

Natural & Built Environment Bill Snapshot

Penalties for Environmental Offending

Accountability and deterrence are two of the key purposes of any sentencing regime and it is no different for environmental offences under the Resource Management Act 1991 (RMA). However, some consider that the current enforcement provisions, and particularly the room they leave for insurance, makes the RMA somewhat toothless, falling short on both these fronts.

While other statutes including the Health & Safety at Work Act 2015 expressly prohibit the use of insurance to pay penalties, the RMA is silent on this issue. Insured offenders are therefore able to have their insurers cover any fine over and above their excess. This neutralises the deterrent value of larger fines. The Court has bemoaned this situation on several occasions.

For example, in *Bay of Plenty Regional Council v Whitiakau Holdings Ltd* the defendant was charged with unlawful disturbance of stream beds and discharge of sediment/forestry debris into habitats for indigenous fish species and the threatened blue duck. The Court described the defendant's actions as "very reckless, bordering on deliberate" and imposed a substantial fine of \$57,500. However, because the defendant had statutory liability insurance, they were likely to only pay a \$2,500 excess out of their own pocket. Such a payment would be minimal in comparison to the 'reckless' offending. While Judge Harland was clear that such a result did not align with the principles of accountability and deterrence, the lack of guidance in the RMA meant that the Court's hands were tied.

The Government is now looking to change this, with section 766(1) of the recently released Natural and Built Environments Bill proposing to explicitly prohibit the use of insurance to indemnify a person from their liability to pay a fine, infringement fee or pecuniary penalty.

If this section is part of the Natural and Built Environments Act (NBA), it will be the offender, not their insurer, who will feel the sting of penalties imposed for environmental offending. This would improve both the deterrent effect of the enforcement regime and avoid a 'pay to pollute' attitude that can come from the current regime's use of insurance. By ensuring those operating in the environment have 'skin in the game', it is hoped that the sentencing principles of accountability and general deterrence will be achieved with respect to environmental offending, which will lead to better outcomes for the environment. The proposed approach also aligns with policy direction which is clear that the costs of environmental offending should be met internally by the offender and not be borne externally.

While there are mixed opinions on the efficacy of the proposed provisions in the Bill, this is one addition that is expected to survive the upcoming select committee process and have a place in the NBA given its existing use in a number of other statutes.

Submissions on the Bill close on 5 February, 2023. We have a team of experts here to help if you would like to prepare and lodge your own submission.

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