



*caring about you & your environment*

# **Enforcement Procedures & Guidelines**

**Harbours Department**



# Contents

## Page

1.	Introduction	1
2.	Enforcement Principles	1
3.	Statutory Basis	2
3.2	Authority to Issue Infringement Notices	2
3.3	Legal Terms	2
4.	Enforcement Policy	3
4.1	Introduction	3
4.2	Overview of Enforcement Options	3
4.2.1	Informal Enforcement Options	3
4.2.2	Formal Enforcement Options	4
4.3	Enforcement Decision Process	4
4.3.1	Matters to be Assessed Before Taking Enforcement Action	6
4.4.2	Selecting an Enforcement Option	7
4.4.3	Guidelines for Formal Enforcement Action	9
4.4.4	Evaluating Effectiveness of Enforcement Action	9
4.5	Criteria for Recovering Costs Associated with Investigations which May Lead to Enforcement	9
4.5.1	Costs Awarded by the Courts	9
5.	General Enforcement Procedures	10
5.1	Using your Warrant of Appointment as an Enforcement Officer	10
5.2	Issuing Enforcement Documents to the Correct Party	10
5.3	Serving Enforcement Documents	12
5.5	Conduct when Carrying out Enforcement Action	12
6.	Infringement Notices	13
6.1	Statutory Grounds	13
6.2	Authority to Issue an Infringement Notice	13
6.3	Standard of Proof	14
6.4	Timeframes	14
6.5	Who to Issue an Infringement Notice to	14
6.6	Format and Content	15
6.10	Serving the Notice	15
6.11	Filing and Tracking	15
6.12	Payment of Infringement Fee	16
6.13	When the Infringement Fee is Not Paid	17
6.14	Challenges to Infringement Notices	18
6.15	When a Court Hearing is Requested	18
6.16	Defences Against Infringement Offences	19
7.	Prosecution	20
7.1	Statutory Grounds	20
7.2	Standard of Proof	20
7.3	Authority to Initiate Prosecution	20
7.4	Legal Advice	21
7.5	Timeframes	21
7.7	Awards of Costs	21
7.8	General Procedure Once a Decision to Prosecute is Made	22
8.	Defences	26
8.1	Defences under the Act	26

8.2	Other Defences	27
	Appendix 1. Legal Terms	28
	Appendix 2 – Formal Enforcement Guidelines	32
	Appendix 3 – Schedule of Infringement Offences and Fees	34
	Appendix 4 - Presenting Evidence in Proceedings	35

## 1. Introduction

This document sets out, as far as is practicable, the manner in which Regional Council staff should act when implementing the enforcement provisions of the Local Government Act 1974. [the Act] with respect to the Wellington Regional Navigation and Safety Bylaws 2000. [the Bylaws]

These procedures and guidelines are intended to ensure staffs carry out their enforcement duties in a way that meets the requirements of the Act. As with all our work you are expected to use your judgement and common sense about what type of enforcement action may be appropriate given the circumstances of each case.

These procedures and guidelines will be updated as and when the need arises, for example, to reflect any internal or external procedural changes or any amendments to the Act or regulations. This document will be formally reviewed at any time the underlying legislation is materially altered.

## 2. Enforcement Principles

The principles behind our enforcement are:

- (1) Our enforcement action is consistent for similar activities and circumstances;
- (2) Our enforcement reflects the letter and intent of the Wellington Regional Navigation and Safety Bylaws 2000;
- (3) Our enforcement is fair and reasonable - We give everyone a fair go but no one gets a free ride;
- (4) Our enforcement process has “no surprises”, i.e., we keep people informed and forewarned where possible;
- (5) We use informal enforcement mechanisms, such as, education, consultation and negotiation where appropriate; and
- (6) Our choice of enforcement action takes into account the individual circumstances of each case.

## 3. Statutory Basis

### 3.1 Local Government Act 1974 - Offences and Legal Proceedings

Sections 699 and 699B of the Act set out the formal enforcement options available.

Where an offence has been committed a Harbourmaster or Enforcement Officer has the ability to lay charges for a prosecution or issue an infringement notice under section 699C of the Act. Under section 699A(2) the Governor General specifies which breaches of the Bylaws are infringement offences.

### 3.2 Authority to Issue Infringement Notices

Section 699C of the Act allows for a Harbourmaster or Enforcement Officer to issue an Infringement Notice.

These infringement offences and their associated fees are set out in Schedule 1 of the Local Government (Infringement Fees for Offences: Wellington Regional Navigation and Safety Bylaws) Regulations 2002.

The Harbourmaster, Deputy Harbourmaster have been appointed as Harbourmasters and the Harbour Rangers have been appointed as Harbourmasters and Enforcement Officers under sections 5.1.1 and 5.1.2 of the Bylaws and have been issued with a warrant of appointment. The Wellington Maritime Police Unit staff have been appointed as Enforcement Officers under sections 5.1.1 and 5.1.2. of the Bylaws. See chapter 5.1 of this manual for further information.

### 3.3 Legal Terms

#### Standard of Proof

*On the balance of probabilities* means that once both sides have presented their evidence, the Judge will find for the party who on the whole has a stronger case e.g.: the party whose evidence tips the balance of probability, however slight the edge may be.

*Beyond reasonable doubt.* A reasonable doubt is a doubt that would prevent a reasonable and just Judge or jury from coming to a conclusion. ...it has become usual to instruct juries that a reasonable doubt is such a doubt as would cause them hesitation in grave and important concerns of their own, but that a mere fanciful doubt is not to be considered a reasonable doubt. *Ministry of Pensions v Greer [1958] NI 156 at 162 per Black LJ.*

See Appendix 1 of this manual for a glossary of commonly used legal terms you may encounter in enforcement proceedings.

## 4. Enforcement Policy

### 4.1 Introduction

We have several options when considering a situation involving a breach or alleged breach of the bylaws. Education, verbal or written warnings, infringement notice or prosecution.

To ensure that our enforcement is consistent and fair you must work through the **Enforcement Decision Process** outlined in chapter 4.3 of this manual. To maximise our chances of enforcement action being successful you need to carefully follow enforcement procedures contained in this manual.

### 4.2 Overview of Enforcement Options

#### 4.2.1 Informal Enforcement Options

In most situations, we can ensure compliance with Bylaws without using any of the formal enforcement measures available. Informal enforcement action, such as outlined below, is often the first step in the enforcement process.

##### *Education*

Ignorance is no defence when an offence is committed against the Bylaws. However, in certain circumstances it may be more appropriate to educate the person responsible for the non-compliance to ensure that they understand how the Bylaws apply to their activity and how they can comply.

The Harbours Department has boat packs and plain copies of the bylaws. These may be used to make people aware of their responsibilities under the Bylaws and of the consequences of not complying with the Bylaws.

##### *Verbal Warnings*

A verbal warning will be sufficient where there is no immediate danger to other water users and the party concerned seems compliant and indicate that they will ensure that the re-offending will not reoccur. You should always note in your incident report when a verbal warning has been given. This may also be an appropriate time to give out a copy of the Bylaws or a boating safety pack.

##### *Written warnings*

A written warnings is used in situations where the action is more serious, but not yet an immediate danger to themselves or other users, or to someone already given one or more verbal warnings. You should give the person responsible a written warning either by using the written warning form or by letter later.

The purpose of this warning is to ensure that our enforcement process has “no surprises”, i.e., we keep people informed and forewarned where possible. Draw their attention to the bottom of the Offence Warning Notice where it outlines the risk of further non-compliance. Such warnings also mean that if the offence happens again we have stronger grounds for taking formal enforcement action.

#### 4.2.2 Formal Enforcement Options

##### *Infringement Notice*

Harbourmasters or Enforcement officers may issue infringement notices for some breaches of the Bylaws as set out in the Local Government (Infringement fees for offences: Wellington Regional Navigation and Safety Bylaws) Regulations 2002. The Regulations provide a schedule of fines, of either \$100 or \$200 depending on the nature of the offence. Infringement notices may be challenged in which case a District Court hears the charge. The onus is on the Regional Council to prove *beyond reasonable doubt* that an offence occurred if a Court hearing is held.

The purpose of an infringement notice is to punish and deter others.

See chapter 6 of this manual for further information.

##### *Prosecution*

We can seek a prosecution for an offence against the Bylaws as set out in section 699 or 683. A prosecution is a criminal proceeding and we must prove *beyond reasonable doubt* that an offence has occurred and the person accused is responsible. Prosecution is punitive and may serve as a deterrent to others. Prosecutions are usually expensive and time consuming.

The purpose of a prosecution is to punish, publicise the breach and the bylaws and deter others.

See chapter 10 of this manual for further information.

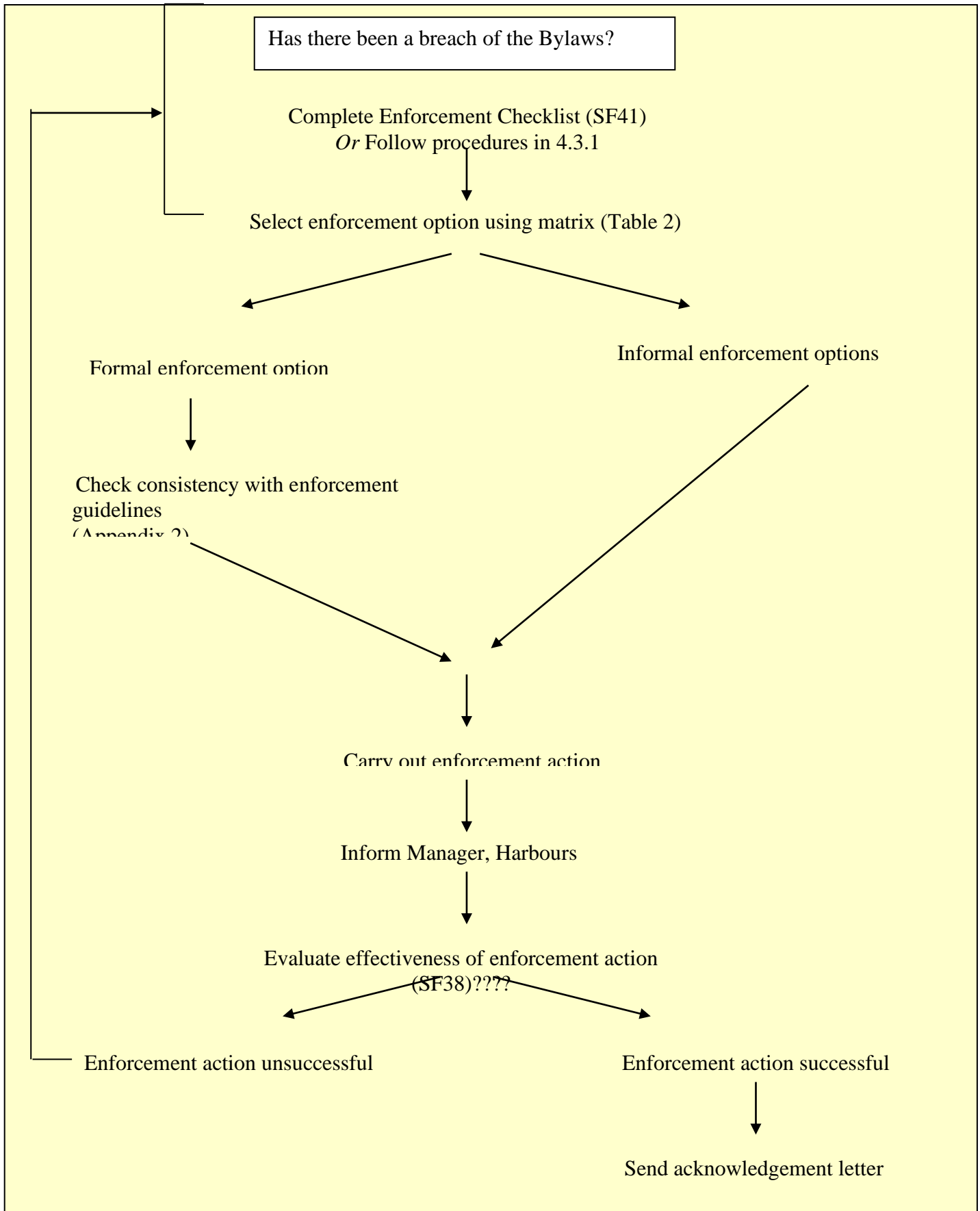
#### 4.3 Enforcement Decision Process

So that we can meet our enforcement principles outlined in chapter 2 of this manual we follow a series of steps before initiating enforcement action. These enforcement steps are summarised in Figure 1. **Summary of Enforcement Decision Process.**

Because of the potential for enforcement to escalate, you should go through this enforcement process with each successive enforcement tool used, where initial efforts have failed to bring about compliance.



Figure 1. Summary of Enforcement Decision Process



#### 4.3.1 Matters to be Assessed Before Taking Enforcement Action

The following matters must be considered before you decide which enforcement option (formal or informal), if any, should be used.

(1) **Circumstances**

- (a) The significance of the actual and potential effects of the breach. i.e., no effects, minor effects, moderate effects, or significant effects.

- (b) Level of responsibility for the non-compliance.

*Consider deliberateness of actions; was there flagrant disregard of the Bylaws or previous warnings; was the person ignorant of the Bylaws; are there any mitigating factors?*

- (c) Previous history of non-compliance

*Have there been previous similar instances of non-compliance?; has there been a failure to act on previous warnings or previous enforcement action?*

- (d) Attitude of the party responsible for non-compliance.

*Are they willing to comply; are they denying responsibility?; do they have a 'couldn't care less' or cavalier attitude or are they taking the matter seriously?; Are they co-operative or obstructive.*

- (e) Likelihood of incident or non-compliance happening again

*Was the incident an isolated event? How confident are you that the situation will not happen again?*

(2) **Legal issues**

- (a) Clear breach of the Bylaw?

- (b) Evidence of breach of bylaw/s? Any witnesses?

- (c) What standard of proof can be met – *on balance of probabilities* or *beyond reasonable doubt*?

- (d) When did we first become aware of the breach? Section 338(4) of the Act provides that any charges for a prosecution must be laid within twelve months from the date the Regional Council first knew (or should have known) that an offence had been committed.

(3) **Desired outcome of enforcement action**

(a) Specify.

*e.g., compliance with Bylaws, educate, deter others, punish.*

**4.4.2 Selecting an Enforcement Option**

Once you have completed the Enforcement Checklist (SF41) use Table 2 Enforcement Option Matrix to help you choose an appropriate enforcement option. The matrix provides a broad overview to help enforcement officers achieve consistency in their initial choice of enforcement option.

These are guidelines, that, while put in place to assist in decision making, do not restrict the ability of the officer attending the incident to make a judgement on which enforcement option to use based on the particular factors in that incident.

Table 2. Enforcement Option Matrix

<i>Nature of incident</i>	<i>Example</i>	<i>Verbal warning; Education material</i>	<i>Written warning; Education material</i>	<i>Infringement notice</i>	<i>Prosecution</i>
Minor breach	Unlikely to interfere with other water uses and/or unlikely to pose a risk to life or property.  Offence that is not directly dangerous.	<ul style="list-style-type: none"> <li>• First offence;</li> <li>• Ignorance of the Bylaws</li> <li>• Unlikely to happen again;</li> <li>• Voluntary compliance likely or undertaken.</li> </ul>	<ul style="list-style-type: none"> <li>• Second offence;</li> <li>• May happen again;</li> <li>• Voluntary compliance likely.</li> </ul>	<ul style="list-style-type: none"> <li>• non-compliance with written warning.</li> <li>• Poor attitude towards previous instruction</li> </ul>	
Moderately serious breach.	Likely to be a nuisance to other water users and/ or pose a risk to life or property.		<ul style="list-style-type: none"> <li>• First offence;</li> <li>• Unlikely to happen again;</li> <li>• Voluntary compliance likely or undertaken.</li> </ul>	<ul style="list-style-type: none"> <li>• Non-compliance with previous warning.</li> <li>• Poor attitude towards previous instruction</li> </ul>	
Serious breach	Is causing a significant risk to life or damage property.			<ul style="list-style-type: none"> <li>• endangerment of other water users</li> </ul>	<ul style="list-style-type: none"> <li>• failure to act on previous warnings;</li> <li>• endangerment of other water users</li> </ul>
Very serious	Injury and/or loss of life and/or substantial damage to property				<ul style="list-style-type: none"> <li>• deliberate or negligent action.</li> </ul>

#### 4.4.3 Guidelines for Formal Enforcement Action

When you select a formal enforcement option check it for consistency with the guidelines for formal enforcement action. See Appendix 2 (Page XX) of this manual for these guidelines.

#### 4.4.4 Evaluating Effectiveness of Enforcement Action

Once you have carried out enforcement action you should evaluate the response to effectiveness of the enforcement action taken.

##### *When enforcement action was unsuccessful in achieving compliance*

Where the enforcement action has not been successful in achieving compliance you should consider whether further enforcement action is necessary.

##### *When enforcement action was successful in achieving compliance*

Where a third party brought the offence to our attention, for example through a complaint, feedback should be sent to the third party.

**Note – the copy sent should be a blind copy, i.e., the person who has complied should not know the identity of the original complainant unless they have given their permission.**

#### 4.5 Criteria for Recovering Costs Associated with Investigations which May Lead to Enforcement

While we cannot recover most of the costs associated with enforcement we may charge for staff time and costs incurred in carrying out initial investigations or inspections before any formal enforcement action is taken.

##### 4.5.1 Costs Awarded by the Courts

The Court may award costs in enforcement proceedings for prosecutions. An order for costs is not a penalty against the unsuccessful party, but compensation for the successful party. Costs may be awarded in favour of the Regional Council or against the Regional Council where enforcement proceedings are unsuccessful.

See chapter 10.7 of this manual for information on award of costs associated with prosecutions.

## 5. General Enforcement Procedures

### 5.1 Using your Warrant of Appointment as an Enforcement Officer

Section 710 of the Act requires Council to supply every enforcement officer with a warrant that clearly states the functions and powers the enforcement officer has been authorised to carry out and exercise.

The Warrant of Appointment must be carried at all times by the enforcement officer and produced, together with identification (e.g., photographed ID card), upon entry to any property, whether requested or not (and at any further reasonable request).

You must show your warrant even if you know the person well.

Section 710(3) requires you to surrender your warrant on termination of employment.

### 5.2 Issuing Enforcement Documents to the Correct Party

It is important that infringement notices correctly identify the party the notice is being issued to. Below is some guidance on the different types of entities you may encounter.

#### *A person*

This means an individual acting on their own. When issuing a document to an individual make sure you check spelling carefully. It is not necessary to use their full name though.

#### *A Company*

A company is a separate legal being – that is distinct from the owners (the shareholders). The Directors are responsible for the affairs of a company and may or may not be shareholders. The advantage of a company as a form of business is that liability is limited to the assets of the company. An outsider must look to the company and not the owner, director nor the officer for amends, unless the owner or director has entered into a personal guarantee or allowed the company to trade recklessly.

Where you issue an enforcement document against a company use the full name, e.g., Trolley Transport Ltd not just Trolley Transport. If you are unsure carry out a company search on the internet <http://www.companies.govt.nz/search/cad>

The search is free and will give you the registered office address for the company plus the name of two company directors.

### ***Trading Name***

Similarly, some businesses prefer to use a trading name that sets them apart from others and usually employed as part of a marketing or brand strategy. That name has no significance in law. In these instances we need to determine what the entity really is – a person, a partnership, a company, etc. For example, *First Electric* is the trading name used by Mighty River Power Limited. In this case, the enforcement notice would be issued against Mighty River Power Limited.

### ***Partnerships***

A partnership is formed when two or more individuals formalise their business arrangements, for example lawyers or accountants often form partnerships. From such an agreement the partners' activities are combined all subsequent dealings are completed jointly. Those individuals are jointly and severally liable for the partnership's liabilities. In essence partnerships enjoy the same status as an individual. There is no opportunity to separate or avoid the liabilities of the business.

Enforcement documents should be issued in the name of the partnership and served on the individual partner(s).

### ***Public Authorities***

These businesses are set up by statute for example territorial authorities look to the Local Government Act 1974 (as amended in 1989 and 1996) as the empowering legislation. That legislation prescribes what activities and ultimate authority that local authority has. Another example is a state owned enterprise that is also created by statute.

### ***The Crown***

Presently under section 4(5) of the Act, no enforcement order, abatement notice, excessive noise direction or information may be issued against the Crown. Case law indicates that this exception also extends to Crown Agencies, for example a school board of trustees is deemed by statute to be an agent of the Crown. However, Crown Agencies are not exempt when they are an incorporated body.

### ***A Trust***

A trust is an arrangement by which one or more persons (called a trustee) hold and manage the trust assets on behalf of a group of other people (called beneficiaries).

You cannot issue enforcement proceedings against a trust unless the trust is an incorporated body (i.e., registered as a company – you can find this out by carrying out a company search on the internet). You can however, issue an enforcement notice against individuals who make up the trust, i.e., the trustees. You can find out who trustees are by checking the property title (where land is involved). This may entail carrying out a title search of the property concerned. This can be done through Land Information NZ (there is a charge for this service).

### 5.3 Serving Enforcement Documents

#### NEED PROCEDURE OF FOR POSECUTION SERVING OF PAPERS

##### *Personal service*

Infringements notices will generally be delivered at the time of the incident and in person. Personal service is always desirable, as it cannot be disputed.

Where possible, two enforcement officers should be present during personal service both to act as a witness and to ensure personal safety.

While it is not always a legal requirement, good practice suggests that when serving papers you (and any other enforcement officer present) should always show your warrant (whether you know the recipient or not) and explain clearly what the notice is being served for, what it requires them to do, and their legal rights. You should also explain to them that what they say can be used in evidence and note their comments and questions.

Record details of personal service in your incident notebook or as a contemporaneous file note. Staff should put a note on the Incident Database to state where details of service are recorded.

##### *Postal service*

When personal service is not possible you may send infringement notice by prepaid post addressed to the person at the usual or last known place of residence or business of the person.

Where a notice or other document is sent by post to a person it shall be deemed, in the absence of proof to the contrary, to be received by the person at the time at which the letter would have been delivered in the ordinary course of the post.

Note: a document is considered to be posted when it is placed in an official Post Box. For correct service all infringement notices should be delivered in person to the nearest Post Office.

Record details of postal service in your field notebook or on the Incident Database.

##### *Other methods of service*

If personal or postal service is not possible then you may deliver enforcement documents to the usual or last known place of residence or business of the person either by facsimile or leaving it in the letterbox.

Retain fax confirmation sheet as proof of delivery. Record details of service in your field notebook or as a contemporaneous file note.

### 5.5 Conduct when Carrying out Enforcement Action



Enforcement action is a serious business. You should always ensure that all parties involved in enforcement action are treated fairly, decently and in accordance with the principles of natural justice.

Where there is the potential for enforcement action, you should inform parties involved that that any information provided may be used in evidence.

You should also avoid giving assurances to parties involved (e.g., complainants or alleged offenders) as to what enforcement action we may or may not take before the enforcement option has been approved by the Department Manager.

***When invoking enforcement action correct procedure is essential.***

If we do not use correct procedures we run the risk of having the Courts reject our evidence. In most cases lawyers for parties who are the subject of enforcement action will carefully look at our procedure to see if we have made a mistake that they can use to get the courts to dismiss our action (a technical knock out). This approach is far easier than defending a case on the facts.

A good way for you to look at enforcement action is that if we are 95% right and the person we are taking enforcement action against is 5% right then we could struggle to get the Courts to accept our view. While that can be frustrating it is useful to remember that the same system protects us from overzealous enforcement agencies.

## **6. Infringement Notices**

### **6.1 Statutory Grounds**

s699A of the Act gives local authorities the ability to issue an infringement notice instead of seeking a prosecution to deal with breaches of specific provisions of the Bylaws..

Local Government (Infringement Fees for Offences: Wellington Regional Navigation and Safety Bylaws) Regulations 2002 sets out breaches of the Bylaws that an infringement notice can be issued for and the prescribed fee.

The schedule of infringement offences and fees is attached as Appendix 3 of this manual.

Section 21 of the Summary Proceedings Act 1957 (SPA) sets out the various options for initiating infringement notice proceedings and specifies the steps that may be taken once an infringement notice is issued. An infringement offence does not result in a conviction.

Refer to LGNZ Enforcement Manual for a detailed overview of the infringement notice mechanism.

### **6.2 Authority to Issue an Infringement Notice**

Harbourmasters and Enforcement officers have the power to prepare and serve infringement notices. (s699C(1) of the Act) Department or Divisional Managers are authorised to consider and decide on any requests for District Court hearings from persons issued with infringement notices.

### 6.3 Standard of Proof

We can serve an infringement notice where we observe a person committing an infringement offence or have *reasonable cause* to believe such an offence has been committed by that person. (s699C(1))

When a person receiving an infringement notice denies liability and where a Court hearing is subsequently held - we must prove the infringement offence *beyond reasonable doubt* i.e., the same standard required for a prosecution. The standard of proof required by the defendant to establish a defence is *on the balance of probabilities*.

Therefore the investigation and collection of evidence relating to an infringement offence, where possible, should be carried out to meet the *beyond reasonable doubt* standard of proof.

Where the evidence does not meet the *beyond reasonable doubt* standard of proof we may still proceed with issuing an infringement notice but may decide not to take the matter any further if the person issued with an infringement notice denies liability.

### 6.4 Timeframes

The infringement notice should be issued as promptly as is reasonable in the circumstances after the infringement offence is discovered.

Note – any unpaid reminder notices relating to an infringement notice must be filed with the District Court within six months of the infringement offence being committed or six months from when we first became aware or should have reasonably known that an infringement offence was committed.

### 6.5 Who to Issue an Infringement Notice to

The infringement notice must be issued to the party responsible for causing the infringement offence. When a number of people are responsible for the activity, a separate infringement notice can be issued to each person who has caused the offence. The responsible party can include the following:

- A person
- A company
- An incorporated body
- A public authority

An infringement notice cannot be issued against a Trust unless the Trust is an incorporated body.

See chapter 5.2 of this manual for further information.

## 6.6 Format and Content

The infringement notice must on the standard Infringement Notice form as detailed by s699C(3) of the Act and Schedule 2 of the Local Government (Infringement Fees for Offences: Wellington Regional Navigation and Safety Bylaws) Regulations 2002 .

## 6.7 Completing the Infringement Notice

The person receiving the infringement notice is given the white and pink copies, the pink copy is to be returned with payment.

Each offence detailed must be numbered, the pre-printed offences must be numbered where appropriate in the boxes provided.

## 6.10 Serving the Notice

The infringement notice must either be delivered in person or posted to the usual or to the last known place of business or residence. This requirement is specified in section 699C(2) of the Act.

Any enforcement officer (not necessarily the officer who issued the notice) may deliver the infringement notice.

Because serving the infringement notice is a potentially confrontational situation, the enforcement officer serving the notice should be accompanied, where possible, by a colleague. The details of how and where and when the infringement notice was served should be recorded in the officer's incident notebook or contemporaneously (i.e., made within 24 hours of service while event is fresh in your memory) as a file note.

When an infringement notice is served in person the issuing officer should:

- show their warrant;
- describe what the infringement notice is;
- draw the person's attention to their rights, which are included in the infringement notice;

If the infringement notice is served by mail, then a covering letter should be enclosed which outlines the points above. Use Standard Letter (SL49).

See chapter 5.3 of this manual for more information on serving enforcement documents.

## 6.11 Filing and Tracking

Each infringement notice is assigned a unique notice number, prefixed with H for Harbours Department. The Administration Officer who records the date of issue of the notice, the recipient, the issuing officer and the due date for payment of the fee on a spreadsheet. Staff have read-only access to the spreadsheet on the Regional Council Intranet.

The Administration Officer informs the issuing officer on the day that the payment of the infringement fee is due, so that if payment has not already been received a reminder notice can be issued.

After issuing the infringement notice, if you decide to take no further action, then you must inform the Administration Officer who will update the infringement notice tracking system.

The Administration Officer maintains a file containing a copy of all infringement notices issued.

An Enforcement Officer who is a member of Police Maritime Unit will pass on the file copy of the Infringement Notice to the WRC Harbours Department as soon as practicable after it has been issued. Any decisions affecting that notice will be made in discussion between the Harbourmaster and the Officer-In-Charge of the Police Maritime Unit. The WRC Harbours will take responsibility for the tracking and follow up of the notice.

## 6.12 Payment of Infringement Fee

### *Payment of infringement fee*

The person issued with an infringement notice has 28 days from the date of service to pay the infringement fee or request a Court hearing.

If the fee is paid within the 28 days then no further action can be taken against the person regarding the incident leading to the issue of the infringement notice.

### *When payment is personally delivered*

If the person issued with the infringement notice pays in person at the Council then they must be issued with a receipt. A receipt book is kept at the Environment Help Desk. Change is available from the Secretary CMD & RID. Remove the payment slip on the bottom of the infringement notice. Cheques and cash should be immediately delivered in person to the Accountant, Environment Division. The Accountant will sign the duplicate copy of the receipt (retained in the receipt book) to show that the monies have been received. Attach the duplicate copy of the receipt to the filed copy of the infringement notice.

The Accountant, Environment Division will generate an invoice for the infringement fee and deliver the invoice and monies received to the Finance Section.

The Administration Officer at Harbours must be informed when payment is received so that the tracking system can be updated.

### *When payment is received by post*

Where the person issued with the infringement notice posts payment to the Regional Council, the cheque and tear off portion of the notice (which identifies the particular infringement notice number) will be sent directly to the Finance Section by Information Services, who receive all incoming Regional Council mail.

Information Services will photocopy the cheque and accompanying tear off portion and forward it to the Manager, Harbours. The Manager will give the photocopied information to the Administration Officer so that the tracking system can be updated. The Administration Officer will inform the officer who issued the notice that payment has been received. The copy of the cheque and tear off portion are then attached to the filed copy of the infringement notice.

### ***Part payments***

No amount less than the full infringement fee will generally be accepted as full and final settlement. If the person issued with the infringement notice wishes to pay by instalment (and a reminder notice has not already been filed with the Court) you should discuss the matter with the Department Manager and the Accountant, Environment Division.

### ***Waiver for compliance***

For some breaches of the bylaws the officer may offer to waive the infringement fee upon proof of compliance. eg proof of purchase of lifejackets as grounds for a waiver of a breach of section 2.1.1.

If this occurs then make a note on the file copy and take no further action.

## **6.13 When the Infringement Fee is Not Paid**

### ***Reminder notices for unpaid infringement notices***

If the person issued with an infringement notice has not paid the fee or requested a Court hearing within the 28 days of the date of service of the infringement notice then we may:

- issue a reminder notice; or
- take no further action.

However, it is our policy to automatically issue a reminder notice in this situation. Once a reminder notice is issued, the recipient is termed the 'defendant'.

The infringement reminder notice must be prepared using the Standard Regional Council Infringement Offence Reminder Notice template (L50) which is based on Form 10 in the First Schedule of the Summary Proceedings Regulations 1958. The reminder notice must contain the same information as contained in the infringement notice.

### ***Payment of reminder infringement notice***

The person issued with an infringement reminder notice has 28 days from the date of service of the reminder notice to pay the infringement fee or to request a Court hearing.

### ***When the reminder notice fails to prompt payment of infringement fee***

If the person issued with the infringement reminder notice has not paid the fee or requested a Court hearing within the 28 days of the service of the reminder notice then we may:

- take no further action; or
- file a copy of the reminder notice in the District Court.

A copy of the reminder notice must be filed with the District Court within six months of the date of the original infringement offence or when we first became aware or should have reasonably known that an infringement offence had been committed. At this point an order is deemed to have been made that the person issued with the infringement reminder notice must pay a fine equal to the amount of the infringement fee plus costs. The Department for Courts is now responsible for collecting the fine.

The decision to file an unpaid reminder notice with the District Court must be approved by the Departmental Manager.

## **6.14 Challenges to Infringement Notices**

A person receiving an infringement notice may raise “any matter relating to circumstances” of the offence in writing within 28 days of receiving the infringement notice. We have the discretion to accept the circumstances raised and take no further action or to continue with the infringement process by issuing a reminder notice.

Any decision to take no further action must be approved by the Department Manager. Where we decide to take no further action the defendant should be notified in writing as a matter of courtesy.

## **6.15 When a Court Hearing is Requested**

### ***Request for a Court hearing***

A Court hearing can only be requested by the person issued with an infringement notice. The request must be in writing and signed by the person who was served with the infringement notice.

If a Court hearing is requested, we may:

- take no further action (i.e., cancel the infringement notice); or
- start the court proceedings by filing a notice of hearing in Court together with the letter from the person admitting or denying liability.

### ***Liability admitted***

A person receiving an infringement notice can admit liability and request a District Court hearing before or within 28 days of receiving a reminder notice. The person receiving the

infringement notice will include a written submission asking the Judge to consider reducing the infringement fee.

In this situation, we may either:

- take no further action; or
- file a notice of hearing with the Court.

We do not need to serve a copy of the notice of hearing on the defendant. The Court decides the case without oral submissions from the local authority or defendant.

### ***Liability denied***

A person receiving an infringement notice may deny liability and seek a Court hearing before or within 28 days of receiving a reminder notice.

In this situation, we may either:

- take no further action; or
- file a notice of hearing with the Court. We must serve a copy of the notice of hearing on the defendant.

The defendant is required to present their case to the Court. However, if the defendant does not turn up to the hearing then we still need to present evidence to prove the case.

### ***Decision to take no further action***

Any decision to either take no further action or proceed with a Court hearing must be approved by your Department Manager. Where we decide to take no further action the defendant should be notified in writing as a matter of courtesy.

Don't forget to give a copy of the cancellation notice to the Administration Officer so that the infringement notice tracking system can be updated.

### ***Decision to proceed with Court hearing***

Prepare the notice of hearing in respect of the infringement offence using the standard Regional Council Notice of Hearing template (L51) which is based on Form 10A in the First Schedule of the Summary Proceedings Regulations 1958.

An infringement notice hearing under the Local Government Act 1974 will be heard in the District Court before District Court Judge.

## **6.16 Defences Against Infringement Offences**

The following defences are set out in Schedule 2 of the Local Government (Infringement Fees for Offences: Wellington Regional Navigation and Safety Bylaws) Regulations 2002(a) that the fee has been paid in full, or

## 7. Prosecution

### 7.1 Statutory Grounds

Section 650g + 699 (breach of bylaws) specifies offences against the Act and section 683 specifies the penalties for the offences. Refer to Table 1 of this manual for further information.

### 7.2 Standard of Proof

The standard of proof for a prosecution is the criminal standard, i.e., *beyond reasonable doubt*. The burden of proof is on the prosecution to prove every element of the offence, including proving the chain of events leading to the offence and that the defendant was responsible for the offence.

A prosecution must prove, by evidence which is admissible in Court, the following elements:

- What happened?
- When did it happen?
- Where did it happen?
- How did it happen?
- Who was involved?
- That there was an offence.
- A connection between the defendant and the incident giving rise to the offence.

Prosecutions for offences under section 699 must be laid in the District Court. Where the offence is a *summary offence*, i.e., punishable by a term of imprisonment exceeding three months, the defendant can elect trial by jury and the case will be heard in the District Court by a District Court Judge.

Rules of law about evidence exist for *hearsay*, *opinion*, documenting evidence and producing evidence in the District Court.

#### *Strict liability*

In any prosecution for an offence of contravening or permitting a contravention of any of sections ??? of the Act, it is not necessary to prove that the defendant intended to commit the offence [s 314(1)]. However, there must be a causal connection or a link between the defendant and the events giving rise to the offence. ???

### 7.3 Authority to Initiate Prosecution



The final decision about whether to *lay an information* will be made by a Department or Divisional Manager.

## 7.4 Legal Advice

Legal advice must be obtained to determine:

- If the evidence is robust enough to meet the standard of proof *beyond reasonable doubt*;
- That correct charges are laid against the correct persons;
- The likelihood of success; and
- The validity of the rule or condition where the prosecution is for a breach of a rule in a plan or a resource consent condition.

Before seeking legal advice you must have the approval of your Department Manager. A purchase order must be completed before legal advice is sought.

Project charge codes for legal costs associated with the enforcement proceedings:

- 
- 

The request for legal advice should be in writing and specify in detail the scope of the advice required and outline the steps we want counsel to take on our behalf. The letter requesting advice should be checked and signed by the Department Manager.

## 7.5 Timeframes

The time limit for laying an information relating to an offence is twelve months from the time when the contravention was first discovered or ought to have been discovered by the Regional Council. The clock starts when the officer has sufficient information which shows that it is likely that an offence has occurred and to justify an investigation into the matter.

Where the offence charged is a continuing offence, the time runs from each and every day the offence continues.

## 7.7 Awards of Costs

### *Successful prosecutions*

Under the Costs in Criminal Cases Act 1967 the Court may also order the defendant to pay a sum to the Council towards the cost of bringing the prosecution, i.e., legal costs. The amount able to be awarded is restricted except in complex cases. In practice only a small proportion of legal costs are usually recoverable. There is no provision for recovering cost of staff time and their expenses in preparing for the prosecution.

It is important to maintain a clear record of time spent by officers investigating the incident. These non-legal costs will need to be itemised in a letter from the Accountant, Environment Division. Staff time is charged at salary rates rather than at charge out rates.

### ***Unsuccessful prosecutions***

Under the Costs in Criminal Cases Act 1967 defendants can claim costs against the Council where prosecutions have been unsuccessful. The defendant can apply for costs when a prosecution is withdrawn by the Regional Council before a hearing.

## **7.8 General Procedure Once a Decision to Prosecute is Made**

### ***Preparing charges***

Our legal counsel will prepare the appropriate charges. Usually multiple charges will be involved. Parameters include:

- Which parties to prosecute (principal, agent, employee);
- Offence committed; and
- Direct liability or vicarious liability (liability of a principal for acts of an agent or employee).

### ***Laying charges against the defendant***

Prosecutions are dealt with by the District Court. Once a decision has been made to prosecute we submit through our legal counsel a document to the District Court which states the offence the person is being charged with. This process is termed the *laying of the information*. The information must fairly inform the defendant of the substance of the offence with which they are charged. The information must be signed and witnessed by Departmental or Divisional Manager.

### ***Serving summons on the defendant***

The District Court will prepare the summons for the defendant, which consists of a copy of the information and the date and time of the hearing. The summons will be sent to the Regional Council or to our legal counsel so we can arrange to serve the summons on the defendant in a way that meets the requirement of the Act and the Summary Proceedings Act 1957.

If the Regional Council is going to serve the summons a council officer must be expressly authorised by the Court Registrar in accordance with the Summary Proceedings Act 1957. The summons can be served in person or by way of registered post. The service address must be checked against the address on the valuation/electoral roll. The method of service of a summons on the defendant is set out in section 24 of the Summary Proceedings Act 1957. An affidavit of service will then need to be prepared by the person who has carried out the service.

### ***Collation of evidence***

All material relating to the offence should be put into one file. The following documents should be collated (from all Departments):

- Correspondence (e.g., warning letters, explanations etc.)
- Telephone logs
- Field note book entries
- Witness statements
- Investigation reports (including database printouts)
- Photographs
- Chain of custody documents
- Sample analyses

Prepare a report addressed to legal counsel (so as to ensure legal privilege) which outlines all the above information. Where relevant, prepare a plan showing each of the sample points and photograph points and include this in the report to legal counsel.

### ***Summary of facts***

Once charges have been laid a summary of facts is prepared by our legal counsel. The summary of facts is a concise account of the essential elements of the offence which can be proven if necessary. This is presented to the defendant. If the defendant agrees with the summary of facts and enters a guilty plea then the summary of facts is used by the Judge for sentencing purposes. The initial objective of a summary of facts is to try and achieve a guilty plea which may involve some degree of bargaining to reach an agreed summary of facts.

### ***Guilty plea***

If a guilty plea is entered, the Regional Council's legal counsel will read out the summary of facts to the Court. The solicitor representing the defendant will then present evidence in mitigation. These submissions assist the Judge to set an appropriate penalty.

### ***Defended hearing***

If the defendant pleads not guilty then a defended hearing is held. A full brief of evidence needs to be prepared.

### ***Preparing brief of evidence***

You will need to prepare a written brief of evidence. See Appendix 4 of this manual for information on how to do this.

### ***Agreement on evidence***

Before any defended hearing, our legal counsel will endeavour to reach agreement with the defendant's counsel, as to an agreed bundle of documents. These documents can then be submitted to the Court by agreement rather than formally proven. Our legal counsel will also endeavour to reach agreement that statements of evidence can be read by the witness concerned.

### ***When evidence is not agreed upon***

If neither documents nor statements of evidence of evidence can be agreed upon then evidence will all be led orally. See Appendix 4 of this manual for further information.

### ***Circulating evidence before the Court hearing***

If prosecution is to proceed, four copies of the evidence are required. One copy each for our records, our legal counsel, the defendant and the Judge.

### ***Discovery of evidence***

Most, if not all, defendants will seek *discovery* which means that they are entitled to copies of all our documents except advice from our legal counsel (which is legally privileged). When a defendant asks to see our records you must ensure that you provide everything that they are legally entitled to. Failure to do so may result in an unsuccessful action (technical knock out).

As well as providing a full copy of the file (minus legal advice) you should also give them photocopies of hand written notes, copies of photos, printouts from databases, handwritten notes from your telephone log, field note book, lab analyses, and any video or audio tapes.

### ***Order of Court proceedings***

The normal order of proceedings is as follows:

- (1) Legal counsel acting for the Regional Council (informant) gives an opening address.
- (2) The Regional Council's evidence is presented.
  - (a) Legal counsel acting for the defendant may *cross-examine* any of the Regional Council witness's evidence. This gives the defendant's Legal counsel an opportunity to scrutinise and test the evidence of the Regional Council witness.
  - (b) Legal counsel acting for the Regional Council may *re-examine* the Regional Council witness's evidence.
- (3) Legal counsel acting for the defendant gives an opening address.
- (4) The defendant's evidence is presented.
  - (a) Legal counsel acting for the Regional Council may *cross-examine* any of the defendants witness's evidence.
  - (b) Legal counsel acting for the defendant may *re-examine* the defendants witness's evidence.
- (5) Legal counsel acting for the defendant gives a closing address.
- (6) Legal counsel acting for the Regional Council gives a closing address.


### ***Cross-examination during a Court hearing***

The purpose of cross-examination is to give legal counsel for the defendant an opportunity to scrutinise and test the evidence presented by the Regional Council. Re-examination of the Regional Council evidence by the Regional Council's legal counsel is also allowed to address any matters that have arisen during cross-examination.

See Appendix 4 of this manual for further information.

### ***Sentencing***

Refer to Chapter 8.8 of the LGNZ Resource Management Enforcement Manual for a discussion of sentencing factors relevant in ??? prosecutions taken under the Act.



## 8. Defences

Where a prosecution is being undertaken or contemplated you must be aware of the following defences available to the defendant.

### 8.1 Defences under the Act

#### *Section ??? of the Act*

Section states that for any prosecution for an offence it is not necessary to prove that the defendant intended to commit an offence – this is termed *strict liability*. However, there must be a causal connection or link between the defendant and the events giving rise to the offence.

To have a defence under section the defendant needs to prove *on the balance of probabilities* that:

- Their action was necessary to protect life, property from serious damage, or to prevent an adverse effect of the environment; and
- Their conduct was reasonable; and
- The effects have been adequately remedied or mitigated.

Or

- Their action was due to an event beyond their control, such as natural disaster, mechanical failure, or sabotage and this could not have been reasonably been foreseen or provided against and the effects have been adequately remedied or mitigated.

This defence under section is essentially a codification of the common law of due diligence.

The defendant is obliged to file a notice stating their intention to rely on the defences in section of the Act and to state the facts which support their defence within seven days after the service of the summons.

#### *Liability of principals - section ??? of the Act*

Where a principal is a natural person and is charged with an offence carried out by their agent they have a defence if they can prove that they did not know nor could reasonably be expected to have known that the offence was to be or was being committed; or that they took all reasonable steps to prevent the commission of the offence; and took all reasonable steps to remedy any effects of the act or omission giving rise to the offence.

Where a principal is a body corporate and is charged with an offence carried out by their agent they have a defence if they can prove that neither the directors nor any person concerned in the management of the body corporate knew or could reasonably be expected to have known that the offence was to be or was being committed; or took all reasonable

steps to prevent the commission of the offence; and took all reasonable steps to remedy any effects of the act or omission giving rise to the offence.

## 8.2 Other Defences

### *No case to answer*

The defence will succeed if the prosecution fails to prove any essential part of the case or the facts proved by the prosecution do not amount in law to any offence. For example, the defendant may state that they are not responsible for the offence, i.e., the offence committed by someone else.

### *Case not established beyond reasonable doubt*

The defendant may present evidence which creates doubt in the mind of the Judge and/or jury as to whether all essential elements of the charge exist. For example, a failure by the prosecution to eliminate other potential sources of contamination.

### *Defective rule in bylaws*

The defence may argue that the bylaws in the plan is invalid or *ultra vires*. This means that the rule is not within the power of the council to make or it does not have enough certainty to be valid.

### *Technical knock out*

This may occur when some area of procedure required under the Act was not followed, for instance service not effected correctly or failure to show warrant.

## Appendix 1. Legal Terms

[mostly taken from Canadian web site Duhaime's Law Dictionary [www.duhaime.org/dict-a.htm](http://www.duhaime.org/dict-a.htm)]

### **Agent**

A person who has received the power to act on behalf of another, binding that other person as if he or she were themselves making the decisions. The person who is being represented by the agent is referred to as the "principal".

### **Affidavit**

A statement which before being signed, the person signing takes an oath that the contents are, to the best of their knowledge, true. It is also signed by a notary or some other judicial officer that can administer oaths, to the effect that the person signing the affidavit was under oath when doing so. These documents carry great weight in Courts to the extent that judges frequently accept an affidavit instead of the testimony of the witness.

### **Applicant**

The person who brings a case to court, also called informant. The person being taken to court is generally called the defendant or the respondent.

### **Contempt of court**

An act of defiance of court authority or dignity. Contempt of court can be direct (swearing at a judge or violence against a court officer) or constructive (disobeying a court order). The punishment for contempt is a fine or a brief stay in prison (i.e., overnight). Section 282 of the Resource Management Act 1991 has provisions for contempt of court.

### **Cross-examination**

In trials, each party calls witnesses. Each party may also question the other's witness(es). When you ask questions of the other party's witness(es), it is called a "cross-examination" and you are allowed considerably more latitude in cross-examination than when you question your own witnesses (called an examination-in-chief). For example, you are not allowed to ask leading questions to your own witness whereas you can in cross-examination.

### **Defendant**

The person, company or organisation who defends a legal action initiated by an informant, i.e., a prosecution. The person receiving an infringement reminder notice is also known as the defendant.

### **Evidence**

Proof of fact(s) presented at a trial. The best and most common method is by oral testimony; where you have an eye-witness swear to tell the truth and to then relate to the court (or jury) their experience. Evidence is essential in convincing the judge or jury of your facts as the judge (or jury) is expected to start off with a blank slate; no preconceived idea or knowledge of the facts. So it is up to the opposing parties to prove (by providing evidence), to the satisfaction of the court (or jury), the facts needed to support their case. Besides oral testimony, an object can be deposited with the court (e.g. a signed contract).



This is sometimes called "real evidence." In other rarer cases, evidence can be circumstantial.

**Exhibit**

A document or object shown to the court as evidence. Exhibits are each given a number or letter by the court clerk as they are introduced for future reference during the trial. For example, weapons are frequently given as exhibits in criminal trials. Except with special permission of the court, exhibits are locked up in court custody until the trial is over. An example of an exhibit in a resource management prosecution is a sample of contaminated water or a photo.

**Hearsay**

Any evidence that is offered by a witness of which they do not have direct knowledge but, rather, their testimony is based on what others have said to them. For example, if Bob heard from Susan about an accident that Susan witnessed but that Bob had not, and Bob attempted to repeat Susan's story in court, it could be objected to as "hearsay". The basic rule, when testifying in court, is that you can only provide information of which you have direct knowledge. In other words, hearsay evidence is not allowed. Hearsay evidence is also referred to as "second-hand evidence" or as "rumour". You are able to tell a court what you heard, to repeat the rumour, and testify that, in fact, the story you heard was told to you, but under the hearsay rule, your testimony would not be evidence of the actual facts of the story but only that you heard those words spoken

**Indictable offence**

An offence that is more serious than those which can proceed by summary conviction. Murder is an example of a crime which would be an indictable offence.

**Interim order**

A temporary court order; intended to be of limited duration, usually just until the court has had an opportunity of hearing the full case and make a final order.

**Judicial review**

When a court decision is appealed, it is known as an "appeal". But there are many administrative agencies or tribunals which make decisions or deliver government services of one sort or another (for example, the Regional Council), the decisions of which can also be "appealed". In many cases, the "appeal" from administrative agencies is known as "judicial review" which is essentially a process where a court of law is asked to rule on the appropriateness of the administrative agency or tribunal's decision. Judicial review is a fundamental principle of administrative law. A distinctive feature of judicial review is that the "appeal" is not usually limited to errors in law but may be based on alleged errors on the part of the administrative agency on findings of fact.

**Leading question**

A question which suggests an answer; usually answerable by "yes" or "no". For example: "Did you see David at 3 p.m."? These are forbidden to ensure that the witness is not coached by their lawyer through his or her testimony. The proper form would be: "At what time did you see David?" Leading questions are only acceptable in cross-examination or where a witness is declared hostile.

**Legal privilege**

Relates to discussions or correspondence between a lawyer and the person who is being represented by the lawyer. Such discussions and documents remain confidential between the lawyer and client and do not need to be disclosed to the Court or any other third party.

**Natural justice**

A word used to refer to situations where *audi alteram partem* (the right to be heard) and *nemo iudex in parte sua* (no person may judge their own case) apply. The principles of natural justice were derived from the Romans who believed that some legal principles were "natural" or self-evident and did not require a statutory basis. These two basic legal safeguards govern all decisions by judges or government officials when they take quasi-judicial or judicial decisions.

**Prima facie**

(Latin) A legal presumption which means "on the face of it" or "at first sight". Law-makers will often use this device to establish that if a certain set of facts are proven, then another fact is established *prima facie*. For example, proof of mailing a letter is *prima facie* proof that it was received by the person to whom it was addressed and will be accepted as such by a court unless proven otherwise. Other situations may require a *prima facie* case before proceeding to another step in the judicial process so that you would have to at least prove then that at first glance, there appears to be a case.

**Principal**

An agent's master; the person for whom an agent has received instruction and to whose benefit the agent is expected to perform and make decisions.

**Respondent**

The party that "responds to" an application for an order filed in the court against them by an applicant. Also the party that "responds" to someone that has appealed a court decision (i.e., an appellant).

**Strict liability**

There is no need for the prosecution to prove intent, negligence or fault (*mens rea* = wrongful intention); as long as you can prove that the defendant committed the offence (*actus rea*). The defence of due diligence (reasonable care) is available for a strict liability offence. The defences in section 341(2) of the Resource Management Act 1991 are a codification of the common law defence of due diligence.

**Subjudice**

While a matter is under judicial consideration (before the Court) media comment on the case is prohibited because the Court is still debating the matter.

**Summary conviction offence**

In NZ, a less serious offence than indictable offences for which both the procedure and punishment tends to be less onerous. A summary offence is one that you are "summoned" and must appear before a court. A summary offence is one that is punishable by a term in prison of more than three months.

**Ultra vires**

(Latin) Without authority. An act which is beyond the powers or authority of the person or organisation which took it.

**Vicarious liability**

When a person is held responsible for the liability of another even though the person being held responsible may not have done anything wrong. This is often the case with employers who are held vicariously liable for the damages caused by their employees.

**Without prejudice**

A statements set onto a written document which qualifies the signatory as exempted from it's content to the extent that they may be interpreted as containing admissions or other interpretations which could later be used against the person signing; or as otherwise affecting any legal rights of the person signing. A lawyer will often send a letter "without prejudice" in case the letter makes admissions which could later prove inconvenient to the client.

**Witness**

The regular definition of this word is a person who perceives an event (by seeing, hearing, smelling or other sensory perception). The legal definition refers to the court-supervised recital of that sensory experience, in writing (deposition) or verbally (testimony).

## Appendix 2 – Formal Enforcement Guidelines

### Infringement Notice Guidelines

#### *May be appropriate where the incident is:*

- A first offence where the effects are serious or significant;
- 
- A breach of written warning where the effects are no more than minor.

#### *May be appropriate where:*

- You are confident that the case would stand up in court (i.e., the case can be proven beyond reasonable doubt);
- You are certain that you will not want to prosecute for the offence at a later stage;
- You consider that the use of an infringement notice is likely to be a viable deterrent;
- You believe that the fine incurred from the infringement notice is sufficient for the severity of the offence committed;
- An instant penalty is considered to be desirable;

#### *May not be appropriate where:*

- The non-compliance is ongoing and not within the alleged offender's capacity to remedy quickly;
- You consider the penalty prescribed on the notice would be inadequate for the severity of the offence;
- The evidence collected is insufficient or not robust, so that if it were to go to a court hearing it would be unlikely to succeed;
- Multiple non-compliance has occurred;

### Prosecution Guidelines

#### *May be appropriate where the incident:*

- Involves serious or significant threat to the well being of other water users and/or significant damage to property;
- 
- Was a result of deliberate action or non-action, i.e., involves intentional or reckless breach of the Bylaws;
- Was foreseeable and not prevented against;
- 
- Is a repeat serious offence.

#### *May be appropriate where:*

- A prosecution will act as a deterrent to others and/or punish the offender;
- A prosecution is in the public interest;

- Charges can be formally laid within six months of the Regional Council first becoming aware of the offence;
- Other enforcement measures have failed ( infringement notices)
- The offender is uncooperative;
- The offender has failed to act on prior requests or instructions from the Regional Council;
- Legal advice indicates that all elements of the offence can be proven beyond reasonable doubt, including causation and who is responsible for the offence.

*May not be appropriate where:*

- Defendant has a defences;
- Regional Council is not able to prove all elements of the offence beyond reasonable doubt.



## Appendix 4 - Presenting Evidence in Proceedings

### 1. Affidavits

Evidence may be given in the form of a sworn affidavit. This is a written statement that you sign in the presence of a solicitor from a firm other than that which is representing you in the Court proceedings. Where affidavit evidence is given in the Environment Court, you do not need to attend the Court unless the opposing parties wish to cross-examine you. In the District Court rules about the use of affidavits are less flexible; an affidavit can only be used in relation to particular facts and will not be allowed where a party wishes to cross-examine the person giving the evidence. The affidavit must be expressed in the first person, must include the witnesses' full name, occupation and place of residence. It must be signed and confined to matters that would be admissible if given in oral testimony.

Affidavits should:

- identify witnesses with first-hand evidence;
- qualify the Council officer as an expert;
- outline the officer's duties relevant to proceedings;
- include a site description – local street map, zoning maps, physical description;
- include relevant activity standards, if any;
- provide background material;
- outline the current situation;
- explain technical information in non-technical terms addressed to a lay person; and
- be limited to relevant information but tell the full story (don't try to be brief).

### 2. Written Brief of Evidence

In the District Court parties will have a copy of your written brief in front of them. As far as possible you should keep to the written brief. You will normally be able to correct any errors as you go and sometimes add in the occasional comment or explanation. You should however discuss any departures from your written brief of evidence with counsel before giving evidence.

Briefs of evidence should:

- Show that the offence occurred and who was responsible;
- Show that the relevant Bylaws or Maritime Rules does not authorise the activity in question (NB the Bylaw which is relevant is the plan as it was at the time of the offence, not including any subsequent amendments);
- Show that the offence occurred within the jurisdiction of a the Wellington Regional Navigation and Safety Bylaws;
- Prove ownership of the property (certified copy of title), if applicable; and
- Contain numbered photographs, keyed to a plan and put into a booklet, if photographs are to be submitted as evidence.

Briefs of evidence cannot include:

- *Hearsay* (e.g., details as to what a complainant told you when that complainant is not providing evidence); and
- Matters of opinion unless you are qualified to offer those opinions, i.e., an expert witness. An expert has formal qualifications and/or has gained experience in the area, e.g., a professional planner.

### 3. Oral Testimony

In the District Court you will usually be required to give oral (*viva voce*) evidence. Counsel will ask you questions based on your written brief of evidence prepared before the hearing (Counsel has a copy of your brief of evidence in front of them). You cannot give evidence in the District Court by reading from a prepared statement. You may, in some instances, with the consent of the Judge be able to refer to field notes or reports to refresh your memory.

In general examining counsel are not allowed to ask ‘leading questions’, i.e., those that suggest an answer. You will be instead asked ‘open ended’ questions intended to prompt you to give the relevant part of your evidence. These type of open-ended questions often begin with when, where, how, why, what etc. With this type of questioning it is important that you are familiar with your brief of evidence. It is also important to think about the purpose of the questions counsel is asking you. Usually counsel will have taken you through questions before the hearing. You must listen carefully to what is being asked and make a considered response.

### 4. Cross-examination

Witnesses may be cross-examined by opposing legal counsel. Although cross-examination is an opportunity for other parties to cast doubt upon your evidence, it also gives you an opportunity to reiterate some points. Your cross-examiner will try to give you little opportunity to further strengthen your evidence. Prior to the hearing our own legal counsel will identify the types of questions likely to be asked so that you are ready to deal with them.

Points to remember

- Think about the question and take your time. Do not answer a question unless you understand it. If you do not understand the question or it is unclear, ask for clarification.
- Avoid the temptation to enter into a debate with cross-examining counsel or Judge. Always be courteous.
- Direct, positive answers are desirable. Avoid saying “possibly” or “I think”. Answer yes or no and then qualify an answer. Never guess at answers and if you do not know or cannot remember something then say so.
- Speak clearly and slowly when answering questions; do not allow the cross-examiner to cut off your reply.
- Admit mistakes; correct and if possible explain mistakes.
- Do not back down merely to avoid confrontation; defend your opinions so long as you honestly believe they are defensible.



- Avoid emotional involvement, arrogance or defensiveness.
- Watch your body language. Do not slouch or fidget. Direct long answers to the Judge rather than the cross-examiner. Try to establish eye contact. Pause or slow down if it appears that the Judge does not understand your response.
- Ask to see documents referred to in cross-examination to make sure you positively identify the document as one you have seen previously.
- Avoid talking to your legal counsel during breaks.

Note – information for this appendix largely taken from “How to be an effective expert witness” a presentation to the NZ Planning Institute by Duncan Laing and Philip Milne (Simpson Grierson Law) on 9 October 1997.