspective**

Infringement notices are a quick and inexpensive method of enforcement. As with abatement notices, when an infringement notice has been issued for prior (historical) non-compliance the courts regards this as an aggravating sentencing factor. 306 However, there are no ongoing consequences in terms of further enforcement for the recipient if the recipient complies with the notice and does not contravene the RMA after receipt of the notice. In those circumstances the matter will be at an end.

In the period between 1 July 2010 and 30 June 2011, 1,800 infringement notices were issued. This result is a small increase from the previous Ministry for the Environment survey period, when 1,530 notices were issued. Of the 1,800

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303 *Otago Regional Council v Bloom* [2010] NZRMA 322 (DC) at [24].
304 *Otago Regional Council v Bloom* [2010] NZRMA 322 (DC) at [27].

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infringements notices issued, 10 per cent were withdrawn, 64 per cent were paid and one per cent were defended.\textsuperscript{307}

19.3.8 Ancillary powers of enforcement

In order to be effective, enforcement authorities require comprehensive powers to investigate whether environmental laws are being complied with. These powers may include the ability to enter private property, to search premises and seize items, and to take samples. The act of investigating in itself may encourage a transgressor to alter their behaviour and bring them into compliance.

Many environmental legislative regimes contain significant powers of investigation, and these may have ramifications for the privacy and private property rights of individuals. In 2012 the New Zealand government modernised the law of search, seizure and surveillance to take into account advances in technology, while ensuring that the protections, rights and entitlements provided for in the New Zealand Bill of Rights Act 1990, the Privacy Act 1993 and the Evidence Act 2006 were secured. The resulting Search and Surveillance Act 2012 details the extensive powers of the police and enforcement officers, and it has direct application to many environmental statutes, including the Biosecurity Act 1993, Conservation Act 1987, Fisheries Act 1996 and RMA.\textsuperscript{308}

Within the RMA, ss 332–336 set out the investigatory powers of enforcement authorities and must be read in conjunction with the Search and Surveillance Act 2012. Enforcement officers may, if authorised in writing by the relevant local authority, enter any premises other than a dwelling house in order to determine compliance with specified matters including the Act, a plan, a resource consent, an abatement notice, a water shortage direction or a court order.\textsuperscript{309} Entry to a dwelling house requires a warrant from an issuing officer.\textsuperscript{310} Section 332(2)–(2A) of the RMA also empowers the officer to take samples.

If the enforcement officer has reasonable grounds for believing that an imprisonable offence has been or will be committed, or if there is something on the premises that it is believed will be used to commit an imprisonable offence, the officer must apply for a warrant to enter and search any place or vehicle. Only a police constable, or the enforcement officer in conjunction with a police constable, can execute a warrant. This additional formality is required because it is possible that a prosecution will ensue. Ensuring that the proper procedures are in place and complied with will help to safeguard the rights of the defendant, and

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{307} Ministry for the Environment Resource Management Act: Survey of Local Authorities 2010/2011 (September 2011) at 60–61. The remainder of notices were either paid or were still in progress at the end of the survey period.
\item \textsuperscript{308} For a comprehensive list, see the Schedule of the Search and Surveillance Act 2012.
\item \textsuperscript{309} RMA 1991, s 332.
\item \textsuperscript{310} RMA 1991, s 334; Search and Surveillance Act 2012, s 3 defines an issuing officer as a Judge, or any official authorised to act as an issuing officer.
\end{enumerate}
\end{footnotesize}
will also protect against any possible challenge to the admissibility of evidence.\footnote{Re Waikato Regional Council [2003] NZRMA 481 (HC) at [54]–[55].} The Search and Surveillance Act 2012 specifies the powers that may be exercised under a search warrant.\footnote{Search and Surveillance Act 2012, s 110.}

19.3.9 Remaining issues and future developments

"To pass a law and not have it enforced is to authorise the very thing you wish to prohibit."\footnote{Attributed to Cardinal Richelieu (1585–1642) in The Times Book of Quotations (HarperCollins, Glasgow, 2000) at 412.}

Paragraph [19.2.4] above discussed the “implementation gap” in environmental law, a phenomenon apparent in all nations. The OECD has advised member states to gather evidence as to the particular causes for non-compliance in their nation and to tailor responses appropriately. Gathering such evidence presents a challenge for many countries, including New Zealand, and to date New Zealand does not have comprehensive data enabling an analysis of the main reasons for non-compliance. This should be rectified. However, it is possible, based on the data that is available and more generally, to postulate as to some of the main factors that might contribute to non-compliance in the New Zealand context. In a nation with high literacy levels and public dissemination of statutes, regulations, standards and planning documents that are all easily accessible and often accompanied by explanatory guidance, some of the theoretical reasons for non-compliance discussed above may not be so prevalent. For example, ignorance of the specific rules is less likely to play a major role in non-compliance than it would in nations that have none of New Zealand’s natural advantages. In contrast, the willingness or otherwise of local authorities to bring enforcement actions, and of the courts to impose the highest penalties, may indeed be playing a part in creating the “implementation gap”. The rationale underpinning this view is explained below.

(1) Local authority usage of enforcement actions

There are currently 78 local authorities in New Zealand, comprising 11 regional councils, 61 territorial authorities and six unitary authorities. The average population per council is approximately 65,000 residents, and the range between the largest and smallest council extends from 1.5 million residents in Auckland to 610 in the Chatham Islands.\footnote{See LGNZ “NZ’s Local Government” <www.lgznz.co.nz>.}

All of these local authorities can and should use formal mechanisms to enforce the RMA when this is appropriate and necessary. However, reports from the Ministry for the Environment on local authority usage of the enforcement
mechanisms under the RMA show that the use of enforcement mechanisms differs dramatically between authorities. For example:

(1) In the period between 1 July 2010 and 30 June 2011, a total of 1,290 abatement notices and 1,800 infringement notices were issued. In the period between 1 July 2012 and 30 June 2013, a total of 2,013 abatement notices and 1,410 infringement notices were issued. However, during both these periods some local authorities did not issue any abatement notices or infringement notices at all.

(2) In the period between 1 October 1991 (when the RMA came into force) and 30 September 2012, there have been a total of only 1,235 prosecutions.

(3) Between 1 July 2008 and 30 September 2012, councils in the Auckland region, the most highly populated region in New Zealand, undertook only nine per cent of prosecutions. Fifty-six local authorities did not undertake any prosecutions during this period.

(2) Imposition of penalties

The High Court in Machinery Movers Ltd v Auckland Regional Council explained the rationale for the higher fines in the RMA when contrasted with the penalties available under the Water and Soil Conservation Act 1967:

“An increase of one third in the maximum fine, the inclusion of imprisonment as a sentencing option, and the addition of director’s liability signify an evident legislative dissatisfaction with the level of penalties imposed under the 1967 Act. In combination, these changes constitute a clear legislative direction to the Courts to ensure that higher penalties are imposed which will have a significant deterrent quality. If fines are too low, they will be regarded as a minor licence fee for offending and convey the idea that the law may be broken with relative impunity.”

320 Machinery Movers Ltd v Auckland Regional Council [1994] 1 NZLR 492 (HC) at 500.
The table below contains information from *A Study into the Use of Prosecutions under the Resource Management Act 1991: 1 July 2008–30 September 2012* and shows a gradual increase in the fines imposed.\(^{321}\)

**Table 2: Summary of fines imposed under the RMA from 1991–2012**

<table>
<thead>
<tr>
<th>Time frame covered by reports</th>
<th>October 1991–30 June 2001 (nine years and eight months)</th>
<th>1 July 2001–30 April 2005 (three years and 10 months)</th>
<th>1 May 2005–30 June 2008 (three years and two months)</th>
<th>1 July 2008–30 September 2012 (four years and three months)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Highest fine imposed</td>
<td>$50,000</td>
<td>$55,000</td>
<td>$86,500</td>
<td>$120,000</td>
</tr>
<tr>
<td>Average individual fine imposed</td>
<td>$4,400</td>
<td>$5,631</td>
<td>$7,221</td>
<td>$10,347</td>
</tr>
<tr>
<td>Average total fine imposed</td>
<td>$6,500</td>
<td>$8,167</td>
<td>$12,463</td>
<td>$21,622</td>
</tr>
</tbody>
</table>

Following the enactment of the Resource Management (Simplifying and Streamlining) Amendment Act 2009, the maximum fines for offences against s 338(1) of the RMA increased from $200,000 (for both natural persons and companies) to $300,000 for natural persons and $600,000 for companies. Justice Allan in *Calford Holdings Ltd v Waikato Regional Council* noted the increase in fines and said:\(^{322}\)

> “Significant care is needed when evaluating some of the older authorities because there has been a recent overall increase in the level of fines imposed in order to reflect the need for ongoing deterrence and denunciation where environmental offending is concerned …”

However, despite this warning (and recalling that the majority of prosecutions are taken in relation to the most serious offending), most of the fines imposed appear to be extremely low when viewed as a percentage of the maximum fines.\(^{323}\) After the statutory increase, in the period between 1 October 2010 and 30 September 2012, the average total fine imposed was $28,792.\(^{324}\) This is only

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322 *Calford Holdings Ltd v Waikato Regional Council* [2009] NZRMA 563 (HC) at [36].

323 As indicated by the relatively low number of prosecutions taken by local authorities and consideration of the facts of each case.

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9.5 per cent of the maximum fine for a natural person and 4.8 per cent of the maximum for a company.

At the time of writing, the highest fine imposed under the RMA is $300,000 (half of the maximum penalty available) against Daina Shipping Co for discharge of harmful substances after the ship Rena grounded off the Tauranga coast on 5 October 2011. The company pleaded guilty to the charge under the RMA and was sentenced on 26 October 2012. The District Court described the consequences as “New Zealand’s worst maritime environmental disaster”.

In the period between 1 October 1991 (when the RMA came into force) and 30 September 2012, sentences of imprisonment have been imposed in six cases. The longest period of imprisonment (at the time of writing) is six and a half months’ imprisonment against Mr Conway for convictions on six counts of contravening an enforcement order, six counts of discharging a contaminant onto land contrary to s 15(1)(b), and two counts of permitting the discharge of a contaminant from industrial and trade premises (a scrap metal yard) onto land contrary to s 15(1)(d). Mr Conway was sentenced after being found guilty by jury trial.

(3) Summary

If the provisions of the RMA and other environmental statutes were complied with to a satisfactorily high level, there would be little need to review compliance and enforcement. But given the present “implementation gap” in New Zealand, there is a need to revisit the approaches taken. Ideally, a clearer picture of the reasons for non-compliance should be obtained. In the absence of this

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324 Ministry for the Environment A Study into the Use of Prosecutions under the Resource Management Act 1991: 1 July 2008–30 September 2012 (October 2013) at 21. The average total fine of $28,792 does not include prosecutions where the defendants were regarded as “poor” by the District Court and where the Court classified the offences as accidental, because these two factors are two main reasons for the reduction of fines.

325 Maritime New Zealand v Daina Shipping Co DC Tauranga CRI-2012-070-1872, 26 October 2012 at [2]. The agreed summary of facts in the case stated that hundreds of tonnes of oil and hundreds of shipping containers and their contents, including dangerous goods, were discharged into the ocean; this resulted in the major pollution of island and mainland shorelines with oil, containers and other debris, with significant consequences for wildlife and impact on the community. The total cost to the Crown at the date of sentencing was approximately $47,000,000. The Court gave the company credit for payment of $235,000,000 towards salvage and clean-up, a commitment to further payments and, in addition to this, the agreement the company reached with the Crown to pay compensation of between $27,600,000 and $38,000,000. The Court noted that this compensation significantly exceeded the company’s civil liability under the Maritime Transport Act 1994 and international conventions. While the voluntary compensation agreement may well justify the imposition of a lower fine in this case, the particular fact remains that this is the highest fine ever imposed.


information, one aspect of enforcement that does appear to require revision is the inconsistent approach taken by authorities, and also the level of fines imposed for non-compliance. If local authorities are unwilling to take enforcement measures, and/or sentencing courts impose fines that are so low that they fail to act as a deterrent, this will do little to promote compliance. Given that this appears to be the case in New Zealand, local authorities and sentencing courts should heed the advice of Cheryl Wasserman:

"Each higher-order enforcement response carries with it a multiplier effect in its deterrent value. Initially, to build credibility, officials may be forced to utilise more costly formal administrative or judicial action. When a track record is established the expectation is that in most instances a simple notice will send violaters scrambling to resolve quickly a compliance problem or negotiate its resolution cooperatively."

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