

2013

Enforcement Manual

Application for a declaration



Application for a declaration

This is the second of seven guidance notes making up the RMA Enforcement Manual. It covers declarations made under the Resource Management Act 1991 (RMA) for enforcement purposes.

Declarations are a means of getting judicial direction on a matter that is in dispute between the local authority and another person.

Guidance note

Declarations in Context

Scope of a Declaration

When Applying for a Declaration may be Appropriate

How to Apply for a Declaration

Onus of Proof and Standard of Proof

Declaration as to Compliance with Section 17 Duty

To access the guidance note scroll down.

Context

Declarations are not an enforcement tool in the same sense as an abatement notice or prosecution, as they neither require an outcome nor penalise any actions taken by an offender. Declarations may, however, clarify whether any particular action or incident breaches, or complies with a plan rule, resource consent condition or regulation. They provide a local authority greater certainty on whether or not enforcement action is warranted.

Declarations are a broad discretionary decision by the Environment Court. There are no statutory statements of principle to guide the decision. The Court of Appeal has found that the discretion should be exercised liberally, so that even if the Environment Court finds the suggested formulation of the declaration too precise or restrictive, appropriate relief might be given (for example, by endeavouring to identify alternative wording).

It is not always necessary to seek a declaration separately from any enforcement proceedings. The Court can determine most matters as part of the enforcement proceedings.

Scope of declarations

The permissible scope of a declaration is set out in s310 of the RMA which reads:

310. Scope and effect of declaration

A declaration may declare -

(a) the existence or extent of any function, power, right, or duty under this Act, including (but, except as expressly provided, without limitation) -

- i. *any duty imposed by s32 (other than any duty in relation to a plan or proposed plan or any provision of a plan or proposed plan); and*
- ii. *any duty imposed by section 55; or*

(b) whether, contrary to section 62(3), a provision or proposed provision of a regional policy statement -

- i. *does not, or is not likely to, give effect to a provision or proposed provision of a national policy statement or New Zealand coastal policy statement; or*
- ii. *is, or is likely to be, inconsistent with a water conservation order; or*

(ba) whether a provision or proposed provision of a regional plan, -

- i. *contrary to section 67(3), does not, or is not likely to, give effect to a provision or proposed provision of a national policy statement, New Zealand coastal policy statement, or regional policy statement for the region; or*



THE RMA QUALITY PLANNING RESOURCE

- ii. contrary to section 67(4), is, or is likely to be, inconsistent with a water conservation order, any other regional plan for the region, or a determination or reservation of the chief executive of the Ministry of Fisheries made under section 186E of the Fisheries Act 1996; or
- (bb) whether a provision or proposed provision of a district plan, -
- i. contrary to section 75(3), does not, or is not likely to, give effect to a provision or proposed provision of a national policy statement, New Zealand coastal policy statement, or regional policy statement; or
 - ii. contrary to section 75(4), is, or is likely to be, inconsistent with a water conservation order or a regional plan for any matter specified in section 30(1); or
- (c) whether or not an act or omission, or a proposed act or omission, contravenes or is likely to contravene this Act, regulations made under this Act, or a rule in a plan or proposed plan, a requirement for a designation or for a heritage order, or a resource consent; or
- (d) whether or not an act or omission, or a proposed act or omission, is a permitted activity, controlled activity, discretionary activity, non-complying activity, or prohibited activity, or breaches section 10 (certain activities protected) or section 20A (certain existing lawful activities allowed); or
- (e) the point at which the landward boundary of the coastal marine area crosses any river; or
- (f) whether or not a territorial authority has made and is continuing to make substantial progress or effort towards giving effect to a designation as required by section 184A; or
- (g) the matters provided for in section 379 (provisions deemed to be plans or rules in plans); or
- (h) any other issue or matter relating to the interpretation, administration, and enforcement of this Act, except for an issue as to whether any of sections 95 to 95G have been, or will be contravened.*

Note that the Resource Management Amendment Act 2013 contains changes to s32 of the Act that come into force on 3 December 2013 (three months after Royal assent). These changes include alterations to s310(a)(i). Section 310 (a)(i) will, from that date, state “any duty under this Act to prepare and have particular regard to an evaluation report or to undertake and have particular regard to a further evaluation or or 32AA (other than any duty in relation to a plan or proposed plan or any provision of a plan or proposed plan); and”

Refer to the Ministry for the Environment’s [Factsheet 6 – Section 32 of the RMA](#) for further information.



When is a declaration appropriate?

In the enforcement context, an application for a declaration may be helpful when:

- there is a need to seek clarification, or an interpretation, of a legal matter without going so far as to prosecute or apply for an enforcement through the courts
- wherever there is doubt about the compliance status of an activity.

In some cases the declaration may be enough in itself to encourage an errant party to comply, or may otherwise remove the need for further enforcement action.

Declarations can be sought on a wide range of matters, including in regard to Regulations under the RMA, including National Environmental Standards. However, they cannot be used as a 'back door' way of challenging the non-notification of a resource consent application.

Applying for a declaration

Who can apply?

Section 311 of the RMA provides that subject to subsections (2) and (3), any person may at any time apply for a declaration:

- subsection (2) provides that a declaration that a person is failing to adopt the best practicable option, may be sought only by the Minister of Conservation or the consent authority
- subsection (3) provides that a declaration as to the location of the boundary of the coastal marine area, may be sought only by the Minister of Conservation, a local authority or the consent authority.

Forms

An application for a declaration must be in the form prescribed by the regulations of the [Resource Management \(Forms, Fees, and Procedure\) Regulations 2003](#). The proceedings may be heard by an Environment Court Judge sitting alone, or with commissioners. Section 313 of the RMA permits the Court to decline the declaration sought or to make it "with or without modification". Accordingly, a declaration may be in different wording than that originally proposed by the applicant.

Giving notice to affected parties

Section 312 of the RMA requires that the applicant for a declaration serve notice of the application on every person directly affected by the application, within five working days after the application is made to the Environment Court.

Court 's discretion to grant a declaration - s313 of the RMA

Section 313 of the RMA gives an Environment Judge sitting alone or the Environment Court discretion as to whether to grant a declaration. There have been examples of the Court exercising its discretion to decline and application. However, the High Court has



THE RMA QUALITY PLANNING RESOURCE

also held that a resultant declaration being precise and restrictive was not a sufficient reason in itself to decline to make any declaration at all. See for example [Wellington Regional Council v Burrell Demolition Ltd \[2000\] W98/00, \[2001\] HC AP25/01, and \[2002\] CA 161/01.](#)

Onus of proof and standard of proof

The onus of proof for a declaration is on the applicant. There is no obligation on the respondent (if any) to give evidence. The courts have stated that the standard of proof is the balance of probabilities.

Declaration as to compliance with s17 duty

In a number of cases, declarations have been made as to compliance with the s17 duty under the RMA (to avoid, remedy or mitigate adverse effects from a person's activity). The Courts have held that the overall effect of s310(a) and s313 of the RMA is that the Court has the power to make a declaration as to the extent of a land owner's (or other person's) duty under s17(1) of the RMA.

Relevant case law

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

