

Innovative Sentencing Under The Resource Management Act

In September 2013 we reported on Mr Conway, [the first person to be sentenced to jail twice for offending under the Resource Management Act 1991](#). Since then Mr Conway's latest attempt to avoid jail has failed – he was denied leave to appeal the Court of Appeal's decision against him to the Supreme Court.

The topic of sentencing repeat offenders under the RMA was addressed in early November by Environment Court Judge Thompson. In a conference speech he suggested some alternative and innovative sentencing options to address repeat offenders who create a burden on council enforcement and prosecution resources. This could include the ability to issue a "shut down order" to a business offender. He also proposed that a scheme similar to police diversion could be used for offenders at the lower end of the spectrum. When asked by the media whether new laws or broader judicial powers were being contemplated to achieve these outcomes Environment Minister Amy Adams indicated that the system already has the sentencing tools that it needs.

We agree with the Minister that these innovative approaches to sentencing under the RMA can be implemented under the existing regime without legislative reform being required. However there must be a will on the part of prosecuting authorities and defence counsel to advocate for these tailored or 'fit for purpose' sentencing outcomes. Judge Thompson's speech indicates that the Environment Court is open to supporting resourceful sentencing in appropriate cases, so we consider that a challenge has been issued to those enforcing obligations under the RMA. The tools for innovative sentencing already exist in the toolkit, it is simply a matter of using them effectively.

The advanced sentencing options endorsed by Judge Thompson have merit. They include:

- When all other enforcement options have failed, using enforcement orders to shut down business operators. This controversial suggestion has gained support from Green Party co-leader Russell Norman who is reported as stating that 'companies that refuse to clean up their ways ought to be driven out of business'. There is also an alternative to using an enforcement order. The Court has the ability to refer a resource consent back to a consent authority to be reviewed if the consent-holder has breached conditions or if problems have arisen with how the consent is operating. The consent authority can impose more conditions to remedy the problem, or even cancel the consent if there are significant adverse effects. The consent holder would participate in the review process and have a right of appeal against the decision. Although there are no known cases where a review has been ordered in this context it remains an available sentencing option.
- Providing an incentive for repeat offenders to comply with resource consent requirements, the RMA, or court orders by requiring offenders to pay a bond to secure performance. This can currently be achieved in an enforcement order made during sentencing. For example, in *Burr v Waikato Regional Council* [2013] NZEnvC 232 the offender was required to secure a \$50,000 bond which would be released once the terms of the enforcement order were fully performed. If there was a breach of the enforcement order that was not remedied within 14 days the Council could require full or part payment of the bond.
- Offenders responsible for one-off unintentional breaches could enter a diversion-like scheme where wrongdoing is acknowledged and a guilty plea entered, a community-based sentence imposed and, when completed, the plea withdrawn and charge dismissed. There is at least one regional council in the south island operating an 'alternative environmental justice' scheme of this type. The scheme is newly implemented so it is yet to be seen how it will fare.

There is scope for tailored and innovative sentencing under the RMA and, it would seem, a judicial willingness to explore this further.

If you would like more information on this issue, or want to know more about the RMA and how it may affect you, please contact one of our specialist Resource Management team.