

2013

Enforcement Manual

Emergency Powers



Emergency Powers

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

Guidance note

An introduction to emergency works

The context for the use of emergency powers

Emergency powers under other legislation

Which procedures and legislation to use

Emergency works and resource consents

Powers and procedures – s330

Powers of network utility operators and a person in charge of a public work

Determining whether to take action under s330

Requirement to advise consent authority – ss330A and 330B

Being prepared for an emergency works situation under s330

Compensation for emergency works – s331

Enforcement in relation to emergency powers

Defences for persons not authorised under s330(1) of the RMA

Good Practice Examples

To access the guidance note scroll down.

Introduction

The emergency works provisions under Part 12 of the RMA are an important means to respond to emergencies. Before they are used, the nature of the emergency powers under the RMA and their relationship to other legislative emergency powers, such as those in the Civil Defence and Emergency Act 2002 (CDEMA), needs to be understood. The RMA emergency works provisions temporarily override the resource consent requirements under sections 9, 12, 13, 14, 15 of the RMA during times of emergency. The RMA emergency powers are not general powers, and are limited to specific people or bodies (authorised persons).

The emergency works provisions in the RMA enable authorised persons to undertake activities that might otherwise contravene the RMA and require resource consent in advance. They can only be used in emergency situations when there is a need for immediate intervention to prevent or remedy adverse environmental effects or prevent loss of life, injury or serious damage to property. They are typically used where other approval or enforcement mechanisms under the RMA would be inappropriate, or would not prevent damage in a timely manner.

The key emergency provisions are sections 330, 330A, 330B and 331 of the RMA. These provisions also have a relationship to s18 and to the statutory defences for prosecution under s341 of the RMA.

Emergency powers have been used in a wide and varied manner. Examples include:

- diverting water without resource consent to dilute a milk discharge
- earthworks to enable temporary repairs to damaged stop-banks
- cutting a channel from a lake to release floodwaters to the sea
- removing protected trees that are in danger of falling on power lines.



Context for the use of emergency powers

In an emergency or disaster scenario, local and central government, emergency services and other community organisations carry many responsibilities. The duties and obligations of emergency services and civil defence groups are largely contained within their respective governing enactments.

However, there are some overlaps in terms of the roles of the various bodies that assist in preventing, mitigating and remedying disaster events. An [emergency](#) situation under the RMA may also qualify for emergency intervention under other legislation.

There are three phases to any emergency:

1. The pre-emergency ('risk reduction') phase. In this phase the obligations for emergency works rest largely with local and central government, network utility operators, lifeline utilities and other bodies in charge of public works. The imperative is to undertake the necessary works to prevent an emergency or dangerous situation from arising. As time pressures are less significant during this phase, more extensive consultation can take place on the options available. It will be rare for this phase to fall within the scope of the emergency powers under s330 of the RMA.
2. The second phase is during the emergency situation (often referred to as the 'response phase'). If widespread, a state of 'national emergency' or 'local emergency' will be declared. During this phase, time pressures will be at their greatest and the use of powers under s330 of the RMA will be more justifiable. The emphasis will be to remove the on-going causes and prevent further damage of the emergency on people and property.
3. The third phase is the post-emergency clean-up and recovery period. This will be dealt with by various persons, including the Recovery Coordinator under the Civil Defence and Emergency Act, governmental bodies, and other responsible bodies. In this situation, time frames may be less restricted and therefore the usual resource consent procedures could be complied with..

These phases form three of the 'four Rs' of emergency risk management; the fourth R is **readiness**: the development of systems and capabilities before an emergency happens.

The emergency works provisions of the RMA are primarily aimed at assisting the response to emergency situations.

A civil defence response will not always be the most appropriate response to emergency situations. For example, most chemical spills are not of such a scale as to justify civil defence measures. It is generally only in the worst-case scenarios that the ability to exercise powers and make emergency regulations (e.g. declaring a civil defence emergency) under the Civil Defence and Emergency Act 2002 will be required.

It is important to consider how local authority and civil defence personnel will work together in a state of emergency. Civil defence personnel may not have the necessary expertise to deal with specific pollution and hazardous substances incidents. However, civil defence personnel would still be concerned with the impact of the emergency on the public (for example rescue, handling of casualties, transportation, providing supplies, communication and information). Where available, specialist emergency service staff are likely to tackle the actual hazard. Particularly in smaller centres and in rural locations, this role may fall on council staff, the Police and emergency service workers.

Emergency powers under other legislation

Which procedures and legislation to use?

There are a variety of provisions providing emergency powers in other legislation that may be considered instead of, or in addition to, the uptake of the RMA provisions. This includes provisions under the Civil Defence and Emergency Management Act 2002, Biosecurity Act 1993, Public Works Act and Hazardous Substances and New Organisms Act 1996. Therefore it is important that authorised persons consider whether using the RMA powers is the most appropriate option in the circumstances before starting emergency works. Many of the provisions in other legislation are in place to achieve different purposes and confer powers that may be more or less general than what is required in the circumstances.

Use of s330 of the RMA emergency works provisions (when a resource consent would usually be required) is generally limited to exceptional circumstances, because it means the works:

- are not subject to due process and assessment under the relevant regional or district plan and RMA beforehand; and
- as such, the ability to ensure effective mitigation occurs afterwards by imposing consent conditions may be quite limited.

The power under s330(2) takes precedence over private property rights and other legal constraints, as it allows entry to any place in order to get to the cause of harmful effects. It does not matter whether the remedial activity would usually require a resource consent. This power can be used instead of interim enforcement orders where there are adverse effects that require immediate intervention and the cause is located on private property (or any other place where entry is ordinarily restricted). However, if there is time to get an interim enforcement order, it is good practice to proceed with that option. This is because the exercise of the s330(2) power may be viewed by private landowners as an undue infringement of their private property rights where other options are available.



Emergency works and resource consents

The provisions of sections 9 and 12-15 of the RMA relate to restrictions on the use of land and water and discharges into the environment. These provisions do not apply to any activity undertaken by any authorised person acting under either s330 or s330B of the RMA to remove the cause of, or mitigate any actual or likely adverse effect of, the emergency.

Effectively, this means that the need to obtain a resource consent before carrying out work is overridden. However, ss330A(2) and 330B(3) of the RMA require the authorised person to subsequently obtain a resource consent for any emergency work undertaken, if one would ordinarily have been required.

Authorised persons

Section 330 of the RMA confers powers only on certain people or bodies (i.e, authorised persons). They are:

- any person with financial responsibility for any public work (this could include Ministers of the Crown, or Chief Executives of Government Departments, as owners or operators of public works)
- network utility operators who are approved as a requiring authorities under s167
- lifeline utilities who provide any service or system within the meaning of section 4 of the Civil Defence Emergency Management Act
- local or consent authorities with jurisdiction over the resource or area affected by the emergency or with financial responsibility for the affected public work.

Lifeline utilities, and the services or systems they provide, are defined by section 4 of the Civil Defence Emergency Management Act. The specific entities and types of business include:

- Airport and port companies
- Radio New Zealand and Television New Zealand
- Gas producers, suppliers and distributors (including bottled gas)
- Electricity generators and distributors
- Water suppliers and distributors
- Wastewater, sewerage and stormwater network providers
- Telecommunications network providers
- Road network providers
- Petroleum product producers, processors and distributors
- Rail network providers

In a 'state of emergency' as defined under the Civil Defence Emergency Management Act, s330B of the RMA provides for the following bodies to also undertake emergency works without the need to first obtain any necessary resource consents:

- [A civil defence and emergency management group](#)
- [A controller, a member of the Police, or persons acting under delegated authority](#)



THE RMA QUALITY PLANNING RESOURCE

Sections 330 and 330B of the RMA both provide that the emergency works provisions may be relied on by persons acting on behalf of any person, authority, network utility operator or lifeline utility otherwise authorised to undertake emergency works.

No other member of the public, or organisation, is able to use emergency powers unless made an agent by an authorised person or organisation, via a lawful transfer of powers or delegation. This was reinforced by the Environment Court in [Gisborne District Council and Minister of Conservation v Falkner and Ors \[1994\] A082/94](#). However, there is a defence to prosecution under s341(1) of the RMA which mirrors the section 330 powers.



Powers and Procedures – s330 of the RMA

Purpose of the powers

Section 330 of the RMA contains the powers that apply to local and consent authorities, network utility operators, lifeline utilities, and persons in charge of public works, including persons acting on their behalf (who have been delegated authority).

Sections 330(1)(a), 330(1)(c) and 330(1)(ca) cover all public works, network utility operations (whether or not they are the subject of a designation in accordance with Part 8 of the RMA), and lifeline utilities. The definition of public work is the same as in the Public Works Act 1981. This definition is wide-ranging, including works undertaken by both local authorities and Ministers of the Crown. It also includes public reserves and national park purposes. The intention of this provision is to secure the important public or economic functions (and benefits) of public works and utility operations from the adverse environmental effects of emergency events.

Section 330(1)(b) relates to any natural or physical resource or area for which a consent authority has jurisdiction. This provision is less specific and has wider potential use for when any adverse effect needs immediate intervention. Practically, however, a consent authority is only likely to use emergency powers when the physical assets within its jurisdiction are under significant threat. This power does not extend to network utility operators, lifeline utilities, or other persons in charge of public works.

Section 330(2) provides a consent authority with wider powers than is usual for network utility operators, lifeline utilities, and persons in charge of public works, in respect of entry onto private property.

Powers of a local or consent authority

Section 330 of the RMA authorises consent authorities to undertake emergency works on both public and private property where the emergency relates to any:

- public work for which it has financial responsibility
- natural and physical resource or area over which it has jurisdiction under the RMA.

Under s330(2) of the RMA a local or consent authority may:

- enter any place (includes land, structures or buildings - which include homes when accompanied by a constable)
- take action to remove the cause of the emergency, or mitigate any actual or likely adverse effect thereof
- direct the occupier to take such action.

Section 330(2) of the RMA therefore allows a local or consent authority to override property rights that would ordinarily restrict its entry and actions. The most common example is for private property, but by virtue of the words 'any place' it might also include a conservation estate, or government installation to which a person does not have free access.



THE RMA QUALITY PLANNING RESOURCE

Anyone deciding whether to exercise powers under s330(2) of the RMA should note that the choice between removing the cause of the emergency, as opposed to mitigating effects, will depend on the circumstances. One needs to bear in mind the need to act responsibly, having regard to the public interest considerations and the private rights of the individual. Whichever objective is appropriate, the action must conform to that which is "immediately necessary and sufficient" for the relevant purpose.



Powers of network utility operators and a person in charge of a public work

A network utility operator is authorised to undertake emergency works in regard to any project or work or network utility operation, for which it is the approved requiring authority under s167 of the RMA. Emergency works can also be undertaken by a person who operates or provides a lifeline utility service or system, as defined by section 4 of the Civil Defence Emergency Management Act.

Unlike local and consent authorities, network utility operators and lifeline utilities do not have a right of entry to private property to carry out emergency works under the RMA although such rights may be provided under other legislation (e.g. the Telecommunications Act 2001).

Alternatively, the operator may have an existing easement or pre-negotiated agreement allowing for emergency access. Where entry was not otherwise legally available, a local or consent authority may rely on s330(2) of the RMA to remove or mitigate the cause of the emergency involving the projects or works of network utility operators or lifeline utilities.

Network operators and lifeline utilities should ensure that relevant staff are aware of the form of legal right or agreement for emergency access, and of the company's procedures for applying them.

Any person with financial responsibility for a public work may undertake emergency works under s330 of the RMA in respect of that public work. Such persons could include a Minister of the Crown or the Chief Executive of a government agency. For example, the Minister of Education could invoke s330 of the RMA for remedial works resulting from an emergency where a school is affected.

Delegations under s330 of the RMA

A local authority may:

- transfer functions, powers and duties to another public authority under s33 of the RMA and
- delegate functions, powers and duties to employees under s34A of the RMA.

Under Part 4 of the RMA, the Minister of Conservation is provided with certain powers of local authorities. In certain cases, these may provide for the transfer and delegations of functions, powers and duties under ss33 and 34A of the RMA.

When delegating any s330 powers to employees, a local authority should both:

- ensure that staff who will be required to form an opinion about whether to undertake emergency works have clear authorisation and that necessary delegations are in place beforehand; and
- set in place procedures whereby staff who may identify and fix emergency related problems, but are not otherwise directly responsible for them, understand the need for clear instruction from an authorised person.

Although there are no specific provisions in the RMA for network utility, lifeline utility, and public works operators to delegate any functions or powers to other persons or bodies, s330 of the RMA contemplates that persons may act on behalf of those bodies.

To ensure the provisions are being used appropriately network utility operators, lifeline utilities, and persons with financial responsibility for public works, should check and, as necessary, seek legal advice as to whether other parties may be authorised to undertake emergency works on their behalf.

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Determining whether to take action under s330 of the RMA

Exercising s330 powers requires that the authorised persons form an opinion on whether an emergency situation as defined in sections 330(1)(d)-(f) of the RMA exists before undertaking any emergency works. Section 330 does not require that anyone else is first advised, or that approval by anyone else is first obtained. However, there is a requirement to advise the appropriate consent authority after the event.

The [brief checklist for action pursuant to s330](#) provides a good practice example of the steps a local authority should follow, in determining whether to undertake emergency works under s330 of the RMA.

The document 'detailed steps by party invoking s330 ' provides a more comprehensive series of steps for any authorised person to follow to determine whether to undertake emergency works under s330.

There are a number of important matters for authorised persons to consider, when determining whether to take action under s330. Section 330 applies where the authorised person is of the opinion that any matter over which it has jurisdiction is [affected or likely to be affected](#) by either:

- an adverse effect on the environment which requires immediate preventative or remedial measures
- any [sudden event](#) causing or likely to cause loss of life, injury, or serious damage to property.

The emergency works powers apply whether or not the adverse effect or sudden event was foreseeable. For example, removing a growing tree that one day might prove a hazard because it will interfere with power lines, does not meet the test for emergency works. This is because the event is not sudden nor does it require immediate intervention. But it could, if the tree falling onto lines was imminent.

The use of s330(2) also requires a local or consent authority to form a reasonable opinion when entering onto private property, and undertaking such action as is immediately [necessary](#) and sufficient to avert the particular issue. This is an important test and any authorised persons should, where possible, consult with the local or consent authority before undertaking any emergency works. Where this is not possible, the authorised person should keep good records of the decision-making process.

Immediate measures

Those relying on Section 330 powers must form an opinion as to whether immediate preventative or remedial measures are required to deal with an adverse effect on the environment; or whether there is a sudden event causing or likely to cause loss of life, injury or serious damage to property.

Preventative measures include for example:

- breaching a stop-bank to release flood waters and avoid overtopping in more vulnerable areas downstream



THE RMA QUALITY PLANNING RESOURCE

- removing a scheduled tree that is about to topple and cause a major power outage
- bulldozing a fire break through native bush to prevent the spread of a fire.

Remedial measures include for example:

- clearing and disposing of slip debris from a roadway after an earthquake
- repairing a railway embankment in the coastal marine area following storm surge.

'Measures' can include any physical work or action specifically directed at removing the cause of, or mitigating, any actual or likely adverse effect of the emergency (refer s330(2) of the RMA).

The immediate measures undertaken must only extend to what is necessary and sufficient for dealing with the emergency. The provisions in sections 330 and 330B of the RMA do not extend to any actions that would go beyond either removing the cause of, or mitigating, any actual or likely adverse effect of the emergency. For example, taking extra steps to widen a road following a slip, simply because the equipment is there, would not fall within the scope of the emergency powers under the RMA.

The following two guidelines are useful to apply when determining immediate measures:

1. The relevant body or person should consider:
 - the impact of selected measures on the environment
 - whether, on balance, preventing or remedying the anticipated adverse effects of the emergency outweighs any foreseeable and irreversible adverse effects on the environment resulting from the emergency works
 - whether any less damaging, yet more suitable, alternative measures are available.
2. The relevant body or person should keep sufficient evidence to demonstrate that the situation required an immediate response.

Foreseeability of an emergency

Section 330(1A) of the RMA provides emergency works powers, regardless whether or not an adverse effect or sudden event was foreseeable. This recognises that:

- immediate action may be required whether or not an event was foreseeable
- the emergency does not need to have been unpredictable. It could be the end result of a gradual build-up in effects or change to the environment that may have been predictable or observable (e.g. increasing rates of coastal erosion in an urban area).

A person or body might anticipate that a sudden event could occur sometime in the future and implement measures designed to cope with the contingency. However, they may also decide not to put required measures in place, whether through lack of finance or community support, other practical constraints, or on-going uncertainty as to what can be done. Knowing in advance whether or not a situation exists (or could exist) which may lead to an emergency is not relevant to the decisions made under s330 of the RMA to act



THE RMA QUALITY PLANNING RESOURCE

once the emergency occurs. The focus is on what is necessary 'on the day', and not on what has happened beforehand.

However, as noted by the Court in [*Auckland City Council v Minister for the Environment and Others \[1998\] A112/98*](#) authorities should endeavour to get their forward planning right under the RMA and avoid using s330 as a fallback provision.

Reasonable opinion

Section 330 of the RMA requires that the opinion formed in deciding whether or not to use the emergency powers, be one a reasonable person would form.

The test is an objective one, as to whether the situation is one in which any reasonable person or body would consider that it qualifies for emergency action

In exercising emergency works powers on private property, examples of situations which might meet the test could include:

- insufficient time given the nature and urgency of the risk to use alternative enforcement provisions in Part 12 of the RMA
- where the owner or occupier of a building or place is not responsible for, or is unwilling or incapable of, acting alone to address the emergency.

Reasonableness is as much about the process of forming the opinion, as the opinion which is ultimately reached. The person or body might be expected to:

- gather as much information and relevant facts as possible, given the urgency of the situation (noting that there generally is not time to undertake a full study of the effects of the action required)
- make logical assumptions and assessments of risks and options for managing them
- draw on suitable levels of knowledge and experience in making judgments and decisions.

It is important to document what was done to provide evidence that the opinion formed was reasonable. This information may be critical in establishing a defence to any prosecution which is based on a challenge to the reliance on emergency powers.

Reviewing and discussing previous cases with experienced colleagues and like agencies, and consulting with relevant consent authorities, will assist decision-makers in determining what is likely to be reasonable in different circumstances.



Requirement to advise consent authority – ss330A and 330B of the RMA

The obligations under sections 330A and 330B of the RMA provide the relevant consent authority with both a monitoring function and an opportunity to check on the effects and appropriateness of an emergency work, should the adverse effects of that work continue. Both sections require that the authorised person who undertook the activity, must:

- advise the appropriate consent authority within seven calendar days of the date of the emergency action
- apply in writing to the appropriate consent authority for any required resource consents within 20 working days of notifying the consent authority under s330A(1) or s330B(2), if the activity contravenes sections 9, 12, 13, 14 or 15 of the RMA and the adverse effects of the activity continue.

Emergency works are permitted to continue if the application is made on time, until any hearings and appeals are determined on the consent application. This provision envisages that the environmental effects arising from emergency works may be on-going.

In preparing for the possibility that a resource consent may need to be applied for, it is good practice for the authorised person undertaking emergency works under sections 330 or 330B to:

- keep full records of what has occurred during any emergency works situation or state of emergency, particularly in relation to effects on the environment, to inform any necessary retrospective resource consent. Those records may include:
- written documentation
- photographic and digital imagery
- sound recordings, etc.
- have in place a means of predicting, or evaluating and monitoring the effects of the work, to establish whether effects will continue (and thereby whether consent will need to be applied for).

In Harris v Bay of Plenty Regional Council [2008] W072/08, the Court noted that the consent authority's role in considering an application for retrospective consent under [s 330A](#) was significantly more limited than for a general consent. It is unlikely that consent would be refused, except in the most extreme situation. The consent authority must consider whether or not the design and installation used is one that is appropriate in the circumstances and what conditions of consent might properly be imposed to ensure that the effects of the activity are adequately remedied, avoided or mitigated.



Being prepared for an emergency works situation under s330 of the RMA

Any authorised person should, as part of their internal risk management, business continuity and asset management programmes, as far as practicable take the following actions:

1. identify the potential for incidents that could require emergency works. This may be in general terms only, or relate to known trouble spots. For example, those sections of roads that are particularly prone to slips, or bridge abutments and the banks of rivers that are undercut by regular flooding
2. check contractual arrangements, and seek legal advice if in doubt, on when a contractor may act on behalf of the person or body authorised to carry out emergency works under s330. Ensure that contractors understand the procedures that must be followed and have any delegations or warrants required to enable them to act quickly in an emergency situation
3. discuss with the consent authority the form and extent of any anticipated emergency event and adverse effects, and the emergency works that may be necessary to respond to them
4. seek advice and, if appropriate, gain some form of agreement on best practicable remedial or mitigation options, and guidelines or procedures to follow, that will assist decision-making and actions when working under emergency conditions
5. seek consent in advance to cover emergency situations where the effects and actions to address them can be anticipated with some certainty, for example establishing spoil disposal sites near known slip hazard zones.

Authorised persons should consider forming a work group involving all relevant consent authorities and other interested parties, for the purpose of agreeing on common guidelines. For example, an emergency works protocol on slip debris clearance practices for all road operators and their contractors within a district or region could be established.

In developing any emergency response plan, network utility operators and persons with responsibility for public works should consult with consent authorities as they may be able to advise on:

- the potential effects of proposed emergency works
- the relative impact of these effects compared with the adverse effects of the emergency
- whether a resource consent is ordinarily required and the types of conditions attached
- other options for emergency works
- the potential for, and nature of, adverse effects for different emergency situations
- suitable emergency works practices, such as silt debris removal and dumping.

The consent authority's advice may enable an operator to pre-plan some of their decision-making processes and response actions. An added advantage is that acquiring any subsequent resource consents or undertaking additional post-emergency works could be easier.



Compensation for emergency works – s331 of the RMA

Section 331 of the RMA provides for compensation relating to emergency works. This applies both for the local authority undertaking works, and for any person who suffers damage as a result of the works. The availability of compensation depends on the connection between the works and any failure of a person to abide by his or her duties under the RMA. In particular:

- If the local authority takes emergency action under s330(2) of the RMA because of the default of any person, the authority may require reimbursement from that person of actual and reasonable costs, as defined in the enforcement order provisions of s314(2). If the costs are not paid within 20 working days, the local authority may seek an enforcement order under s314(1)(d).
- Every person suffering any damage as a result of the exercise of any power under s330(2) is entitled to compensation from the authority in respect of any damage, so long as this did not arise from that person's failure to abide by his or her duties under the RMA. The compensation is to be determined in accordance with Part 5 of the Public Works Act 1981.

Compensation is not available in relation to damage arising from emergency works on land under a local authority's own control, that is, works pursuant to s330(1) of the RMA. Other remedies may be available to a person affected by such works.

For example, in [*Waiheke Island Country Club Ltd v Auckland City Council \[1998\] W05/98*](#), a private landowner had sought an interim enforcement order against the (former) Auckland City Council to halt a proposed septic and sewage dump works carried out under the umbrella of s330 adjacent to his land. The applicant had made a substantial financial commitment to the development and conservation of his land, and Council's works may have affected his proposed development. The Court held that compensation was not available under s331(2) because the local authority was relying on s330(1). However, the Court did approve the application for an interim enforcement order, having decided there would be a great risk of injustice if it did not.

Section 331 applies the concept of fault in two ways:

- The first relates to situations where the local authority is looking for reimbursement (refer s330(1) of the RMA). The test is whether the authority's emergency action was required because of the "default of any person". The qualifying default is not defined in subsection (1) but should be read together with subsection (2), with which it shares the principle of fault to allocate liability.
- The second relates to situations where a person may claim compensation from the local authority. Compensation is available for damage that did not result from failure of the person to abide by his or her duties under the RMA.

In the second instance, a person's breach of duties may directly cause damage and that damage cannot be part of their claim. However, it might be difficult to separate out the causes and determine liability, when the local authority's response also contributes to the damage.

Section 331(2) of the RMA provides the mechanism for deciding how compensation should be divided between the regional council for the cost of mitigating the original flood, and the property owner and others affected by the collapse of the dam. The critical question is, to what extent the Council's response added to damage that the other person's actions or defaults had already caused.



Enforcement in the relation to emergency powers

Immunity from prosecution for authorised persons

Section 18(2) of the RMA provides immunity from prosecution for an activity that is undertaken in accordance with s330. Therefore, the immunity will not apply in any of the following circumstances:

- the work is not carried out by authorised persons (as described in s330)
- the circumstances are not deemed to be an emergency
- the works are inappropriate in type or scale for addressing the emergency only.

Because a local authority is responsible for enforcing its plans, it will want to scrutinise decisions relying on s330 to undertake activities without obtaining resource consent. It will want to be convinced that emergency powers apply. However, it cannot do so unless it is advised that the powers have been exercised.

While s330A requires any person who has relied on s330 to advise the consent authority of an emergency work (and to apply for consent if effects are on-going), there is uncertainty as to the consequences of that person not complying with s330A. Immunity from prosecution under s18 does not depend on compliance with s330A. Non-compliance with s330A is not an offence under s338. Therefore it is generally best for the enforcing authority to issue an abatement notice (or seek an interim enforcement order) to require an application for consent.

For this reason, anyone exercising powers under s330 of the RMA should:

- maintain records of any delegations or contracts that relate to the types of work that may be carried out as an emergency work
- consult with the consent authority immediately before undertaking any emergency works where this is possible in order to gauge the consent authority's opinion on whether the situation constitutes an emergency, and
- record all key steps and factors in decision-making.

There is conflicting case law on who needs to establish whether the s18 immunity applies. One line of cases suggests that s330 contains elements which are difficult for the prosecution to prove, or which may be within the knowledge of the defendant alone. Therefore placing the onus on the prosecution may make it hard to prove that the immunity does not exist. The other cases suggest that the onus should be on the prosecution, because s330 is intended to confer express rights and powers. Unlike prosecutions for breaches of restrictions, the defendant should not suffer the onus when expressly given powers (and the immunity that attaches to their use). Refer to the following cases for a discussion of these points [Southland Regional Council v Invercargill City Council \[1996\] CRN 6025006200 and 6855](#) and [Canterbury Regional Council v Doug Hood Ltd and Another \[1998\] CRN 7076006424](#).

In either case, a person or body acting reasonably and responsibly throughout, and maintaining records of such, would be in a better position of avoiding a charge, or defending against prosecution if charged.



Defences for persons not authorised under s330(1) of the RMA

Section 341(2) of the RMA provides further 'emergency type' defences. It applies to certain strict liability offences, including a breach of sections 9 and 11-15, where *"the action or event to which the prosecution relates was necessary for the purposes of saving or protecting life or health, or preventing serious damage to property or avoiding an actual or likely adverse effect on the environment"*.

While the s18 immunity would be preferred, for example as the basis on which to apply to strike out charges, this section will assist other defendants not listed in s330(1)(a)-(ca). It must be proven on the balance of probabilities by the defendant.

Section 341(2) uses the word 'and' between (a)(i), (a)(ii) and (a)(iii), and (b)(i) and (b)(ii). Consequently, the tests to be applied are conjunctive (i.e. need to be read together). As such, for a defendant to rely on s341(2)(b), the event that took place must not have been reasonably foreseeable, or provided for by the defendant. The effects of the action or event must also be adequately mitigated by the defendant. This provision relates to an event that could not have been foreseen or provided against, but s330 does not require so.

Note that the statutory defences available under s341 apply to sections 9 and 11-15 of the RMA and do not mention abatement notices or enforcement orders. However, without clear wording indicating absolute liability, a defendant has available a common law defence of [absence of fault](#).

Council as enforcer and emergency worker

A local authority can have two very different roles in relation to emergency powers. A local authority is the enforcer of its plan, but may also be the authority carrying out work under the emergency works provisions.

As the enforcer of its plan, a local authority may find itself needing to check the validity of its own decisions to use emergency powers. This should be done with a clear separation of functions, and at with the operational officers of the council remaining at arm's length from its enforcement officers. All decisions should be recorded carefully to avoid allegations of undue bias. For example, a senior manager with both an enforcement team leader and an infrastructure team leader (undertaking emergency works) reporting, should play no part in brokering agreements between the two functions. Each should work independently according to best practice in their respective fields.

Obstruction when entering land or directing actions

If an occupier obstructs entry to a person exercising s330(2) powers, or refuses to take action on a direction, the relevant authorised person may seek the cooperation of the Police. Refusal or obstruction would qualify as an offence (refer s338(3)(a) of the RMA). As set out in the notes on compensation under s331, the local authority may require reimbursement if it has to act in default of another person (recoverable by means of an enforcement order pursuant to s314(1)(d)).

Good Practice Examples

Checklist for s330 - Detailed steps by party invoking s330

(adapted from the Ministry of Civil Defence and Emergency Management)

Dealing with emergency works

These steps cover the undertaking of emergency works under s330 of the RMA. Those persons authorised to carry out such works should operate in this way in all cases where no state of emergency is in force under the Civil Defence and Emergency Management Act 2002. This includes the recovery period following the termination of a state of emergency.

During a state of emergency, authorised persons may continue to follow these steps to undertake emergency works under s330 of the RMA within the area for which a state of emergency exists. For most emergencies, this arrangement should prove satisfactory.

In exceptional circumstances only, any person or body (including those persons or bodies ordinarily permitted under s330) may be directed or requested to carry out emergency works (or possibly to desist, modify or reprioritise the carrying out of works) by a Group or Local Controller, a member of the Police, or persons authorised by one of the foregoing. In these circumstances, s330B of the RMA may need to be followed. Regardless, such persons or bodies undertaking the emergency works are still expected to follow best practice approaches, and otherwise fulfil general duties and responsibilities under the RMA, as much as possible.

The following are a series of steps intended to follow the order of assessment and action provided by s330.

Step 1: Determining authorised status

Determine if the person or body (the 'authorised person') considering action under s330 is entitled to utilise that section. Check if that person or party is any of the following:

- a person who has financial responsibility for any public work
- a local authority or consent authority with jurisdiction under the RMA for any natural and physical resource or area
- approved as a requiring authority under s167 of the RMA and the network operator for any project or work
- operates or provides a lifeline utility service or system, as defined by section 4 of the Civil Defence Emergency Management Act.

Step 2: Forming an opinion as to whether immediate action is needed

The relevant authority must form an opinion that any public work, any natural and physical resource or area, or any project or work, network utility operation, or lifeline utility is actually affected by or likely to be affected by any of the following:



THE RMA QUALITY PLANNING RESOURCE

- an adverse effect on the environment which requires immediate preventative, or remedial, measures
- any sudden event causing or likely to cause loss of life, injury, or serious damage to property.

Step 3: Taking action

Once that opinion is formed, the relevant authority may take preventative or remedial measures to remove the cause, or mitigate any actual or likely effect, of the emergency. The authority should ensure that any staff or contractors that are to act on their behalf have the necessary authorisations, delegations and warrants (if required) to do so.

Consideration should be had to the best course of action available. Taking such action should go no further than is necessary to manage the emergency situation and consider likely on-going effects (if any) from the action (with the aim of minimising the scale, severity and duration of such effects).

Whenever possible, keep accurate and thorough records of all actions and decisions (in preparation for steps 6 and 7).

Step 4: Entering a place (if required)

Where the relevant authority is a local authority or consent authority, consideration may be given to exercising the power under s330(2) to enter any place (including a dwelling house when accompanied by a constable) to take or direct relevant action.

If it is necessary to enter a dwelling, the Police should be contacted and staff or agents wait until a constable can accompany them.

Staff or agents (or both) should ensure they carry identification (such as an enforcement warrant) with them. As soon as practicable after entering the place, the staff member or agent who entered must identify him or herself and inform the occupier of the place and entry and reasons for it.

Step 5: Costs and compensation

Where Step 4 is taken, the authority may require reimbursement of its actual and reasonable costs from a person, if the entry and works were necessitated by the default of that person (refer s331 of the RMA).

A record of costs should be prepared and forwarded to that person requiring payment. If payment is not forthcoming within 20 working days of being required, then the authority may seek an enforcement order under s314(1)(d) of the RMA.

There is also the right of a person injuriously affected by the intervention to seek compensation from the local authority. Note: Compensation is only payable in respect of loss or damage that is not the fault of the claimant. It is to be determined in accordance with Part V of the Public Works Act 1981 (with any necessary modifications).



Step 6: Collection and collation of information on event and action taken

The person or authority, network utility operator, or lifeline utility should:

- collect and record all relevant information by written record, recordings, verbal or visual or still photographs relied on, in reaching their opinion that immediate preventative measures or immediate remedial measures or any actions taken to avoid loss of life, injury or serious damage to property are appropriate
- ensure full information recovery and recording of the event, and the action plan used to remove the cause, or mitigate any actual or likely effect, of the emergency.

Step 7: Notice to consent authority (and resource consent application if necessary)

Where an activity or action is undertaken under s330, the relevant authority is required to advise the consent authority within seven calendar days (of commencement), that the activity has been undertaken (refer s330A of the RMA).

If resource consent would usually have been required for the activity, and the adverse effects of the activity are continuing, then the relevant authority must apply for resource consent within 20 working days of the notification given above.

In the instance that the resource consent application is made within the 20 working-day period, the activity may continue until the application for resource consent and any appeals have been finally determined.

Note: The requirement to advise the consent authority should be used by the enforcement officers of that authority as an opportunity to check whether the s330 powers are being used appropriately. In particular the officers should make inquiries similar to Step 6.

Step 8: Review and compliance checking

Review all prior steps for accuracy and completeness, and undertake a review of how the emergency provisions of the RMA were utilised for the purpose of checking compliance, enhancing and/or streamlining processes for the future, and educative reasons.

Relevant case law

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

