

Otago Regional Council

Biosecurity Compliance and Enforcement Policy

Biosecurity Act (1993)

Otago Regional Pest Management Plan 2019-29



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1. Introduction

The Otago region covers 12% of New Zealand's land area and is the second largest region in New Zealand. The region has a high level of endemism, meaning that certain species are only found in this region. Otago also features a wide range of geography and ecosystems, from alpine regions, glacial lakes, grasslands, forests, and a dramatic coastline. This leads to Otago being one of the most biodiverse regions in New Zealand. The indigenous biodiversity contributes to our health, our economy, and our social and cultural wellbeing. The Otago landscapes and geography are a key attraction to those who visit the region and supports the agricultural sector as key drivers of Otago's economic development.

Broadly, the environment encompasses the ecosystems that include people and their communities, natural and physical resources, and the resulting amenity values. These, in turn, influence, and are influenced by, the prevailing aesthetic, cultural, economic, and social conditions. However, the environment of the region is increasingly under threat by harmful organisms. These organisms can have a detrimental effect and adverse impact on the natural environment and human wellbeing.

All land occupiers, including crown¹, public and private entities, are responsible for effectively managing the spread of animal and plant pests. Under the Biosecurity Act (1993) (BSA), the Otago Regional Council (ORC) is empowered to enforce action to ensure pests are managed appropriately. To achieve this, the Otago Regional Pest Management Plan 2019-2029 (RPMP), under the provisions of the BSA, provides the scope to undertake inspections and enforcement action to ensure compliance with given regulations.

This policy sets out the approach and principles by which the ORC ensures compliance with the RPMP as provided by the BSA. This policy is intended to ensure a fair and reasonable, consistent and robust approach to compliance and enforcement by ORC.

2. Principles to achieving effective compliance

This policy defines non-compliance as 'any breach of a rule as stated in the RPMP, for which an exemption has not been given'. Under the provisions of the BSA, non-compliance is liable for enforcement. The BSA does not provide guidance on the scale, or threshold, of non-compliance. Therefore, non-compliance is, in effect, any breach of a RPMP rule, irrespective of scale. This means a breach of a RPMP rule does not necessarily have to be widespread across a property and may relate to a single location (or a defined area) within a property to be deemed non-compliant.

ORC's preferred approach is to use informal means to achieve compliance (e.g. through education, consultation, request for work and negotiation). The emphasis here is to foster voluntary cooperation for a common goal. This is, ultimately, the most cost-effective approach for occupiers and landowners.

When informal options have not led to compliance, ORC will progressively, yet fairly and reasonably, undertake enforcement action as provided for by the BSA. The provisions of the BSA are clear and straightforward. By following standard processes, enforcement actions undertaken under the BSA have proven to be robust and able to withstand legal challenge².

¹ Under Section 69(5) of the Biosecurity Act (1993), the Crown is only liable to meet its responsibility for pest management under the 'Good Neighbour Rule'.

² Hayes v Environment Waikato, District Court Manukau CIV-2009-057-000319, 21 March 2011.

The eight principles of compliance and enforcement

The underlying principles to ORC's approach to compliance and enforcement action are:³

Transparency – We will provide clear information and explanations to the community, and those being regulated, about the standards and requirements for compliance. We will ensure the community is kept informed about the actions taken by us to address the non-compliance of biosecurity rules.

Consistency of process – Our actions will be consistent with the legislation and within our powers. Compliance and enforcement outcomes will be consistent and predictable for similar circumstances. We will ensure that our staff have the necessary skills and are appropriately trained, and that there are effective systems and policies in place to support them.

Fair, reasonable and proportional approach – We will apply regulatory interventions and actions appropriate for the situation. We will use our discretion justifiably and ensure our decisions are appropriate to the circumstances, and that our interventions and actions will be proportionate to the seriousness of the non-compliance and the risks posed to people and the environment.

Evidence-based and informed – We will use an evidence-based approach to our decision making. Our decisions will be informed by a range of sources, including robust science, regulated parties, information received from other regulators, community members, industry and interest groups.

Collaborative – We will work with and, where possible, share information with other regulators (e.g. Ministry for Primary Industries) and stakeholders to ensure the best compliance outcomes for our region. We will engage with the community, those we regulate and government to explain and promote biosecurity requirements and achieve better community outcomes.

Lawful, ethical and accountable – We will conduct ourselves lawfully and impartially and in accordance with these principles, relevant policies and guidance. We will document and take responsibility for our decisions and actions. We will measure and report on our regulatory performance.

Targeted – We will focus on the most important issues and problems to achieve the best biosecurity outcomes. We will target our regulatory intervention at non-compliances that pose the greatest risk to biosecurity. We will apply the right tool for the right problem at the right time.

Responsive and effective – We will consider all alleged non-compliances to determine the necessary interventions and actions to minimise impacts on the community and maximise deterrence. We will respond in an effective and timely manner in accordance with legislative and organisational obligations.

³ These principles are adapted from the Compliance and Enforcement Special Interest Group (CESIG) Regional Sector Strategic Compliance Framework 2019-2024.

3. Methods to achieve compliance

The ORC has a 'spectrum' approach to encouraging positive behaviour change and ensuring the highest levels of compliance possible. The ORC's approach to ensuring compliance with the RPMP is based on '4Es model'⁴ of Enable, Engage, Educate and Enforce:

- ▶ **Enable** – provide opportunities for occupiers and landowners to be exposed to best practice and regulatory requirements. Link regulated parties with appropriate pest management industry.
- ▶ **Engage** – consult with occupiers and landowners, stakeholders and community on matters that may affect them. This will require maintaining relationships and communication until final outcomes are reached. This will facilitate greater understanding of challenges and constraints, engender support and identify opportunities to work with others.
- ▶ **Educate** – alert occupiers and landowners to what is required to be compliant and where the onus lies to be compliant. Education should also be utilised to inform community and stakeholders about what regulations are in place around them, so that they will better understand what is compliant and what is not.
- ▶ **Enforce** – when non-compliance is identified then enforcement tools and actions are available to ensure the RPMP intentions are achieved. Enforcement outcomes should be proportional to individual circumstances of the breach and culpability of the party.

When non-compliance with the RPMP is observed, ORC will inform the occupiers and landowners of the work required. This proactive approach is to encourage compliance, however, the BSA is a robust law that provides for significant enforcement action should non-compliance be persistent. ORC's approach and use of enforcement actions depends on the issue, context and seriousness of the breach as illustrated below⁵:

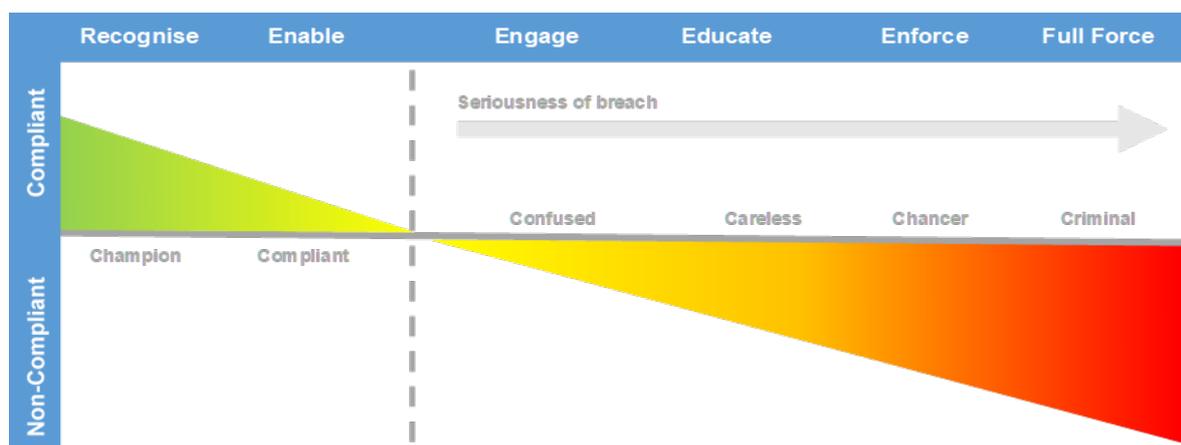


Figure 1: Enforcement Progression

⁴ The 4Es model is adapted from the CESIG Regional Sector Strategic Compliance Framework 2019-2024.

⁵ Influencing behaviour change is based on the CESIG Regional Sector Strategic Compliance Framework

4. The compliance and enforcement process

The Chief Executive Officer of the ORC has the authority to issue staff with warrants of authority. A warranted enforcement officer is permitted to enter private property (excluding a house or marae) for the purpose of assessing compliance with the BSA and RPMP. Warranted staff receive specific training and are familiar with their statutory obligations before carrying out any enforcement functions.⁶

The initial phase of the compliance and enforcement is to undertake an inspection. Inspections can be scheduled, in response to a complaint, or based on professional observation. When inspecting a private property, the rights of the occupier and landowner will be respected. ORC staff must ensure that all entry to private property is done so lawfully. However, inspections can be undertaken without providing prior notice to the occupier or landowner.

If the occurrence or density of pest infestation exceeds the rules as set out in the RPMP, then compliance and enforcement action will be implemented to ensure compliance with the RPMP rules. If a property is deemed to be non-compliant, occupiers and landowners will have a given timeframe to undertake the required work before a re-inspection is carried out. A re-inspection is undertaken to ascertain whether compliance with the rules of the RPMP rules has been achieved and to determine if any further actions are required. Re-inspections can occur throughout the compliance and enforcement process until compliance is achieved.

Informal and Formal Actions

The options for enforcement action will depend on the pest species in question and the individual circumstances of each case. Informal actions (not covered in the Act) to encourage compliance include verbal and written advice. Formal actions are available by law through the enforcement mechanisms prescribed in the BSA. The administrative approaches taken with respect to compliance and enforcement will follow the standard operating practices detailed in the ORC Biosecurity Compliance Procedures Manual.

In brief, the compliance and enforcement options that follow a non-compliant inspection are:

1. **Informal Actions** are focused on providing education and incentive-based responses to allow the occupier or landowner to become better informed and develop their own means to achieve compliance. Informal actions will be detailed through a 'Request for Work' letter.
2. **Formal Actions** are forward-looking to provide clear direction of action required to ensure compliance. Formal actions will be detailed through:
 - a. Legal notices (e.g., Notice of Direction), followed by, if needed,
 - b. Default action or Prosecution.

Figure 2 shows the progression of compliance and enforcement, while Table 1 describes the compliance and enforcement actions in more detail. With respect to legal enforcement, while prosecution remains an option, the most common action will be default action.

⁶ Warranted ORC staff gather data and information in keeping with best practice detailed in *Basic Investigative Skills for Local Government*

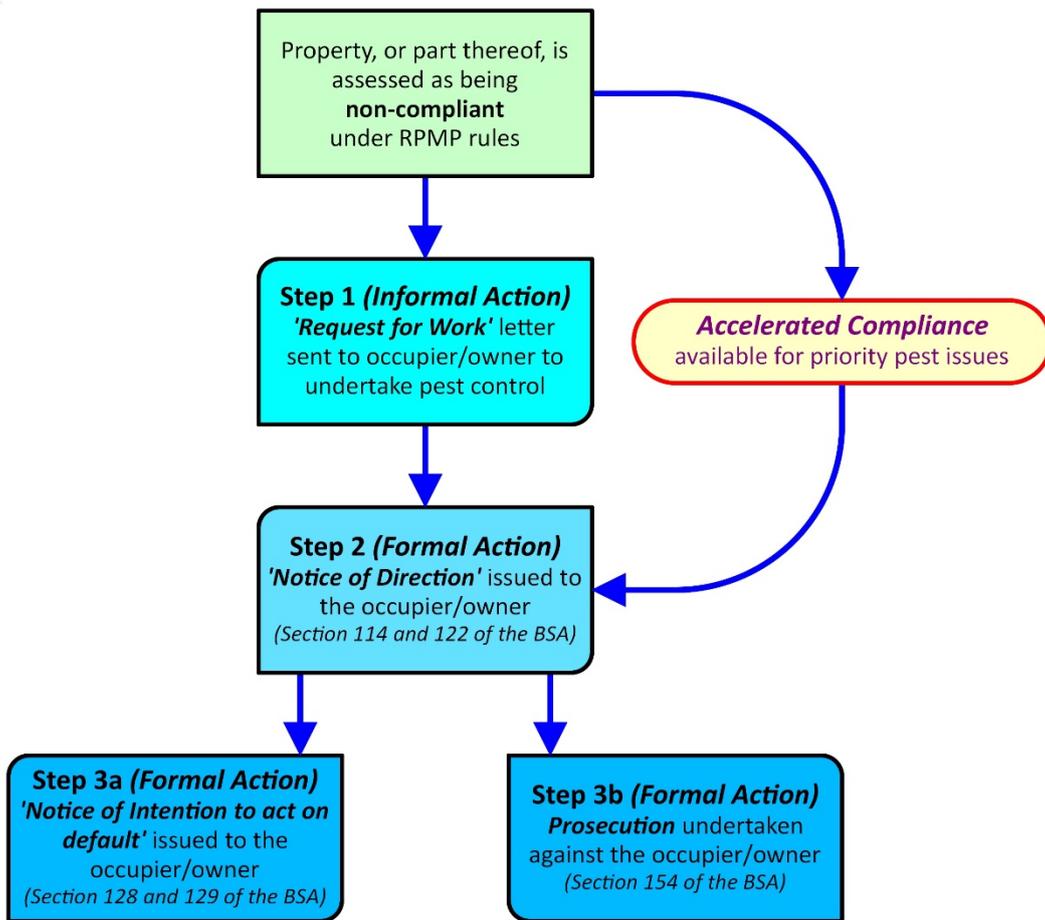


Figure 2: Sequence of primary actions for compliance and enforcement under the BSA

Table 1: Description of Compliance and Enforcement Actions

	Description of action	Potential impacts for the liable party	When this action is appropriate
Informal actions	<p>Request for Work Letter</p> <p>Following an initial inspection, this letter alerts occupiers and/or landowners to the pest issue, providing an opening for dialogue and negotiation on timeframes and expectations.</p> <p>This letter provides the opportunity to proactively prevent further spread, to remedy, or to mitigate the effects of non-compliance. The Council can provide guidance around rules and regulations or help parties to achieve compliance.</p> <p>If needed, a reminder letter can also be issued to ensure the request for work is progressing as required.</p>	<p>This is a non-formal process and as such has no legal implication. However, it does start the path towards possible formal action if the request for work is not completed as required.</p>	<p>This letter is provided after the initial inspection when a property is deemed non-compliant.⁷ This is normally the extent of the action required when dealing with cooperative parties who are motivated to do the right thing but lack the knowledge or skills necessary to achieve and maintain compliance.</p>
Formal actions	<p>Notice of direction (NOD)</p> <p>Under the BSA, an authorised person has the power to give directions to control pests. This is enacted through a Notice of Direction (NOD). A NOD is the first level of formal enforcement action under the BSA. Once issued, a NOD can be extended, varied or cancelled depending on circumstances and actions taken.</p>	<p>A NOD requires a person to take action to address plant and animal pest problems that breach a rule in an RPMP. The NOD is the formal acknowledgement of non-compliance.</p>	<p>A NOD is issued:</p> <ol style="list-style-type: none"> 1. When there has been no (or ineffective) action to rectify a state of non-compliance following informal actions; or 2. After the initial inspection where a priority pest issue needs to be addressed using the accelerated compliance process as described in Section 5 of this policy.

⁷ A request for work letter does not apply if the non-compliance is being dealt to through the accelerated compliance pathway (see Section 5).

	Description of action	Potential impacts for the liable party	When this action is appropriate
Formal actions (cont.)	<p>Compliance orders</p> <p>Under the BSA, an authorised person may serve a compliance order on a person, requiring them to cease doing something or prohibit the person from starting something, doing something again, or having something done that will contravene biosecurity law.</p>	<p>A direction given through a compliance order is legally enforceable. To breach a compliance order is to commit an offence under the BSA and make liable parties open to punitive actions.</p>	<p>A compliance order may be appropriate any time that there is a continual risk of further breaches of the RPMP rules due to non-compliance.</p>
	<p>Default Work</p> <p>Under the BSA, the regional council has the power to undertake default action when a NOD or a compliance order has not been complied with. Default action occurs when the ORC legally undertakes the necessary work to ensure the pest non-compliance has been dealt to. Other than in the most extreme cases, this will be the most punitive action taken to enforce the BSA.</p>	<p>This is legally enforceable action and requires the occupier/landowner to provide access for the work as directed, arranged and costed by the ORC. The action to undertake default work does not need court approval.</p> <p>All costs will be charged to the occupier/landowners. Non-payment of costs will lead to a statutory land charge being placed on the property. More details on cost recovery are given in Section 7 of this policy.</p>	<p>This action occurs when a Notice of Direction (NOD) and/or a compliance order (and any related instructions) has been persistently not complied with.</p>
	<p>Prosecution</p> <p>A prosecution is a process followed through the criminal courts to establish guilt or innocence and, if appropriate, the court will impose sanctions.</p> <p>BSA matters are heard by a District Court Judge. All evidential rules and standards must be met in a BSA prosecution.</p>	<p>A successful prosecution will generally result in a conviction, a penalty imposed, and consideration to costs of the investigation.</p> <p>A prosecution forms part of the history of non-compliance and will be considered if there are future incidents of non-compliance.</p>	<p>A prosecution may be considered appropriate when the factors listed in Section 6 of this policy indicate that the matter is sufficiently serious to warrant intervention by criminal law.</p>

Additional Enforcement

There are two further formal enforcement options available:

- ▶ **Declaration of a restricted place:** The BSA provides the ability to issue a Restricted Place Notice to prevent the removal or introduction of any organism or good to any place, and may direct that specified organisms and goods be isolated, confined or stored and identified. A Restricted Place Notice is useful and relevant for RPMP work where, for example, the movement of gravel from a place containing pests to a non-infested place needs to be stopped to avoid the pests spreading.
- ▶ **Declaration of a controlled area:** The BSA provides the ability to publicly declare a specified area to be controlled. The notice may restrict, regulate or prohibit the movement into, within, or from the controlled area of specified organisms, organic material, risk goods or other goods and/or require the goods be treated or subject to specified processes. While this enforcement power exists for regional councils, it has limited relevance for RPMP compliance.

5. Accelerated compliance process

When there is need to respond to a significant pest management issue (e.g. rapid increase in wallaby sightings accompanied by landowner apathy, or to curtail the increase in a priority pest, such as rabbits), this policy provides for the compliance process to be accelerated. An accelerated compliance process means that if a property is deemed to be non-compliant following a first inspection, the Council can bypass the informal action (Step 1 in Figure 2) to automatically issue a Notice of Direction (Step 2 in Figure 2).

Accelerated compliance will apply to priority pests (as identified in the current Biosecurity Operational Plan) and to any current or potential exclusion programmes. An accelerated compliance process prioritises the risk to environmental, economic and landscape values while being mindful of the increased operational requirements.

6. Enforcement decision

The ORC takes a rational and principled approach to regulation. In general, the ORC advocates a policy of education and co-operation towards compliance. However, the ORC recognises that there are times when the use of punitive measures is necessary.

The process for taking enforcement action against biosecurity non-compliance is clearly laid out in the BSA. The BSA provides a robust enforcement framework, with only one known case filed.⁸ This decision was in favour of the regional council in question as they had shown good process, provided accurate documentation, taken relevant photographs, and kept good, clear records.

While the BSA maybe viewed as being less visible than the Resource Management Act, it could lead to greater penalties for those who are persistently non-compliant.

⁸ Hayes v Environment Waikato, District Court Manukau CIV-2009-057-000319, 21 March 2011.

Some factors to take into account when considering enforcement action:

- ▶ What were, or are, the actual adverse effects on the environment?
- ▶ What were, or are, the potential adverse effects on the environment?
- ▶ What is the value or sensitivity of the environment or area affected?
- ▶ Is the non-compliance a result of deliberate, negligent, or careless action?
- ▶ What degree of due care was taken and how foreseeable was the non-compliance?
- ▶ Was there a failure to act on prior instructions, advice or notice?
- ▶ What efforts have been made to achieve compliance?
- ▶ What has been the effectiveness of those efforts?
- ▶ Is this persistent non-compliance or has there been previous enforcement action taken against the landowner or occupier?
- ▶ Is the non-compliance manifestly different to other observations of non-compliance?
- ▶ Are there any extenuating factors that has led to the non-compliance?

The factors leading to an enforcement decision will be context dependent as each non-compliance situation will be unique. Individual circumstances will also be considered to achieve a fair and reasonable outcome.

The discretion to take enforcement action, or not, sits solely with those delegated to make decisions in the regulatory agency⁹. These decisions include:

- ▶ The appropriate defendant to pursue;
- ▶ The appropriate enforcement tools to use in the circumstances; and
- ▶ Whether to withdraw an enforcement action that has been commenced.

ORC is required to exercise this discretion in a way that is reasonable and consistent with the principles of the BSA and the requirements of natural justice.

The prosecution test:

The Solicitor-General's Prosecution Guidelines provides direction on what factors should be considered before a decision to prosecute is made. The first part of the test is the **evidential test** for prosecution and requires a legal assessment of whether:

- ▶ The evidence relates to an identifiable person (whether natural or legal).
- ▶ The evidence is credible.
- ▶ The Council can produce the evidence before the court, and whether it is likely it will be admitted by the court.
- ▶ The evidence can reasonably be expected to satisfy an impartial jury (or judge), beyond a reasonable doubt, that the individual has committed a criminal offence; the individual has given any explanations and, if so, whether the court is likely to find the explanations credible in the light of the evidence as a whole.
- ▶ There is any other evidence the Council should seek out which may support or detract from the case.

⁹ New Zealand Law Commission 'Prosecution decisions and the discretion to prosecute'
<http://www.nzlii.org/nz/other/nzlc/report/R66/R66-5.html>

Once it has been established that there is sufficient evidence to provide a reasonable prospect of conviction, the test for prosecution requires a consideration of whether the **public interest** requires a criminal prosecution. Prosecution is required if it is in the interest of the public, with the predominant consideration being the seriousness of the offence – the Public Interest Test.

7. Cost recovery

The BSA gives ORC the power to recover the costs associated with its compliance monitoring obligations. This is provided for under section 135(3) and section 129 of the BSA. In Otago, charges do not currently apply to informal actions, such as a scheduled inspection or a re-inspection when the property has become compliant.

Recovery of Non-Compliance Costs

Councils, as management authorities, have the statutory right to use a variety of charges to recover costs incurred in administering the RPMP. This can include fixed charges for issuing notices, hourly rates, estimates of advanced work and reasonable costs. Fees and charges that may be recovered are listed in the current Long-Term Plan or Annual Plan and are reviewed annually. In setting its cost recovery model, ORC is conscious that costs associated with monitoring should fall onto those resource users who are subject to monitoring, as opposed to the general ratepayer. For any prosecutions, ORC reserves the right to seek recovery of allowable legal costs.

Recovery of Default Work Costs

The actual and reasonable cost of default work is to be recovered by the Regional Council. This is normally done through an invoice. However, when this is not paid, a statutory land charge may be placed on property to recover the costs of default work. This means the costs incurred will be paid if the property is sold or re-financed.