

2013

# Enforcement Manual

Managing Noise Through Enforcement



## **Managing Noise Through Enforcement**

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This guidance note is the fifth of seven guidance notes that form the RMA Enforcement Manual.

This guidance note covers the RMA tools for managing noise, including:

### **Guidance note**

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- **Context to managing noise through enforcement**
- **The duty to adopt the best practicable option – s16**
- **Abatement notices for unreasonable noise**
- **Excessive noise, including the issuing of excessive noise directions**
- **Which procedure? pros and cons**
- **Noise rules and consent conditions**
- **Imposing penalties – infringement notices and prosecutions**

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## Context

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The primary duty relating to noise under the RMA is contained in s16. Section 16 of the RMA requires that noise is kept to a reasonable level by adopting the best practicable option. The duty applies to every person who occupies or carries out an activity within New Zealand's territorial boundaries, including its coastal waters and the airspace above the land and water.

District plans (refer s31(1)(d) of the RMA) and regional plans (including regional coastal plans) (refer s30(1)(d)(vi) of the RMA) may set out rules controlling noise, whether at source or receptor. An example of noise controlled at source is noise being **emitted** from a factory as measured at the site boundary. An example of noise controlled at receptor is **emission** controls that require acoustic design of living apartments in commercial centres, to reduce the level of noise to specific levels as received by occupants.

Noise emission controls relating to aircraft are limited to those prescribed by either a national environmental standard or set by a local authority in relation to the use of airports, not to overflying aircraft (see s9(5) of the RMA).

Temporary noise issues can be dealt with efficiently under s326 and s327 of the RMA, which provide for intervention in the case of excessive noise.

This guidance note describes the different mechanisms of controlling noise, helps you understand their differences and describes when one mechanism may be more appropriate than another.

## **Duty to adopt best practicable option - s16 of the RMA**

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### **When does the s16 duty apply?**

Section 16 of the RMA imposes a duty on occupiers of land and users of the coastal marine area, to ensure that noise levels are kept at a reasonable level by adopting the best practicable option, as defined in [s2 of the RMA](#). Local authorities can also set noise emission standards in plans and resource consents.

The s16 duty and any applicable rules for noise are related. Generally if the noise exceeds the standards set by the rules, it will be treated as unreasonable noise. However, if a person complies with a national environmental standard, rule or applicable resource consent condition, the duty in s16 of the RMA is not necessarily met. The occupier may still need to do more if the noise is unreasonable and a practicable option is available to reduce it. This was illustrated in *Ngataringa Bay 2000 Inc v AG & North Shore CC A16/94* where the Court stated "even sophisticated district noise control rules cannot fully be responsive to local circumstances to ensure noise emissions do not exceed reasonable levels".

Section 16 sits in Part 3 ("Duties and restrictions") of the RMA. It imposes a general duty on all occupiers of land to control the emission of noise from that land. It sets out the supervening policy of the RMA in relation to noise and could be called upon notwithstanding that noise emissions comply with the noise control limits of a District Plan. Whether the section focuses on the duty to adopt the best practicable option or not, the clear intent of the section is to limit emissions of noise from land to reasonable levels (*Empire Entertainment Ltd v Auckland City Council [2010] NZRMA 525 (HC)*).

### **Enforcement of the s16 duty - general**

There are three options for enforcement of the s16 duty under the RMA:

- application for an enforcement order
- application for an interim enforcement order
- issue of an abatement notice.

These options are not mutually exclusive and all may be used to enforce general duties under s16.

## Abatement notice for unreasonable noise

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### Application and use of abatement notice

An abatement notice can be issued under s322(1)(c) of the RMA to require an occupier of any land or a person carrying out any activity in, on, under, or over a water body or the water within the coastal marine area, who is contravening s16 of the RMA to adopt the best practicable option to ensure noise emission from that land or water does not exceed a reasonable level.

The reasons for an abatement notice, and the actions required, must be stated with sufficient precision to enable the recipient to appeal it. This is because the recipient becomes liable for prosecution if they fail to comply. For example, the Planning Tribunal in *Sykes and Three Bros Ltd v Rotorua District Council* [1992] 1 NZRMA 233 made several points about the detail required in abatement notices for noise. These include:

- The Council had written to the recipient in January 1992, giving details of noise complaints. The Tribunal held that the reasons must be given in the notice, not in a letter.
- The recipient was referred to Appendix 2 of the District Plan, but should have been referred to the particular part of Appendix 2 that was relevant.
- The notice should state where and how the sound levels were measured.
- The notice should take care to refer to the correct noise standards (the 1977 standards cited in the notice were no longer current).
- Precise details of the action to be taken to comply with the abatement notice must be given (only general options were provided in this case).

The importance of the abatement notice being accurate and specific was also demonstrated in [Wilhelmsen v Dunedin City Council \[1992\] C059/92](#). Wilhelmsen successfully appealed on grounds including:

- The notice required the adoption of the best practicable option, but did not say what the best practicable option was.
- An abatement notice must set out what the recipient is required to do (the notice used the words "may require you").
- The notice referred to excessive noise (managed under s326 excessive noise directions, not an abatement notice).

### Action in case of default against abatement notice

If the recipient of an abatement notice fails to comply with it, an enforcement officer may take reasonable steps to reduce the noise to a reasonable level. When accompanied by a constable, the enforcement officer may seize and impound the noise source (refer s323 of the RMA).

Where equipment is seized and impounded, the owner of the property or person from whom it was seized may apply to the local authority (or Police), at any time, to have the



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property returned (refer s336 of the RMA). The local authority or Police shall arrange for the return of the property if:

- they are satisfied the return will not result in the emission of noise beyond a reasonable level; and
- the applicant has paid all costs incurred by the local authority or Police in seizing, transporting and storing the property.

If the local authority or Police refuses to return the property, then the owner or person from whom it was seized, may apply to the Environment Court within 6 months of the date of the seizure to order the return of the property (s325 RMA). The Court may grant or refuse any such applications.

Property may be disposed of by the authorities if not claimed within 6 months of seizure, or if an application to the Court is not made within 6 months of seizure.



## Excessive noise

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### Definition

Excessive noise is dealt with in sections 326, 327 and 328 of the RMA. [Section 326 defines excessive noise](#). Key features of the definition in s326 of the RMA are:

- It applies only to noise under human control (including that from a musical instrument, electrical appliance, machine, or explosion or vibration).
- It can apply to noise from a person or group or persons (such as people in the outdoor courtyard of a bar).
- The noise has to be of such a nature as to unreasonably interfere with the peace, comfort and convenience of any person (other than the person responsible for it).
- It does not include noise from aircraft in flight (or immediately before or after flight), vehicles driven on roads, or trains (other than when being tested, maintained, loaded/unloaded).

### Excessive noise direction - s327 of the RMA

An enforcement officer (or constable) may issue an excessive noise direction on receipt of a complaint after investigating the noise and forming an opinion the noise is excessive. An excessive noise direction directs the occupier of the place from which the sound is being emitted, or any other person who appears to be responsible for causing the excessive noise, to immediately reduce the noise to a reasonable level.

The direction may be written or oral. The direction prohibits emissions of excessive noise for a maximum period of 72 hours or such shorter period as the enforcement officer (constable) specifies. This period of compliance applies from the time the direction is given.

Section 327 powers are in addition to powers under sections 322 to 325 of the RMA, to issue abatement notices relating to unreasonable noise and to seek an enforcement order under s316.

### Duty to comply with direction/action in case of default - s328

The recipient of an excessive noise direction must immediately comply. In addition, everyone who knows, or ought to know, that a direction under s327 of the RMA has been given in respect of a particular place, must comply with the direction as if he/she were the recipient, while in, or in the vicinity of, that place.

Section 328(3) of the RMA provides that, if the direction is not complied with, an enforcement officer accompanied by a constable (or a constable alone) may enter a property and take any of the following actions in relation to any instrument, appliance, vehicle, aircraft, train or machine that is producing or contributing to the excessive noise:

- seize it and remove from the place
- render it inoperable by the removal of any part from
- lock it or seal it so as to make unusable.



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Once seized, the offender can apply for the return of property (refer section 336 RMA).

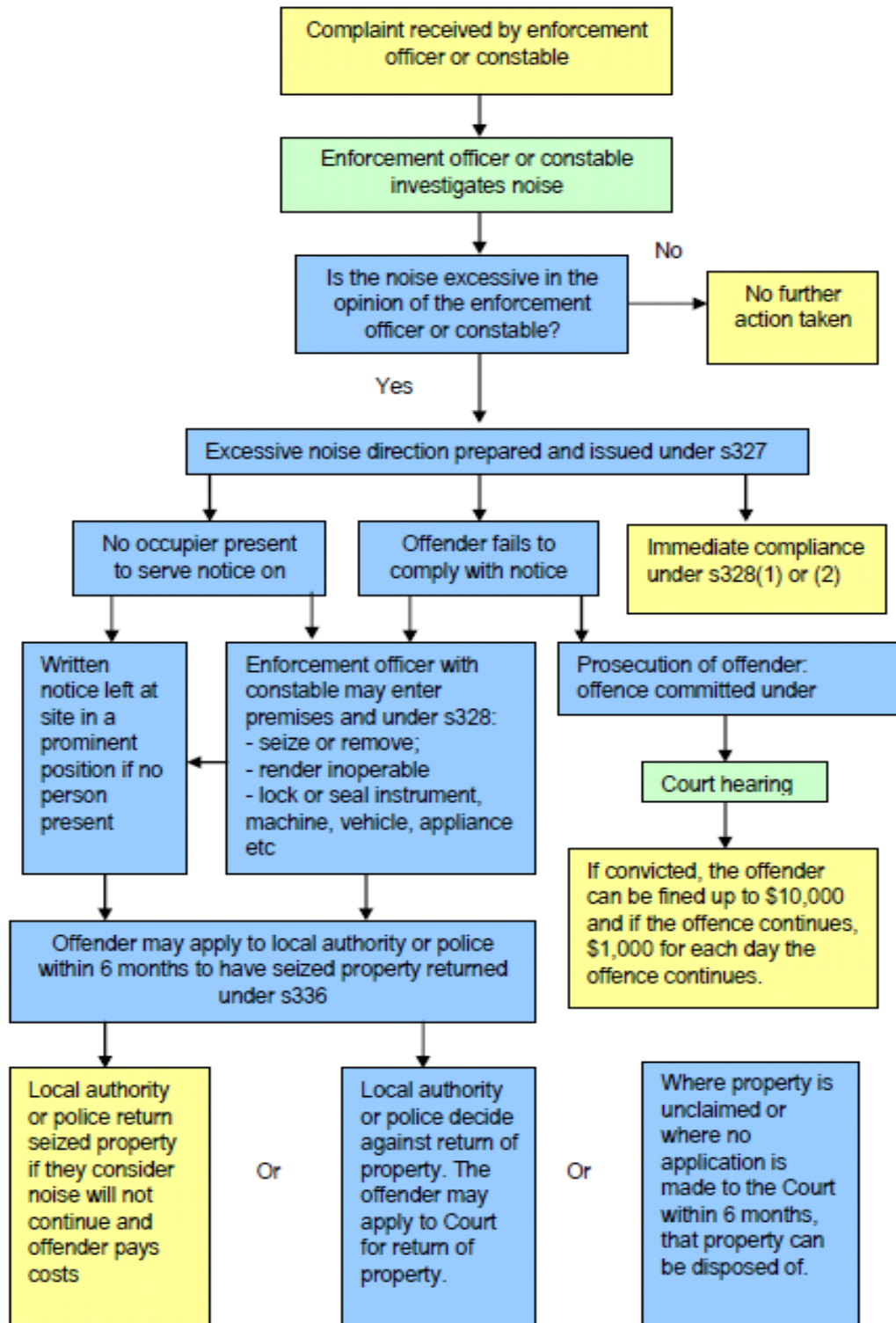
In addition to the above enforcement options for when an excessive noise direction is not complied with, s343C of the RMA allows an enforcement officer to serve an infringement notice. Infringement notices carry a fine of \$500 for offences concerning the contravention of an excessive noise direction (see [Schedule 1 of the Resource Management \(Infringement Offences\) Regulations 1999](#)).

If an excessive noise direction cannot be given because there is no-one occupying the place from which the sound is being emitted, or the occupier cannot be identified, and there is no other person who appears to be responsible, an enforcement officer accompanied by a constable may enter the premises and take one of the above actions to stop the excessive noise. A written excessive noise direction must be left in a prominent position together with a written notice stating:

- the date and time of entry
- the name of the person in charge of the entry
- the actions taken to ensure compliance with the excessive noise direction
- the address of the office at which enquiries may be made in relation to the entry.

Any enforcement officer exercising any power under s328 of the RMA may use such assistance as is reasonably necessary. These steps and options for controlling and enforcing excessive noise are illustrated in the diagram below.







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The benefits of having a constable present when equipment needs to be seized were highlighted in [Bazley v Police \[1998\] AP14/98](#) (due to Bazley and Fowler being convicted of assault). Importantly in this case in relation to process and powers of the Police, this Court noted:

- A constable who is acting on the request of an enforcement officer may receive a complaint, investigate the complaint, and if they are of the opinion the noise is excessive may then issue an excessive noise direction.
- A constable cannot issue an abatement notice.



### Which procedures? Pros and cons

The difference between the powers and procedures available under the RMA for managing noise should be understood in terms of the outcomes sought, rather than the type or nature of the noise.

Nature of noise	Outcome sought	Tool
Noise from an on-going activity	Having operators consider methods that will best ensure reasonable levels are achieved over the long term.	Section 16 - Best practicable option This requires the person responsible to consider alternatives, but also allows the local authority to educate the offender and negotiate the best possible outcomes in the longer term.
Short-term noise	Immediate cessation or reduction of the noise to a reasonable level.	Section 327 - Excessive noise direction.  This direction will last 72 hours. If the noise does not stop, the enforcement officer, accompanied by a constable, can physically intervene to stop the noise.

When section 16 is applied the interaction between the operator and the local authority may result in an unopposed abatement notice or enforcement order. This will provide a level of assurance for the public that action is being taken, and a practical and effective solution for the operator.

An abatement notice issued under s322(1)(c) of the RMA is usually the most effective and efficient enforcement procedure for contravention of s16. In practice, however, a local authority should be aware that enforcing the s16 duty (and associated directives) may be quite time-consuming.

Identifying and implementing the 'best practicable option' may take months to implement because of the requirements of design, sourcing new equipment and skills, testing the solution, and building it. Alternatively, relocating the activity to an environment where the noise will have less impact may also take considerable time.

If the operator is slow to cooperate, the local authority may feel compelled to seek an enforcement order. However, this process can also be slow since a hearing may take several months to convene, unless the matter is urgent and justifies an interim application.

Section 327 of the RMA is, at best, a stop-gap measure in situations of on-going activity producing unreasonable noise, but it is ideally suited to temporary noise issues. It has been used effectively to secure immediate relief for people seriously affected by noise, such as hotel residents disturbed by rock-breakers used in demolition on an adjoining site. Alternative methodologies for reducing unreasonable noise for the duration of the works can then be discussed and agreed.

Penalties can also be imposed in relation to noise, by way of an environmental infringement notice or summary proceedings (prosecution). For more guidance on use of penalties for noise, see below.

## Noise rules and consent conditions

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[Abatement notices](#), applications for [enforcement orders](#), [interim enforcement orders](#) and [infringement notices](#) can be used to enforce noise emission controls within a national environmental standard, a plan and in resource consent conditions. It is important to check the controls, rules or consent conditions are enforceable. While national environmental standard controls plan rules and consent conditions are often clear and concise (and can be enforced by law), some controls/rules/conditions have minor omissions or wording problems that can lead to difficulties.

Noise levels are typically determined by taking samples and arranging the results in order from loudest to quietest. The number that is 10% below the loudest measured level becomes the L10, often called the average maximum. Similarly, the L95, often called background level, is 95% below the loudest measured level (i.e. nearly the quietest).

Sound energy is measured in decibels (dB) with most measurements being undertaken on the A-weighted (dBA) scale as this most closely matches the human ear. The scale is logarithmic rather than linear so noise increases tenfold for every additional one decibel unit recorded.

Guidance on noise management, including the preparation of plan rules for controlling noise and the setting of conditions can be found in the guidance notes on [noise in mixed-use environments](#) and [land transport noise](#).



## Imposing penalties - infringement notices and prosecution

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Infringement notices can be issued for one or more breaches of district or regional plan rules in relation to noise (breach of s9 of the RMA is an offence under s338(1) and an infringement offence). They can also be issued for contravening an excessive noise direction under s327, and for breach of an abatement notice for unreasonable noise under s322(1)(c). As prescribed under the Resource Management (Infringement Offences) Regulations 1999, the penalties are:

- \$300 - for contravening s9 offences
- \$500 - contravening an excessive noise direction
- \$750 - contravening an abatement notice.

The amounts charged are relatively small and may not be a sufficient deterrent for some offenders.

On prosecution, the maximum penalty for a breach of noise rules (s9) or of an enforcement order relating to noise by a natural person is two years imprisonment or a \$300,000 fine. In the case of other persons, the maximum penalty is a \$600,000 fine. By comparison, the maximum penalty for breach of an excessive noise direction under s327 or an abatement notice for unreasonable noise under s322(1)(c) is \$10,000.

Enforcement officers should consider this significant difference in penalties when deciding what enforcement tool to use. For example, it might be more appropriate to apply for an enforcement order for more serious and on-going emissions of noise, including actions by a potential defendant that are deliberate, reckless or negligent. Where the offence involves a breach of a resource consent, the Court may, instead of or in addition to the maximum penalties above, make an order that requires a consent authority to review a resource consent under s128(2) of the RMA.

## Good practice examples

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### Scenario 1: Noise from a nightclub

The council receives a number of complaints between 11 pm and midnight about noise from the Shady Night Club. Enforcement officer Harry investigates together with a colleague. The view of both enforcement officers is that the noise is excessive.

Q1: What is the appropriate enforcement mechanism?

An excessive noise direction should be issued. This should be given to the person in charge of the Shady Night Club. If the recipient fails to comply immediately, Harry should arrange for a police constable to accompany both enforcement officers onto the nightclub premises. Pursuant to s328(3) of the RMA, they can seize and remove from the nightclub, or render inoperable by the removal of any part from, or lock or seal so as to make unusable, any instrument or machine that is producing or contributing to the excessive noise.

## Relevant case law

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For a list of relevant case law refer to the [Enforcement Manual case law summaries](#) when appropriate.

