

RMA COMPLIANCE AND ENFORCEMENT

Preliminary Analysis of Options for Future Amendments

December 2008

Internal Discussion Document – Not for Circulation

Executive Summary

Problem definition

Practical restrictions on the use of RMA enforcement powers, low penalties for non-compliance, and the exemption of Crown agencies from enforcement action provide limited incentive to comply with the RMA, RMA plans or resource consent conditions.

Technical inefficiencies and an inability to recover full costs of carrying out compliance activities and enforcement action necessary to protect the environment frustrates the ability of local authorities in the performance of their compliance enforcement functions and duties under the RMA.

Objectives

Any changes to compliance and enforcement provisions should aim to:

- enhance the deterrent effective of RMA penalties
- streamline procedures to monitor compliance and take enforcement action
- ensure local authorities can adequately recover their costs for undertaking compliance and enforcement activities and that the polluter pays
- encourage RMA compliance to be more effectively linked to plan objectives

These objectives would help provide more accountability to resource users under the RMA. It is considered that tougher penalties would complement any move to streamline other RMA processes, such as resource consents and plan development.

Summary of recommendations

- Increase the maximum penalties for RMA offending
- Remove the barriers to prosecute directors and managers of corporations
- Raise the fine level of infringement notices
- Enable higher penalties for offences relating to commercial gain
- Remove the ability of fines to be underwritten by insurance
- Allow local authorities to recover the full costs of prosecutions
- Simplify the drafting requirements for abatement notices
- Remove the requirements for a constable to be present during search warrants
- Make contravention of consent conditions a RMA offence
- Widen scope of Court to review, amend and cancel consents
- Remove Crown immunity from RMA enforcement.

The options assessed in this paper are shown below in a summary table. Each option to improve RMA compliance and enforcement is assessed against the objectives in the introduction. Options are assessed as:

- **not workable:** requires other means to achieve objectives
- **workable:** but has implications and/or will require modifications
- **recommended:** priority option for further research and implementation.

Option	Not workable	Workable	Recommended
Increase RMA penalties			
• 1.1: raise the maximum level of penalties for RMA offences			<input checked="" type="checkbox"/>
• 1.2: remove the barriers to prosecute individuals within corporations			<input checked="" type="checkbox"/>
• 1.3: raise the level of infringement notices			<input checked="" type="checkbox"/>
• 1.4: extend the timeframe to lodge a prosecution	<input checked="" type="checkbox"/>		
• 1.5: extend the ability of the Court to order payments relating to commercial gain			<input checked="" type="checkbox"/>
• 1.6: remove the ability of fines to be underwritten by insurance			<input checked="" type="checkbox"/>
• 1.7: investigate additional methods of penalties		<input checked="" type="checkbox"/>	
Enhance the ability to costs recover			
• 2.1: transfer council administrative charging to LGA		<input checked="" type="checkbox"/>	
• 2.2: amend section 36 to allow local authorities to charge non-consent holders for monitoring and compliance		<input checked="" type="checkbox"/>	
• 2.3: expand "reasonable costs" to include the costs of prosecution			<input checked="" type="checkbox"/>
Remove practical barriers for compliance and enforcement			
• 3.1: simplify abatement notices			<input checked="" type="checkbox"/>
• 3.2: remove the requirements for a constable during a search warrants			<input checked="" type="checkbox"/>
• 3.3: make contravention of resource consent a specific offence			<input checked="" type="checkbox"/>
• 3.4: clarify distinction between investigation for prosecution versus normal compliance		<input checked="" type="checkbox"/>	
• 3.4: widen the scope of the Court to review, amend or cancel consents			<input checked="" type="checkbox"/>
• 3.5: remove the right to elect jury		<input checked="" type="checkbox"/>	
Improve coordination and support for compliance			
• 4.1: require a specific commitment to compliance monitoring objectives		<input checked="" type="checkbox"/>	
• 4.2: link compliance to LGA funding	<input checked="" type="checkbox"/>		
Clarify enforcement of national instruments and crown immunity			
• 5.1: make it explicit that local authorities are responsible for monitoring and enforcing national instruments		<input checked="" type="checkbox"/>	
• 5.2: remove crown immunity from RMA enforcement			<input checked="" type="checkbox"/>

Introduction: Compliance and enforcement

Issue

Effective compliance monitoring and enforcement under the Resource Management Act 1991 (RMA) is important to ensure a credible resource management regime. Plan provisions and resource consent conditions can be pointless if not supported by effective compliance monitoring, backed up by enforcement when appropriate. There is however little evidence of compliance monitoring that is effectively linked to environmental objectives sought by the RMA. It also appears that RMA enforcement tools and penalties are not acting as an effective deterrent; as illustrated by the high rates of non-compliance reported around the country.

Effective compliance and enforcement is dependent on the capacity of local authorities to undertake the activities and the tools provided to them. Capacity for RMA compliance and enforcement is a particular issue for local authorities as these activities are generally given a low level of priority and support within their organisations. In addition to capacity issues, local authorities have raised a number of practical and substantive concerns about the enforcement tools provided to them. This includes current fine levels, the inability to adequately recover costs and practical difficulties in undertaking compliance monitoring, investigations and enforcement under the RMA.

Options

This paper examines five broad options to improve RMA compliance and enforcement:

1: Increase RMA penalties	6
2: Enhance the ability to recover costs	13
3: Remove practical barriers to monitoring, investigation and prosecution	18
4: Improve coordination and capacity for compliance and enforcement	22
5: Clarify compliance of national instruments and remove crown immunity	25

Background

Unlike resource consent and RMA plan processes, compliance and enforcement activities does generally not attract a high level interest or commentary. There have however been increasing media reports of RMA prosecutions, particularly in relation to the dairying industry and the discharge of effluent into waterways. This increase in RMA prosecutions is driven by rapid intensification of dairying in many areas and other industries that regularly breach RMA rules and consent conditions. Non-compliance with the RMA is directly linked to declining water quality in many areas, as highlighted in the 2007 State of the Environment report.

Despite the increase in compliance monitoring and enforcement, local authorities are still detecting widespread non-compliance. Dairying and water pollution provides an obvious example but the biggest prosecutions generally relate to non-compliance in other areas¹. This would suggest that councils are increasingly being forced to prosecute in an attempt to increase the level of compliance with the RMA. It also suggests that current penalties are not having the general deterrent effect intended by the legislation².

An effective deterrence based regime requires the following:

- there must be a credible likelihood that non-compliance will be detected
- responses and penalties must be swift and certain
- responses must be appropriate (and penalties high enough)
- resource users must perceive the presence of the first three factors³.

There appears to be a number of issues with the RMA that are acting as a barrier to meet the requirements of an effective deterrence based regime. These issues can be summarised as follows:

- environmental fines and penalties are not at a high enough level to act as a sufficient deterrent (both specifically and generally)
- there are numerous practical barriers that hinder effective environmental monitoring, compliance and enforcement, including cost recovery
- compliance activities are not adequately linked back to plan objectives and environmental outcomes
- there is a lack of capacity and support for compliance work.

There are also some emerging concerns around the compliance and enforcement of national instruments (e.g. National Environment Standards) that would benefit from some clarification. Crown immunity from RMA enforcement is another issue that has recently been raised and is timely to review⁴.

¹ The two biggest prosecutions related to discharge of PCBs (total fines of \$120,000 in *Waikato Regional Council v Wallace Corporation*) and serious breach of consent conditions for a hydro electric station (total fines of \$86,500 in *Waikato Regional Council v Hydro Energy (Waipa) Ltd*)

² This intended deterrent aspect of RMA penalties is well established in the Courts both specifically and generally. Refer to *R v Kiwi Drilling Company Ltd and Smith* [1997] 4 ELRNZ 23 and *Machinery Movers Ltd v Auckland Regional Council* [1994] 1 NZLR 492.

³ This is the well established view in international literature. Refer to Strategik Consulting Ltd (2008), “*The state of the enforcement regime under the RMA*”.

⁴ This includes the introduction of the Crown Organisations (Criminal Liability) Act 2002 following the Cave Creek tragedy.

1: Increase RMA penalties

Issue

Prosecutions

Maximum fines for prosecution under the RMA were set at \$200,000 in 1991. This increase was clear intent by Parliament for RMA penalties to act as an effective deterrent to pollution and non-compliance. This was noted in the leading case on RMA sentencing: *Machinery Movers v Auckland Regional Council* [1994] NZLR 492, where the Court stated:

"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 license fee for offending"

Despite this clear legislative intent there is considerable evidence that prosecution penalties are not acting as an effective deterrent. Courts use the maximum penalty as a starting point and then discount based on various factors⁵, to a level that may provide little deterrent, especially in comparison to corporate profits. The table below shows the trend in fine levels since the RMA was introduced.

Timeframe	October 1991- June 2001	July 2001- April 2005	May 2005- June 2008
Highest fine imposed	\$50,000	\$55,000	\$86,500
Average individual fine imposed	\$4,400	\$5,631	\$7,221
Average total fine imposed	\$6,500	\$8,167	\$12,463
Average number of prosecutions per year	39	45	82

While there has been increase in the level of penalties by the Court, the average over the last three years amounts to only 6% of the maximum penalty. There has also been a significant increase since 2005 rising to 82 prosecutions per year on average. However, this increase in prosecutions does not appear to be having a positive effect on the rates of pollution or non-compliance. For example, recent audits of dairy farms have found 30% were non-compliant in the Manawatu-Wanganui, and less than half were fully compliant in Wellington.

The current level of penalties and the relatively low risk of getting caught would suggest that there is often an economic advantage to not comply. Larger corporations may simply factor the risk of RMA prosecutions as "a cost to business" and this may provide a significant economic advantage over the cost to comply with consent

⁵ *Machinery Movers Ltd v Auckland Regional Council* [1994] 1 NZLR 492 is the leading case on sentencing and refer to 'A Study into the Use of Prosecutions under the RMA: 2005-2008' for an overview of the relevant sentencing factors.

conditions. For example, in *Hawkes Bay Regional Council v Taharua Farm Ltd* [2008] a large corporate farm was fined \$37,500 (the largest single fine for dairy effluent) for increasing the herd size from 3000 to 4500. However, this increase in herd size provided the corporation with a huge increase in profit, with an estimated annual payout of \$5million (130 times the penalty received). This imbalance between profit and the level of RMA penalties appears to provide a clear economic incentive not to comply in some cases. Discharge of dairy effluent is an area of particular concern as evidence has shown that 50% of dairy effluent prosecutions involved an element of deliberateness or carelessness⁶.

The RMA has been in force for 17 years and the \$200,000 maximum penalty has not been adjusted for inflation. Applying the Consumer Price Index⁷ for inflation indicates this sum should now be \$288,000. However, even this figure would be significantly lower than other jurisdictions. For example, in New South Wales there are three tiers of penalties that are significantly higher than provided for by the RMA. Environment penalties in New South Wales are based on the seriousness of the offence and whether the offender is an individual or corporation. These are:

Tier 1 (most serious, involves mens rea as an element of offence)

- Committed wilfully: \$5,000,000 for corporation and \$1,000,000 for an individual and 7 years imprisonment.
- Committed negligently: \$2,000,000 for a corporation and \$500,000 for an individual and 4 years imprisonment.

Tier 2 (strict liability offences)

- \$1,000,000 for a corporation and \$250,000 for an individual

Tier 3

- Dealt with by infringement notices

In Canada the Environmental Penalties Act of 2000 increased the maximum fine for a corporation's first conviction of a major environmental violation from C\$1 million to \$6 million per day. Fines for an individual's first conviction of a major violation increased from C\$100,000 to \$4 million per day.

The evidence that current RMA penalties are not acting as an effective deterrent and that the penalties are significantly lower than other jurisdictions means that it is timely to review the current prosecution penalties under the RMA. An increase in maximum penalty levels will send a clear message to the Courts that current levels of penalties being imposed are inadequate⁸.

Infringement notices

Infringement notices under the RMA were set by regulation in 1999 and range between \$300 and \$1,000. Evidence has shown that infringement notices have been useful tools for low-level offending and they provide an good alternative option to prosecution in many instances. Benefits of infringement notices are that they are

⁶ Karenza De Silva (2008), 'Effectiveness of the Prosecution and Enforcement Provisions of the RMA and its Implementation by Local Authorities and the Courts'.

⁷ The Consumers Price Index (CPI) is a measure of the price change of goods and services purchased by private New Zealand households and is often used as a measure of inflation. Refer to:

<http://www.stats.govt.nz/datasets/economic-indicators/consumers-price-index-cpi.htm>

⁸ Refer to *Department of Labour v De Spa*[1994] 58/94, High Court of New Zealand

quick and inexpensive, provide a good history of non-compliance and are rarely defended⁹. The Court has described the infringement process as¹⁰:

...a process which enables offences of the least relative significance to be processed swiftly, efficiently and inexpensively. To enable this to happen it abrogates minimum rights, and reverses the usual onuses. By equally, it transforms the offence into an infringement, and no conviction is ever imposed. The transformation is not complete. The one who commits the infringement faces a liability which can be enforced like a fine. But the absence of a conviction is a distinction of real, and probably decisive significance.

So infringement notices are designed to be cheap and efficient tool to penalise offending without going through the Courts and seeking conviction. However, there are concerns that current infringement fine levels may be insufficient to act as a deterrent to low level pollution. There also seems to be an unnecessary distinction between the seriousness of low level offending as reflected in the different fine levels for breaches of the relevant sections of the RMA.

This would suggest it may be desirable to increase infringements levels, perhaps to be consistent with similar legislation such as the Building Act 2004¹¹ (which range from \$250-\$2,000), or to make fee levels consistent (e.g. \$1,000 for all infringements). Another option is to allow some flexibility for local authorities to vary RMA infringement fees based on the seriousness of the issues within their region/district.

However there are counter arguments that infringement notices do not need to increase, but that local authorities need to make much more use of them¹². Local authorities are able to issue multiple notices where an offence continues, which could be used more effectively to encourage compliance. There is also the potential for an increase in infringement levels to result in more infringement notices being defended. This may result in local authorities being more cautious on how they issue infringement notices, as defending them in Court can be very expensive.

Note that the Ministry of Justice has highlighted the need for greater consistency in the design and operation of infringement schemes, and improved information recording about their use¹³. For RMA infringement this could extend to the development and operation of a national environmental infringement database to provide accurate information on environmental offending.

Overall, it is clear there is potential to increase the effectiveness of RMA penalties to ensure they have a both a specific and general deterrent effect. This could be achieved through raising penalties and fines but also by making sure individuals and corporate polluters are more accountable.

⁹ MFE (2005), "Infringement notices: are they working?", Karenza De Silva (2008), 'Effectiveness of the Prosecution and Enforcement Provisions of the RMA and its Implementation by Local Authorities and the Courts'.

¹⁰ *Wellington City Council v McCready* [1995] DCR 536.

¹¹ <http://www.dbh.govt.nz/building-infringement-scheme-guidelines-6>

¹² Karenza De Silva (2008), 'Effectiveness of the Prosecution and Enforcement Provisions of the RMA and its Implementation by Local Authorities and the Courts'.

¹³ Refer the policy framework for infringement notices on Ministry of Justice website: <http://www.justice.govt.nz/pubs/reports/2008/infringement-guidelines/index.html>

Options include:

- 1.1: raise the maximum level of penalties for RMA offences
- 1.2: remove the barriers to prosecute individuals within corporations
- 1.3: raise the level of infringement notices
- 1.4: extend the timeframe to lodge a prosecution
- 1.5: extend the ability of the Court to order payments relating to commercial gain
- 1.6: remove the ability of fines to be underwritten by insurance
- investigate additional methods of penalties (e.g. publishing names).

1.1 Raise the maximum penalties for prosecutions

Raising maximum penalties could take a number of different forms. An increase in the maximum level could be supported by through a more structured fine regime. For example, the RMA could be amended to set different maximums based of culpability and seriousness of offence. However, the sentencing principles for RMA prosecutions are reasonably developed through case law and there is little evidence to suggest that further guidance is required¹⁴.

Another important question is whether corporations should be fined more than individuals through setting higher maximum penalties for corporations. Options to raise RMA penalties include:

- raising the maximum penalty (e.g. \$500,000)
- raising the maximum penalty (e.g. \$500,000), and increasing it higher still for corporations (e.g. \$1,000,000).

Pros	Cons/risks
<ul style="list-style-type: none"> • The Courts will be sent a clear signal to increase the level of penalties • Improved deterrence from higher fines should increase compliance and reduce pollution • Raising the penalty levels higher still for corporation may put them at a level that may have some impact on corporate profit (especially if ability to obtain insurance is removed) • Will adjust RMA penalties for inflation and make penalties more aligned with other legislation. 	<ul style="list-style-type: none"> • If higher fines for corporations may be less incentive to prosecute individual and get conviction.

1.2: Remove the barriers to prosecute individuals within corporations

Currently it is very difficult to prove that a director or manager of a body corporate is liable under section 340(3) of the RMA. This is because section 340(3) requires that the prosecution must prove that:

- a) *That the act 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 reasonable steps to prevent or stop it.*

¹⁴ *Machinery Movers v Auckland Regional Council* [1994] 1 NZLR 492. Also refer to ‘A Study into the Use of Prosecutions under the RMA 2005-2008’ for a discussion on sentencing factors.

This is a difficult test to prove and very few company managers and directors have been convicted under the RMA due to the difficulties of proving the two limbs of defence. Anecdotal evidence suggests that corporations will enter a guilty plea in exchange for the individual not being prosecuted (and receiving a criminal conviction) with the company being prosecuted instead.

To increase environment compliance, pressure must be placed on corporations directly through their directors and managers. This issue could be addressed by amending section 340(3) by swapping “and” for “or” so only proof was only required for one subsection. Alternatively section 340(3) could be amended so that is the defendant must prove the two limbs of defence. Section 340(2)(b) will also need to be amended with this option to swap the word “or” linking the sub-sections to the word “and”.

Pros	Cons/risks
<ul style="list-style-type: none"> • More individuals will be prosecuted which will improve deterrence (through fear of criminal prosecution) • The burden of proof for local authorities to prosecute individuals within corporations will be reduced • Corporations will have less opportunity to negotiate with prosecuting body • Corporate directors and managers will become more aware of environmental responsibilities. 	

1.3: Raise the levels of infringement notices

There is potential to raise the current infringement fine levels or allow local authorities to vary their fees. The latter would help address the differences in the nature of infringements in terms of the impacts of offending and culpability (while still being for a minor offence as intended). However, this option would require clear guidelines and protocols from councils (or central government) on how infringement levels should vary. A more straightforward option would simply be to make infringement levels consistent for all types of offending (e.g. \$1,000).

Note any changes to the infringement scheme will need to be in accordance with Ministry of Justice policy framework, which state an infringement fee should generally not be higher than \$1,000 unless in the particular circumstances of the case a high level of deterrence is required.

<http://www.justice.govt.nz/pubs/reports/2008/infringement-guidelines/index.html>

Pros	Cons/risks
<ul style="list-style-type: none"> • Would improve deterrent effect for low-level offending • One set infringement level would help reduce complexity of what section to issue notice under in some circumstances • Would be logical step up for inflation and more consistent with other legislation • The set \$1,000 maximum would be consistent with Ministry of Justice guidelines 	<ul style="list-style-type: none"> • Raising the fine levels too high may make them more susceptible to challenge and defence in Court • Raising them too high may make some councils reluctant to issue them more frequently • Allowing local authorities to raise fine levels may add another layer of complexity than already exists • Some local authorities may be reluctant to set infringement levels higher than the standard rate.

1.4: Extend the timeframes for filing prosecutions

There are some concerns that the six-month timeframe for lodging a prosecution (after the date the offence was first known) is too short in some circumstances and may prevent prosecutions being taken. This is due to the demands of proving an offence to the criminal standard which can be problematic for some local authorities, particularly those with fewer resources or less advanced systems in place. The option could involve extending the timeframe in which a prosecution is required to be made (e.g. 12 months).

Pros	Cons/risks
<ul style="list-style-type: none"> • Could make it easier for local authorities to take prosecutions, particularly those with fewer resources both providing more time to put the case together. 	<ul style="list-style-type: none"> • Could simply be seen as a delay tactic for local authorities and provides less incentive to take quick, decisive enforcement action • This problem could be addressed without legislative change through more efficient enforcement practices.

1.5: Extend the ability of the Court to order payment for commercial gain

In 1998 the Court was given an additional power under section 339B to order additional payment to the penalty imposed, if the Court is satisfied that offence was committed in the course of producing a commercial gain. However this section is limited to offences under 338(1)(A) and 338(1)(B), which relate to dumping of waste in the coastal marine area. These offences are very rare in terms of the prosecutions made under the RMA and there is plenty of evidence commercial gain being made for other offences (e.g. discharge of dairy effluent). Indeed profits realised by an offence is a factor that can be present in all areas of environmental offending, and is already recognised as a sentencing factor¹⁵.

This option could involve an amendment to section 339B so that it applies to all offences under section 338(1).

Pros	Cons/risks
<ul style="list-style-type: none"> • Would make commercial gain a more important sentencing factor • Could result in higher fines and improved deterrent factor for corporate offenders • Would mean there is less economic incentive not to comply as any commercial gain could be lost. 	<ul style="list-style-type: none"> • Some sectors may argue that this provides an economic disadvantage for New Zealand • Some cases may become more complex to try and prove the extent of commercial gain made.

1.6: Remove the ability of fines to underwritten by insurance

Many defendants prosecuted under RMA have statutory liability insurance. This insurance covers legal costs for the prosecution and any fine imposed. This ability to obtain insurance for RMA fines completely undermines the deterrence effect of fines. Other legislation, such as the Health and Safety in Employment Act 1992, include specific provisions to remove the ability of fines to be underwritten by insurance. This option would simply involve the RMA being amended in a similar way.

There is merit in allowing reparation to be covered by insurance when it relates to the payment to clean-up costs so these can be taken more readily and reduce environmental impact.

¹⁵ *Machinery Movers Limited v Auckland Regional Council* [1994] NZLR 492.

Pros	Cons/risks
<ul style="list-style-type: none"> Improved deterrence, especially for corporations A logical and practical change to ensure offenders are penalised. Is a quick option that has been adopted in other NZ legislation 	<ul style="list-style-type: none"> Some would argue the outcome is generally the same (in terms of the local authority and Court getting paid) and that there is a public good interest to ensure that fines are paid Could result in more defendants arguing poor financial position as a important sentencing factor.

1.7: Investigate additional methods of penalties

In addition to penalties there may be merit in using other methods of penalties for RMA offenders. One additional method of penalty for RMA offenders would be to publically “name and shame” individuals and corporations where convictions are obtained. Currently the names of those convicted under the RMA find minimal attention in the media and there is no reliable source to find out previous convictions. Although local authorities often make press releases following successful prosecution these generally fail to reach a wide audience.

The publication of the names of those convicted and the sentences imposed may be a useful method to get the message out. This may be effective method for general deterrence as most environment offenders are “white collar” criminals. The possibility of publication will generally be of concern to them as it may affect their future business. The Ministry of Economic Development already does this for certain offenders under the Companies Act¹⁶, so it is feasible to set up a similar scheme for RMA offending.

Pros	Cons/risks
<ul style="list-style-type: none"> Would improve public accountability of RMA offenders, which could a effective deterrent for some business and individuals Could be complemented by an environmental improvement programme where those convicted could take steps to improve their performance (which could also be made publically available to show steps to improvement). 	<ul style="list-style-type: none"> May require a significant amount of resources to set up and administer Would be unpopular with industry groups and certain sectors May not be required if maximum penalties and fines increases.

Direction for further work / Recommendation:

Increase RMA penalties			
• 1.1: raise the maximum level of penalties for RMA offences			<input checked="" type="checkbox"/>
• 1.2: remove the barriers to prosecute individuals within corporations			<input checked="" type="checkbox"/>
• 1.3: raise the level of infringement notices			<input checked="" type="checkbox"/>
• 1.4: extend the timeframe to lodge a prosecution	<input checked="" type="checkbox"/>		
• 1.5: extend the ability of the Court to order payments relating to commercial gain			<input checked="" type="checkbox"/>
• 1.6: remove the ability of fines to be underwritten by insurance			<input checked="" type="checkbox"/>
• 1.7: investigate additional methods of penalties		<input checked="" type="checkbox"/>	

¹⁶ See <http://www.enforcement.med.govt.nz/BanDirs-fs.htm>

2: Enhance the ability to recover costs

Issue

To carry out monitoring, compliance and enforcement effectively local authorities need to be able to fund the necessary activities and courses of action. The RMA is based on the philosophy that the polluter should pay but there is evidence that this is not adequately occurring, for various levels of pollution¹⁷.

Low-level pollution

Section 36 of the RMA sets out provisions for administrative charging. However, section 36 does not include a specific power to charge for monitoring or compliance inspections unless it relates to a resource consent holder. This is a particular issue for many councils as response to low level pollution takes up a significant amount of resources. As this response work is important for councils to fulfil their functions under the RMA, these response costs are generally borne by rate payer.

There is potential to make more use of infringement notices for low-level offending but many local authorities are reluctant to do so. This is because it can be seen as overly aggressive approach on citizens from council and many prefer a more cooperative and educational approach in the first instance. For example, the preferred approach of Auckland Regional Council in 2005¹⁸ as presented in the paper *“Implementing the Polluter Pays Principle”* was:

“ARC prefers to educate and help its community where possible, rather than take aggressive enforcement action against citizens. ARC submits that a local authority is better able to carry out its functions if the community does not regard it as adopting an overly heavy-handed approach. ARC is concerned its community would see it in that light if it were to start issuing infringement notices for most of the approximately 2000 annual incidents of pollution it is aware of”

There are a number of counter arguments whether warning, education or other fines should be used for low-level pollution. The fact that infringements notices are cheap, quick, there is no conviction and are generally means there is some merit in using them much more frequently, including on low level, non-malicious incidents of pollution¹⁹.

What is clear is that response to low level pollution creates costs for councils that can not easily be recovered but there is still an obligation for councils to respond to these incidents. Local authorities could continue to recover these costs through rates on public good grounds. However, it is considered to be more appropriate for costs to be recovered directly from the polluter (whether deliberate, careless or accidental) as this is more akin to the principle of polluter pays. The issue is whether this should be done through a new ability to charge for monitoring compliance or whether more infringements should be issued.

¹⁷ This argument is presented in detail by in a 2005 paper by Auckland Regional Council: *“Implementing the Polluter Pays Principle under the RMA: Policy, Practice and the Need for Law Reform”*.

¹⁸ Note Auckland Regional Council staff have indicated that this is not their position now.

¹⁹ Karenza De Silva (2008), *‘Effectiveness of the Prosecution and Enforcement Provisions of the RMA and its Implementation by Local Authorities and the Courts’*.

Prosecution penalties

There are concerns that local authorities (particularly those less resourced) are often reluctant to prosecute due to the costs of prosecution proceedings. Under section 342 of the RMA the local authority prosecuting receives 90% of the fine imposed. In many cases it appears that the fine levels imposed does not adequately cover local authorities costs and in some cases only covers a small proportion of the costs²⁰. These concerns are supported by research into the use of prosecutions where fines averages range between \$6,500 and \$12,500, which is often too low for local authorities to adequately recover their costs.

Section 314- Scope of Enforcement Order

For more serious breaches local authorities can claim costs through an enforcement order. Under section 314(1)(d), the Environment Court is able to order a party to:

“pay money to or reimburse any other person for any actual and reasonable costs and expenses which that other person has incurred or is likely to incur in avoiding, remedying, or mitigating any adverse effects on the environment where [the person whom against whom the order is sought fails to comply with –

- I. Any order the under any other paragraph of this subsection; or*
- II. An abatement notices; or*
- III. A rule in a plan or proposed plan or resource consent; or*
- IV. Any of that other persons other obligations under this Act.*

Section 314(2) then states:

“For the purposes of subsection (1)(d), “actual or reasonable cost” include the costs of investigation, supervision and monitoring of the adverse effects on the environment, and the costs of any actions to required to avoid, remedy or mitigate the adverse effect”.

Section 314(2) falls short of full cost recovery as it does not include the costs of enforcement proceedings. This is supported through case law that has established that costs under 314(1)(d) includes the costs up to the decision to enforcement action but not any costs of taking enforcement action. The lead case is *Interclean Industrial Services Limited v Auckland Regional Council* [2000] 3 NZLR 480, where the Court held that cost recoverable under section 314(1)(d) extended to “the present or future clean up and avoidance costs of investigation, supervising and monitoring” and does not include any time spent solicitors, officers and witnesses in preparing the application. However, legal fees and the time spent preparing the prosecution can be significant for local authorities so clearly this interpretation limits the ability of to recover costs.

Collectively the concerns over the inability to charge non-consent holders for compliance monitoring, inadequate penalties from RMA prosecutions and the limitations of what constitutes “reasonable costs” under 314(2) means that cost recovery is inadequate for prosecutions and acting as a barrier for local authorities to taking prosecutions²¹. Arguably the current framework under the RMA and interpretations by the Courts has lead to a situation where the polluter pays principle is not occurring in practice, which hinders the ability of councils to take enforcement action. As noted by Auckland Regional Council²²:

²⁰ Karenza De Silva (2008), ‘Effectiveness of the Prosecution and Enforcement Provisions of the RMA and its Implementation by Local Authorities and the Courts’.

²¹ See Strategik Consulting (2008), “The state of the enforcement regime under the RMA”, ARC (2005) “The Polluter Pays Principle”.

²² ARC (2005), “Implementing the Polluter Pays Principle under the RMA:”.

“The current legislative framework as interpreted by the Courts has led to a situation where local authorities’ ability to recover costs for responding to pollution-related incidents is best by anomalies. For example, while local authorities can charge resource consent holders for the cost incurred by the local authority in supervising and monitoring the consent, authorities are unable to recover the costs of responding to pollution caused by individuals who do not obtain consent. Even with consent holders, ARC often cannot recover costs of undertaking enforcement action”

Options include:

- transfer council administrative charging to Local Government Act 2002 (LGA) to allow councils to charge for basic monitoring and compliance activities
- amend section 36 to allow local authorities to charge non-consent holders for monitoring and compliance, including permitted activities and National Environmental Standards
- expand “reasonable costs” to include the costs of prosecution.

Note that if prosecution penalties increase (option 1.1) this could also assist with cost recovery.

2.1 Transferring council administrative charging to LGA

Section 150 of the LGA 2002 allows a local authority to prescribe fees payable through a bylaw “*under any other enactment, if the relevant provisions does not – authorise the authority to charge a fee*”. This provision is essentially there to ensure there is no “double dipping” by local authorities when charging for their services.

Technically this already provides the power to charge for activities not recoverable through the RMA (e.g. monitoring non-consent holders and permitted activities) but it is not explicit. There are some local authorities that are charging non-consent holders for monitoring and compliance under the RMA through the LGA. For example, Greater Wellington’s 2008 charging policy includes provision to charge for “environmental incident inspection charges” where section 9, 12-15, 327 and 329 of Act are contravened²³. To be considered reasonable for cost recovery, a breach or contravention must be established. Once this is done the charge may then include officer identifying the activity, talking to the appropriate people, making suggestions to improve environmental effects, travel time and disbursements.

However, other councils appear to be wary of charging for RMA monitoring under the LGA and are reluctant to do so²⁴. This is because the RMA explicitly states what should be charged for under section 36. This would suggest that if charging for monitoring compliance from non-consent holders was intended it would be explicit.

This option could involve making it explicit that environmental monitoring and compliance can be charged through the LGA. The other more significant option is to remove all RMA charging under section 36 and carry this out under the LGA (which may have benefits for other areas of the RMA, such as consent processing).

²³ Greater Wellington: http://www.gw.govt.nz/story_images/5356_ResourceManagem_s10819.pdf

²⁴ Enfocus Ltd (2008) ‘*The Resource Management Act: Interface Issues*’ and Strategik Consulting Ltd (2008), ‘*The state of the enforcement regime under the RMA*’.

Pros	Cons/risks
<ul style="list-style-type: none"> • Would allow local authorities to recover costs for monitoring non-consent holders, permitted activities, national environmental standards etc. without issuing a fine and appearing overly aggressive • LGA charging powers are less specific than RMA and no right of objection for additional charges (which is beneficial but only if used appropriately) • Could be part of full shift of RMA charges to LGA which would help to reduce complexity. 	<ul style="list-style-type: none"> • Could simply issue more infringement notices to recover costs • The RMA is explicit about what can be charged for is questionable whether separate charges should be made through other legislation • If only to cover environment monitoring, it appears that this can be done already through the LGA (e.g. Greater Wellington) although there are some uncertainties about the legality • There is no right of objections for additional charges under the LGA which means local authorities would need to use these carefully. More clear guidance and review powers may be required from central government. • A full deletion of section 36 is a major policy proposal and there may be concerns about broadening the charging powers for RMA services. May need to be supported by specific guidelines on what constitutes “reasonable costs”.

2.2 Amending section 36 to allow local authorities to charge non-consent holders for monitoring and compliance

This option would involve an amendment to section 36 to include to a new subsection in section along the lines of, a local government may fix charges for:²⁵

“charges payable by a person or persons where a local authority takes action or requires action to be taken because of the failure of that person to comply with their duties under section 9-15C or this Act or under a rule in a district plan or regional plan”.

Note option would be a substitute for the option above. The best option depends on whether RMA charges should remain within the RMA or be transferred to the wider charging powers of the LGA. An alternative to both options is for local authorities to issue more infringement notices to recover costs.

²⁵ This option was recommended by ARC in “Implementing the Polluter Pays Principle under the RMA.”

Pros	Cons/risks
<ul style="list-style-type: none"> • Would shift the cost of low-level pollution response from the rate payer to the polluter, which is consistent with the polluter pays principle • Would have the benefits of all RMA charges come from the same place (rather than use the LGA where the RMA has gaps) • Would remove the inconsistency in the RMA which all consent holders to pay monitoring charges but not to charge non-consent holders • Charges set under section 36 still go through the LGA consultative process which will help ensure they are reasonable 	<ul style="list-style-type: none"> • May only provide a more complicated method of cost recovery with a similar outcome as an infringement notice²⁶ • May reduce the issuing of infringement notices which provide a more effective deterrent effect • Does not address monitoring for permitted activities or National Environmental Standards.

2.3 Expanding “reasonable costs” under section 314 to include the costs of prosecution

This option would involve amending section 314(d) so that it also included the cost of making the application to the Environment Court, which includes the cost of case preparation and presentation, legal costs, and the time of any experts, officers or witnesses.

Pros	Cons/risks
<ul style="list-style-type: none"> • Would enable local authorities to recover the costs of prosecutions (lawyer fees etc) which can be significant in some cases • May encourage more local authorities (particularly those that are less resourced) to take more prosecutions and/or seek enforcement orders • Widens the categories of costs that a Court can award but provide the Court with the discretion to award what it considered to be “actual and reasonable”. 	<ul style="list-style-type: none"> • Could be concerned that this could be a significant impact on some businesses

Direction for further work / Recommendation:

Enhance the ability to costs recover			
• 2.1: Transferring council administrative charging to LGA		<input checked="" type="checkbox"/>	
• 2.2: Amending section 36 to allow local authorities to charge non-consent holders for monitoring and compliance		<input checked="" type="checkbox"/>	
• 2.3: Expanding “reasonable costs” to include the costs of prosecution			<input checked="" type="checkbox"/>

²⁶ Karenza De Silva (2008), ‘Effectiveness of the Prosecution and Enforcement Provisions of the RMA and its Implementation by Local Authorities and the Courts’

3: Remove practical barriers to monitoring, investigation and prosecution

Issue:

Local authorities have identified a number of practical barriers with the RMA to undertake effective RMA compliance monitoring, investigations and prosecutions. These barriers can hinder the frequency of enforcement activities and create unnecessary costs for local authorities. This is a particular issue for local authorities with limited resources. Anecdotal evidence suggest there are a low level of prosecutions taking place in proportion to the level of offending²⁷.

Options include:

- 3.1: simplify the requirements for abatement notices
- 3.2: remove the requirements for a constable be present during a search warrant, or to take seized property
- 3.3: make contravention of resource consent a specific offence
- 3.4: resolve issues around the distinction between investigation for the purpose of prosecution versus activities to detect compliance
- 3.5: widen the scope of the Court to review, amend or cancel consents
- 3.6: remove the right to elect jury regardless of seriousness of offence.

3.1: Simplifying the requirements for abatement notices

Abatement notices are generally regarded as useful tool, not only to get a quick response, but to demonstrate a history of non-compliance which is an aggravating factor if a prosecution is subsequently taken²⁸. Abatement notices are important to deal with more frequent offences as the local authority does not need to spend resources going the Court.

However, there can be practical issues with abatement notices as the RMA requires a clear definition of the actions required when directing a person to take steps to resolve compliance through an abatement notice. This puts the onus on the local authority to find solutions and specify the best practical option. This can be problematic where the officer may not have all the expertise to specify particular actions or the time available to develop solutions. In these instances compliance officers can have difficulties correctly drafting the grounds and directives for abatement notices.

It may be more desirable for the abatement notices to specify the contravention or non-compliance and leave the onus (and cost) to the offender to identify and carry out the best practical solution to comply with the RMA or deal with adverse effects. Offenders would have to demonstrate the best practical option through a formal process approved by the local authority. Failure to carry out the best practical option within a set timeframe would result in the local authority undertaking work itself with the powers to recover costs.

²⁷ Strategik Consulting (2008), “*The state of the enforcement regime under the RMA*”.

²⁸ Karenza De Silva (2008), ‘*Effectiveness of the Prosecution and Enforcement Provisions of the RMA and its Implementation by Local Authorities and the Courts*’.

Pros	Cons/risks
<ul style="list-style-type: none"> • Puts the onus on the offender rather than the council to identify the best solution • Would simplify the drafting requirement which may encourage councils to issue more abatement notices • May help to educate offenders on the appropriate steps to mitigate adverse environmental effects. 	<ul style="list-style-type: none"> • Some may view it as a lazy option from local authorities • Some offenders may have little skills and/or resources to identify best options and could create delays in taking remedial action.

3.2: Removing the requirements for a constable be present and size items

There are concerns that the requirement for a constable to be present during the execution of a search warrant is impractical, unnecessary and a waste of police resources²⁹. Constables are also required to have custody if items seized under search warrant which can be impractical and is generally seen as unnecessary. This option would simply involve removing constable from section 335 so that specify that an enforcement officer is only required to be present, and deleting or rewording section 337(1) so that local authorities could have custody of items seized.

Pros	Cons/risks
<ul style="list-style-type: none"> • Would make it much easier and efficient for local authorities to carry out searches for the purpose of investigation • Would waste less police resources • May help to up-skill compliance officers on legally sound practice 	<ul style="list-style-type: none"> • There many be concerns/risks that greater powers leads to greater abuse of powers • Would make a robust process in local authorities particularly important including the “chain of custody”. However this could also be an advantage through improvements in practice.

3.3: Making contravention of resource consent a specific offence

Contravention of a resource consent is not specified as an offence under the RMA. To establish an offence requires local authorities to equate non-compliance with consent conditions as a breach of the relevant duties restrictions in Part III of the RMA. This is a complicated route which some local authorities are reluctant to take. Some prefer to rely on issuing an abatement notice then seeking prosecution for non-compliance of the notice³⁰. The interim step of issuing an abatement notice may act as a barrier when the real issue is the breach of the consent.

This option would involve making contravention a resource consent a specific offence under section 338(1).

²⁹ Environment Waikato has indicated they use this provision frequently and the search can sometimes take hours. Also see Strategik Consulting (2008), “*The state of the enforcement regime under the RMA*” and Karenza De Silva (2008), ‘*Effectiveness of the Prosecution and Enforcement Provisions of the RMA and its Implementation by Local Authorities and the Courts*’.

³⁰ Strategik Consulting (2008), “*The state of the enforcement regime under the RMA*”.

Pros	Cons/risks
<ul style="list-style-type: none"> • Important to deal with breach of consent conditions that own specific timeframes and requirements tailored to the proposal • May help to get more responsive compliance with consent conditions • May result in consent holders being more aware of their consent conditions and complying with them • Reduces the complexity around prosecuting for breach of consent condition. 	

3.4: Resolve issues around the distinction between investigations for the purpose of prosecution versus inspection for compliance

Some local authorities are not clear when the power of entry to private land to inspect and determine compliance is exhausted and a search warrant is required to continue investigation. This issue is caused by the key differences in section 332 (power of entry for inspection) and section 334 (application for warrant for entry for search). A High Court decision³¹ has set limitations on when section 332 can be used to enter a property. These limitations must be adhered to or any evidence gathered will not be admissible in subsequent Court proceedings.

The limitations set in the High Court decision mean that the underlying purpose of the visit should determine whether section 332 or 334 is used. If the purpose is determining compliance or contravention, section 332 should be used (and this evidence can be used for prosecution purposes). However, if the purpose of the visit is to obtain evidence to support a prosecution of an offence punishable by imprisonment, then section 334 applies and a search warrant is required.

The boundaries between establishing compliance and collecting evidence for prosecution seem artificial in practice and can be problematic for compliance officers. Arguably, entry under section 332 is justifiable whether monitoring compliance or collecting evidence for offences that may result in a prosecution. The burden of applying a search warrant (and being accompanied by a constable) may be high and impractical and evidence suggests it is often not honoured in practice³². This option could provide enforcement officers with the power to collect evidence for compliance and prosecution purposes.

Pros	Cons/risks
<ul style="list-style-type: none"> • Would remove a boundary that seems artificial in practice and avoid confusion about purpose of visit • Would simplify the steps to detect compliance and gather evidence for investigations • May encourage compliance officers to be more skilled in legal sound practice. 	<ul style="list-style-type: none"> • There many be concerns/risks that greater powers leads to greater abuse of powers.

3.5: Widen the scope of the Court to review, amend or cancel consents

There are instances where resource consent holders have argued that they are incapable of compliance with conditions. Under the RMA, the only way to review a consent to cancel it through section 132(4) is to essentially repeat the decision-

³¹ *Re an application by Waikato Regional Council* [2003] NZRMA 481

³² Strategik Consulting (2008), “*The state of the enforcement regime under the RMA*”.

making process. Furthermore, the grounds to cancel the consent are limited to inaccuracies that influenced the decision and significant adverse effect on the environment. The grounds to cancel or change a resource consent through an enforcement order under 314(1)(e) is also limited to inaccuracies that influenced the decision.

This option would involve widening the scope of the Court to amend or cancel consents where they are clearly unable to meet conditions. Local authorities could seek cancellation of consent this through an enforcement order which would provide the Court with discretion and an opportunity for debate. Alternatively local authorities could hold this power with a right of appeal to the Environment Court.

Pros	Cons/risks
<ul style="list-style-type: none"> • Would provide a greater incentive for consent holders to comply with conditions • Would make it easier to cancel consents where the holder was uncooperative or the activity had unanticipated adverse effects 	<ul style="list-style-type: none"> • May not be appropriate in some circumstances (e.g. for certain discharge consents, when it best for works to be completed)

3.6: Remove the right to elect a trial by jury regardless of seriousness of offence

Some local authorities hold the view that the right to elect trial by jury for prosecutions, regardless of the seriousness of the offence, is inefficient. Although trial by jury is rare, it has the potential to impose unnecessary costs on local authorities and the Courts. There is also an argument that people add little value to fact finding in RMA prosecutions what are often quite technical environment matters.

This option would involve removing the right for a defendant to elect a trial and leave this up to the Court's discretion if deemed to be necessary.

Pros	Cons/risks
<ul style="list-style-type: none"> • Would reduced demand on Court resources • Would improve efficiency of some prosecution cases. 	

Direction for further work / Recommendation:

Remove practical barriers for compliance and enforcement			
• 3.1: simplify abatement notices			<input checked="" type="checkbox"/>
• 3.2: remove the requirements for a constable during a search warrants			<input checked="" type="checkbox"/>
• 3.3: make contravention of resource consent a specific offence			<input checked="" type="checkbox"/>
• 3.4: clarify distinction between investigation for prosecution versus normal compliance		<input checked="" type="checkbox"/>	
• 3.4: widen the scope of the Court to review, amend or cancel consents			<input checked="" type="checkbox"/>
• 3.5: remove the right to elect jury		<input checked="" type="checkbox"/>	

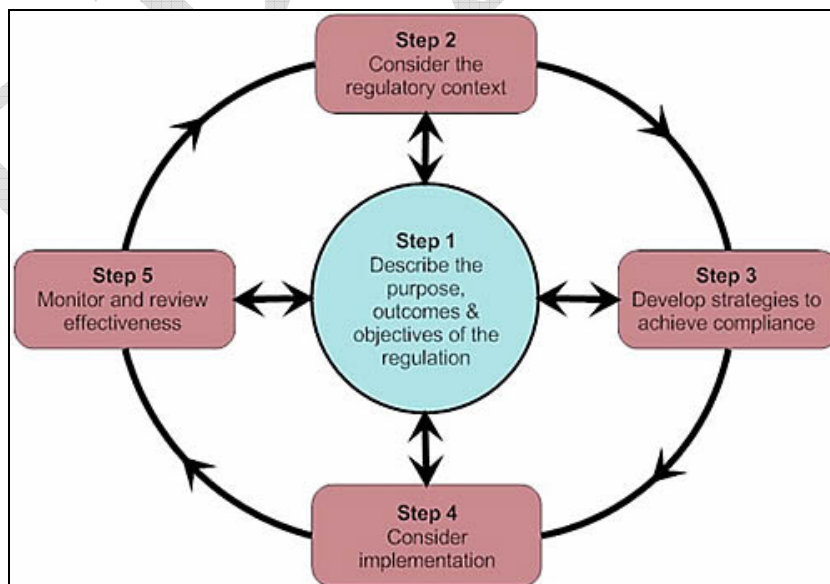
4: Improve coordination and capacity for RMA compliance and enforcement

Issue

Currently there is a lack of coordination and support for RMA compliance and enforcement activities. However, these activities are important to support the environmental objectives sought under the RMA and regional and district plans. International studies show that conducting environment inspections and presence from compliance officers increases the rate of compliance³³. Without compliance officers, there is little presence which reduces the perceptions of offenders that they will get caught. Therefore it is important that local authorities have the staff, skills and strategies in place to carry out effective compliance monitoring.

A number of factors contribute to the lack of capacity and support for RMA compliance and enforcement. This includes the lack of political support for enforcement action, the difficulties in linking environmental monitoring to plan provisions, and a lack of capacity to undertake compliance and enforcement activities. Addressing these issues is likely to require a combination of legislative improvements and capacity building initiatives.

The importance of planning for compliance is recognised by the Ministry for Economic Development in their *Regulatory Compliance Guidelines*³⁴. These guidelines were developed to show how compliance should be given consideration in the design and implementation of regulatory proposals and policy development. The framework links policy, rules, compliance monitoring and enforcement to provide feedback and adjustment where necessary to improve policy and rules. This framework is shown below.



This feedback between policy and compliance allows regulatory bodies to remain engaged with the outcomes of their policies and encourage continuous improvement

³³ Refer to Strategik Consulting (2008), “The state of the enforcement regime under the RMA”.

³⁴ Refer <http://www.med.govt.nz/upload/51357/compliance-guidelines.pdf>

of methods. There is however a lack of evidence that this framework to achieve an iterative policy cycle is actually being achieved for RMA planning.

Improving coordination and capacity for RMA compliance monitoring and the links to policy development is likely to require a number of initiatives. Central government could play a bigger role through targeted support and guidance to local authorities on the importance of compliance and the policy cycle³⁵. This could be facilitated through existing channels such as the Compliance and Enforcement Special Interest Group (CESIG). Central government could also play a greater role in monitoring how local authorities are compliance and enforcing activities to this is done. This could possibly extend to taking action where a local authority is clearly unable to do so.

There is also the potential to make changes to the RMA to encourage a better consideration and commitment to compliance monitoring. This could be achieved through the RMA (to make clear links to plan provisions) and/or the LGA (to improve funding and planning for compliance).

Options include:

- 4.1: require a specific commitment to monitoring that links compliance to environmental objectives
- 4.2: link monitoring and compliance to LGA planning and funding

4.1: Require a specific commitment to link environmental objectives to compliance monitoring

Possible options to achieve this include:

- amending section 35(2)(b) to state every local authority shall monitor “the efficiency and effectiveness of policies, rules or other methods in its policy statement of plan to ensure compliance and achieve plan objectives”
- amending section 32 so make the evaluation examine the extent to which policies, rules and methods will be monitored to ensure compliance.

Pros	Cons/risks
<ul style="list-style-type: none"> • Would raise the profile of compliance as a fundamental consideration during plan development and review • May help to facilitate the ongoing improvement of policies through feedback loops 	<ul style="list-style-type: none"> • Would just be another requirement on local authorities that would stretch their capacity further • Could be done without legislative amendment but more guidance, training and support.

4.2: Link monitoring and compliance to LGA planning and funding

This option would involve amending the LGA to require that a local authority have in its Long-Term Community Council Plan an environmental compliance monitoring strategy in place (with associated funding) subject to regular review.

³⁵ Note there is a large amount of best practice guidance on RMA monitoring and enforcement through the Quality Planning website.

Pros	Cons/risks
<ul style="list-style-type: none"> • Would improve funding and strategic planning for compliance 	<ul style="list-style-type: none"> • Would just be another requirement on local authorities that would stretch their capacity further • Local authorities can do this without any legislative amendment • Create more overlap between the RMA and LGA potentially adding complexity and uncertainty.

Direction for further work / Recommendation:

Improving coordination and support for RMA compliance and monitoring			
<ul style="list-style-type: none"> • 4.1: require a specific commitment to compliance monitoring objectives 		<input checked="" type="checkbox"/>	
<ul style="list-style-type: none"> • 4.2: link compliance to LGA funding 	<input checked="" type="checkbox"/>		

5: Clarify the enforcement of national instruments and remove crown immunity

Issue

Enforcement of National Environment Standards

Monitoring compliance under the RMA is a duty placed on local authorities. However there is no section that specifies who should enforce what. The directive is to monitor compliance is through section 35; Duty to gather information, monitor and keep records. Under section 35(2) the RMA states that every local authority shall monitor:

- (a) *The state of the whole or any part of the environment of its region or district to the extent that it is appropriate to effectively carry out its functions under this Act; and*
- (b) *The efficiency and effectiveness of policies, rules or other methods in its policy statement or plan; and*
- (c) ..
- (d) *The exercise of resource consents that have effect in its region or district, as the case may be; and*

And take appropriate action (having regard to the methods available to it under this Act) where this is shown to be necessary.

This implies that local authorities should monitor the environment, plans, police statements and resource consents within their region and district and take appropriate action when shown to be necessary (i.e. for non-compliance). Appropriate action implies the range of enforcement tools under Part 12 of the RMA (Declarations, Enforcement and Ancillary powers) which includes abatement notices, infringement notices, enforcement orders and prosecutions.

However, the RMA is silent on who should monitor and enforce National Environment Standards (NES). Once the NES becomes a rule in a plan, it becomes the responsibility of the local authorities but it is unclear who is responsible for enforcement and monitoring when this is not the case. It is also unclear whether breach of a NES constitutes an offence under the RMA.

Crown immunity

Prior to 2002, there was long-standing principle that the Crown was indivisible and immune from criminal prosecution. This principle appears to have been, at least in part, behind the wording of section 4(5) of the RMA which established immunity of the Crown from prosecution, and provides that no other enforcement action can be taken against the Crown.

Following the Cave Creek Tragedy it was felt that there was a need to “provide incentives for the Crown to avoid systemic failure and to provide for the accountability of the Crown if systemic failure occurs”³⁶. For the Crown to be criminally liable, the Courts have held that it is necessary for legislation to include very clear wording to that effect.

³⁶ Explanatory note to the Crown Organisations (Criminal Liability) Bill 2001

Since 2002 Crown organisations are able to be prosecuted for a limited range of offences under the Crown Organisations (Criminal Liability) Act 2002 (the ‘Crown Liability Act’). A Crown Organisation under the Crown Liability Act includes any government department, crown entities and government related organisations (such as the Police, Defence Force, Audit Office, Parliamentary Counsel and Parliamentary Services).

In considering whether it is desirable to allow the Crown to be subject to enforcement action or prosecution under the RMA the following considerations are relevant:

1. Does excluding the Crown from enforcement action create an unfair benefit to the Crown or adversely affect third parties?
2. Would making the Crown subject to possible enforcement actions create an unfair burden over and above those applicable to private persons or companies?
3. Would the risk of enforcement impact on the efficient operation of government?

In regard the first question, there are possible situations where the Crown may be seen as having an unfair advantage over private organisations. For example, the Crown not being able to be served with an abatement notice that would otherwise have held up work on a development. The answer to the second question is no. Provided the Crown follows the Act and regulations it has itself created, and the rules of relevant local authority plans, the onus on the Crown is no greater than that of the public generally. In regard to the third question, the answer is also no, provided the Crown is acting in good faith the risk of impairment to the operation of government is minor.

The ability to take enforcement action against the Crown, does as noted in the original Crown Liability Bill, provide an incentive for Crown agencies to ensure their systems and operations comply with the purpose, spirit and intent of the legislation, in this case the RMA and the various regulations and plans produced under it. To this extent it can be seen as a positive change for the Crown to be liable under the RMA.

Options include:

- 5.1: be explicit about who enforces a National Environmental Standard
- 5.2: remove Crown immunity from the RMA.

5.1 Being explicit about who enforces a National Environment Standard

This option could make it explicit through section 35 that local authorities must monitor National Environment Standards within its region and district and take appropriate action where this is shown to be necessary. Section 338 could also be amended to include National Environmental Standards as a specific offence (and corresponding changes to the infringement notices regulations).

Pros	Cons/risks
<ul style="list-style-type: none"> • Would remove uncertainty around who is responsible for monitoring compliance with NES • Would clarify the steps local authorities could take to enforce NES (e.g. infringement, prosecutions). 	<ul style="list-style-type: none"> • Not clear whether the existing problem is sufficient to warrant legislative change • May be unpopular with some local authorities due the costs and resources involved (complementary changes to cost recovery provisions would also be required to be made).

5.2: Remove crown immunity

Enabling the Crown to be prosecuted for breaches of the RMA would require:

1. The repeal of section 4(5) that explicitly states that none of the enforcement mechanisms that exist within the RMA can be used against the Crown; and
2. A consequential amendment to the Crown Organisations (Criminal Liability) Act 2002 to include reference to the RMA amongst the statutes under which the Crown can be prosecuted.

Pros	Cons/risks
<ul style="list-style-type: none"> • Can be done relatively simply by deleting section 4(5) of the RMA and including the RMA in the Crown Organisation (Criminal Liability) Act 2002 • Brings Crown responsibilities in line with those of private companies • Provides an incentive for Crown organisations to follow good practice and minimise environmental damages. 	<ul style="list-style-type: none"> • Could be used by opponents of Crown projects as a means of slowing down or preventing Crown projects. • Could add cost and time to crown projects.

Direction for further work / Recommendation:

Clarify enforcement of national instruments and Crown immunity			
<ul style="list-style-type: none"> • 5.1: make it explicit that local authorities are required to monitor and enforce national instruments 		<input checked="" type="checkbox"/>	
<ul style="list-style-type: none"> • 5.2: remove Crown immunity from RMA enforcement 			<input checked="" type="checkbox"/>