

## Natural and Built Environment Bill Reform Series: Compliance and Enforcement

### New range of compliance and enforcement tools

The Natural and Built Environments Bill (**NBE Bill**) proposes various changes to compliance and enforcement powers, introducing new tools for responding to non-compliance, and also increasing the scope for a regulatory authority to take enforcement or abatement action. We take a look at some of the key changes in this article.

#### In summary:

Deterrence is a key component in the NBE Bill, reflected in the introduction of multiple new mechanisms for regulatory authorities to choose from when responding to non-compliance and the ability for Courts to impose significantly higher penalties:

- **Increase in the existing penalty caps:** maximum penalties on conviction for a natural person are imprisonment for up to 18 months (compared to 2 years under the Resource Management Act 1991 (**RMA**)) and a fine of up to \$1 million (compared to \$300,000 under the RMA). Non-natural persons are liable for a fine of up to \$10 million, compared to \$600,000 under the RMA.
- **Insurance against fines unlawful:** The NBE Bill makes it illegal to enter into an insurance policy or contract that indemnifies liability to pay a fine, infringement fee, or pecuniary penalty under the Bill. Any policy or contract already held will have no effect, and courts are restricted from granting relief in respect of a policy or contract already held.
- **Revocation or suspension of resource consent for non-compliance:** A regulator may revoke or suspend a resource consent if they are satisfied that there has been "ongoing and severe non-compliance" with the NBE Bill.

- **Adverse publicity orders:** Somewhat like naming and shaming, adverse publicity orders can require a person involved in non-compliance to either publicise or notify specific persons of the non-compliance, any impacts on human health or the environment or other consequences, and any penalties imposed / orders made by the court as a result of the non-compliance.
- **Pecuniary penalties:** A court can require payment of a penalty to the Crown or other person following a failure to comply with any requirement in the NBE Bill. The maximum penalties are \$1 million for a natural person, and \$10 million for non-natural persons.
- **Monetary benefit orders:** The Environment Court can order a person to pay an amount that represents the amount of monetary benefits acquired, accrued, or accruing to or by the person as a result of committing an offence.

The NBE Bill introduces the ability for a person to make an 'enforceable undertaking' in response to alleged non-compliance, as what appears to be an alternate avenue to enforcement action, and does not constitute an admission of guilt. An undertaking can include requirements to pay compensation to another person and/or the regulator, or take other action to avoid, remedy, or mitigate the adverse effects caused by the breach.

Changes to existing processes include:

- **Limitation periods:** Increased scope to take enforcement and compliance action is introduced through longer limitation periods (how much time a regulatory authority has to take action after becoming aware of an offence). The usual limitation period is increased from 1 to 2 years. In addition to this, a specific limitation period of 6 years is

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provided for seeking a declaration relating to trade competition and for pecuniary penalties. The extension of limitation periods also shows the intention to widen the ability to take compliance action.

- **Enforcement orders and abatement notices:** The NBE Bill largely adopts the existing regime on enforcement orders and abatement notices but for some changes including:
  - scope for making an enforcement order is broadened slightly to include specific orders relating to a polluter of contaminated land – requiring payment of money or reimbursement to the local authority or EPA for the cost of preventing or remedying any adverse effects or to carry out remediation; and
  - abatement notice scope is also broadened to include the ability to require a person to take preventative action to avoid actual or likely adverse effects on the environment, and to cease, or prohibit a person from starting, anything specified in the abatement notice to avoid the risk of imminent risk of harm.
- **Declarations:** The following changes to declarations have been proposed:
  - there is no longer a restriction on seeking a declaration on notification decision making / status. The Bill proposes an ability for the Court to make an order referring a notification decision back to a consent authority to reconsider; and

- declarations relating specifically to contravention of trade competition restrictions are allowed.

The changes in the NBE Bill leave regulators with a range of options for managing a breach or potential breach, and also give offenders alternatives to compliance and enforcement action through enforceable undertakings. However with so many tools now in the toolbox, clarification will be needed on how these processes are intended to interact and be used together.

General themes from submissions in relation to compliance and enforcement include:

- Concern the lack of transitional provisions will cause inefficiency and confusion for councils in their enforcement and monitoring functions, particularly with the uncertainty between the new resource consenting regime and the old. Without clear demarcation and responsibilities there is a risk of complexity and confusion for members of the public and Council officers.
- Concern at the centralisation of policy and planning documents away from local councils creating a tougher environment for implementation and enforcement, whilst managing statutory accountability for both monitoring and enforcement functions.
- The Chief Justice submission on behalf of the Judiciary noted the compliance and enforcement provisions are complex resulting in potential overlap between the District and Environment Courts, with potential confusion about when a proceeding should be commenced in each court.

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