THE FINAL STRAW FOR THE RMA?

SOME SHORTCOMINGS OF THE RESOURCE LEGISLATION REFORM BILL 2015

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1. INTRODUCTION

1.1 The Resource Legislation Reform Bill 2015 ("RLRB" or "the Bill") represents the second phase of the National-led Government's reform of the Resource Management Act 1991 ("RMA" of "The Act"), as signalled by the February 2013 discussion document "*Improving our Resource Management System*" ("Discussion Document"). It follows the first phase of RMA reforms which resulted in the Resource Management (Simplifying and Streamlining) Amendment Act 2009 ("2009 Amendment Act") and the Resource Management Amendment Act 2013 ("2013 Amendment Act").

1.2 The Discussion Document[3] indicates that the Government considered further reform was necessary for the reason that it:

> *"… continues to hear concerns that resource management processes are cumbersome, costly and time-consuming, and that the system is uncertain, difficult to predict and highly litigious. The system seems to be difficult for many to understand and use, and is discouraging investment and innovation. The outcomes delivered under the RMA are failing to meet New Zealanders' expectations."*

1.3 This is typical of language that has surrounded the RMA, which has been a political football since even before its enactment. It also reflects the misconception that it is the RMA rather than its implementation that is the problem.

1.4 Some aspects of the Bill are worthwhile and can be supported. However, many aspects of the Bill are ill-conceived and poorly drafted. The 2009 and 2013 Amendment Acts were a source of concern for their poor drafting, erosion of access to justice and unintended consequences. Even judged against those amendments, the RLRB represents a retrograde step, to such an extent that if enacted in its present form could prove to be the straw that breaks the RMA's back in terms of efficiency and ease of application.

1.5 The four key concerns with the Bill relate to:

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3 Page 6.

(a) Amendments that are based on flawed assumptions or seek to address problems which have not been proven to exist and/or which could be dealt with under the existing framework.

(b) Poor drafting coupled with the introduction of entirely novel legal concepts that will introduce further confusion, costs and delay (for which the RMA will inevitably and simplistically be blamed).

(c) Further reductions in opportunities for public participation and access to justice.

(d) The continued aggregation of power to the Minister for the Environment at the expense of planning by co-operative mandate which has always been one of the cornerstones of New Zealand planning legislation.

1.6 Such concerns are reflected in submissions on the Bill from local authorities and key professional organisations, including the Resource Management Law Association ("RMLA"), New Zealand Planning Institute ("NZPI"), Local Government New Zealand ("LGNZ") and the Auckland District and New Zealand Law Societies ("NZLS").

1.7 The severe erosion of rights of public participation seems to spring from a mind-set reflected in the Regulatory Impact Statement[4] ("RIS") that such amendments are required because the Act's current scheme of broad public participation:

> *"…undermines the purpose of notification and seeking submissions, which is to give decision-makers useful, focused input".*

1.8 With all due respect, this is an extraordinary non sequitur that is inconsistent with the basic concept of public participation that has always been fundamental to RMA processes. Indeed, this thinking has spawned proposed reforms of a nature never seen before – amendments that represent a difference in kind rather than degree that would strike at the very heart of the RMA as we know it. Classic examples are the unusual concept of deemed permitted activities and the specific listing of parties who are the only ones who can be deemed to be affected by an activity by reference only to the status of that activity.

1.9 Despite these shortcomings, the Bill has received little substantive attention – probably because it was notified over Christmas and submissions were due at a time when the Resource Management community was overloaded by the Proposed Auckland Unitary Plan ("PAUP"). Most objective comment has been critical. It is therefore imperative that the worst features of the Bill are highlighted in sufficient time for these to be objectively considered by officials and the Select Committee.

1.10 To that end, this paper briefly addresses the Bill as a whole and then identifies some of the key concerns about the Bill as set out above. It is not intended to be an exhaustive analysis - the analysis in relation to the clauses addressed must necessarily be limited and there are worrisome provisions not addressed in this paper.

2. THE RESOURCE LEGISLATION REFORM BILL – OVERVIEW

2.1 The Bill was introduced to Parliament late November 2015 and had its first reading on 3 December 2015. The Explanatory Note states that the Bill's overarching purpose:

> *"… is to create a resource management system that achieves the sustainable management of natural and physical resources in an efficient and equitable way."*

4 Paragraph 253.

2.2 The Bill seeks to achieve the following three objectives:

(a) Better alignment and integration across the resource management system (to avoid duplication, ensure internal consistency and that the tools under the RMA are fit for purpose);

(b) Proportional and adaptable resource management processes (with increased flexibility and adaptability, and allowing processes and costs to be scaled to reflect specific circumstances); and

(c) Robust and durable resource management decisions (based on high value participation and engagement and an upfront focus on planning decisions, rather than individual consents).

2.3 The Bill includes over 40 individual proposals (other than "minor fixes") which can be categorised into seven broad themes, namely:

(a) Greater national consistency and direction; to achieve this, the Bill proposes to:

(i) Introduce a new regulation-making power, allowing the Minister to prohibit, remove and prescribe certain planning provisions; and

(ii) Enable the development of a national planning template ("NPT"), which prescribes the structure and format for policy statements and plans, and substantive content on matters requiring national direction or consistency.

(b) Creating a responsive planning process; to achieve this, the Bill proposes to:

(i) Provide for plan changes to be processed limited notified in appropriate circumstances, with limited rights of appeal; and

(ii) Introduce two new "alternative" plan making tracks to the current Schedule 1 process: the collaborative planning process ("CPP") and the streamlined planning process ("SPP").

(c) Simplifying the resource consenting system; to achieve this, the Bill would:

(i) Introduce a ten-working-day time limit for determining "simple" or "fast-track" applications;

(ii) Allow councils to "deem" certain low impact activities as "deemed permitted activities";

(iii) Prescribe the parties eligible to be notified of different types of applications;

(iv) Provide greater ability for a consent authority to strike out submissions (including where these are not supported by evidence); and

(v) Require that resource consent conditions be directly connected to an adverse effect or applicable district or regional rule.

(d) Ensuring efficient and speedy resolution of appeals.

(e) Reducing overlaps and duplications between various statutes within the resource management system.

(f) Making several RMA process "improvements".

(g) Other minor technical "fixes".

2.4 Submissions on the Bill were heard by the Local Government and Environment Committee during May and April 2016. The Select Committee is scheduled to report back in September. It obviously has a crucial role to play.

3. FLAWED ASSUMPTIONS ON WHICH THE BILL IS BASED

3.1 The Bill contains a number of proposed "reforms" that are based on flawed assumptions as to issues which need to be addressed. The upshot is that the Bill contains provisions that are designed to solve problems that do not exist or, if they do, are arguably not of a scale as to warrant legislative intervention. These will require councils to gear up for change for little benefit and which could well have unintended negative consequences.

Flawed assumptions regarding the plan making process

3.2 The first example of a flawed assumption is the rationale for introducing the CPP and SPP as alternatives to the current First Schedule process, namely that[5]:

> *"…the current plan-making processes are often litigious and costly. The length of time taken to develop a new plan and resolve any appeals (approximately 6 years) means that plans lack agility and are not able to be responsive to urgent issues. A significant amount of time taken for plans to become operative has been spent resolving appeals in the Environment Court."*

3.3 However, contradicting that, the Regulatory Impact Statement ("RIS")[6] itself notes that over the last ten years more than three-quarters of all plans (77%) and the vast majority of plan changes (92%) have been successfully determined within two years of notification. This is consistent with the Environment Court's analysis in the Annual Review it undertook for the calendar year 2014.

3.4 This is significant because where the private sector proposes a change to a plan – 92% of the time they are dealt within under two years. In our experience, the most common cause of delay for private plan changes is a client wishing to pause to complete negotiations on one or more aspects of their intended development.

3.5 The timing for proposed plans is largely controlled by Councils and has as much to do with how fast the Council wishes to proceed, how much resourcing they apply to the project and what availability their staff and hearings commissioners have.

3.6 Where plans or plan changes have exceeded the two year time frame, that is generally because the issues were of such complexity and importance, and attracted the attention of so many interests, that time was needed to achieve a quality outcome. A classic example is the Waikato Water Allocation variation in which the Environment Court expertly juggled and adjudicated across a broad array of vested interests over a period of many months.

3.7 Either way, the time taken in the minority of cases need not be seen as a failure of the First Schedule process. In our view, these figures do not support a conclusion that all plan making processes consistently take too long or lack "agility" and are unable to be responsive in the majority of cases and when required.

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5 Explanatory Note to the Bill.
6 Paragraph 143.

3.8 Further, neither the RIS nor any other material produced in support of the Bill provides any data to support the assumption that a "significant" amount of the plan making process is spent resolving appeals in the Environment Court. This may have been a valid criticism some fifteen years ago when the "first generation" of plans were being processed, but the current reality, as summarised in the Environment Court's Annual Review for 2015[7], is as follows:

> *"Gone are the days when a Council would be granted a year or two by the Court to endeavour to negotiate solutions, often with no outcome to show for it, and only then to find that much mediation and / or hearing work remained necessary to resolve cases.*
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> *In recent sets of such appeals, mediation has been undertaken commencing as soon as all parties have been identified under section 274, and bought to a conclusion about 10 or 11 months after the cases have been filed, with a high degree of success. Councils have been enabled to make large parts of the proposed instruments operative in short order if they wish, leaving the Court to move quickly to resolve remaining issues through hearings, facilitated conferences of experts, and pre-hearing and settlement conferences."*

3.9 As an example, pro-active case management and use of mediation resulted in the vast majority of the appeals on the Waikato Regional Policy Statement being resolved by consent order within just over a year.

3.10 The concept underpinning the CPP is that time spent litigating issues at hearings could potentially be reduced or avoided by encouraging more "up-front" engagement with the community and stakeholders in the preparation of proposed planning instruments. That concept is supported. However, such "front-loading" of plan making is already undertaken under First Schedule processes[8]. One wonders whether encouraging this practice requires the introduction of a whole new alternative planning process.

3.11 Further, we are now moving into the second generation of plans and plan reviews are commonly being undertaken on a "rolling review" or chapter-by-chapter basis. Consistent with the statistics cited in the RIS and by the Environment Court[9], both of these factors are resulting in faster planning processes and reduced need for appeals.

3.12 We therefore question the need for introducing two completely separate alternatives to the current First Schedule plan making process, especially as they are unlikely to achieve better planning outcomes or time and cost savings over making appropriate amendments to the First Schedule process.

The speed versus quality conundrum

3.13 Plan making is a complex exercise - sometimes time is needed to produce a sound result. A concern which arises in this context is the potential that the desire for speed in plan making may result in sub-standard outcomes both in terms of process and the plan provisions themselves. The desire for speed can overlook that existing provisions remain appropriate in the meantime while the new plan is put through its paces.

3.14 The PAUP is a good example. The speed with which it was prepared resulted in a very poor plan to kick the process off with. In hindsight, the process that has been followed might look acceptable on paper but is generally regarded as being too hurried, with too little time devoted to many highly complex and important issues (particularly in terms of the research and analysis underpinning the growth and infrastructure provision), and too much time spent sitting in pointless mediations. The process cost has been vast, as has the human cost. The Council routinely failed to

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7 Page 19.
8 Indeed, this is specifically anticipated by clause 3(2) of the First Schedule.
9 Environment Court Annual Report 2016.

meet deadlines, became adept at trotting out the party line, got some things wrong (e.g., land supply and the pre-1944 Overlay) and vacillated on fundamental issues – circulating evidence and then not appearing in support of it.

3.15 This is not a criticism of the Independent Hearing Panel ("IHP") which has done an exceptional job. But if Auckland ends up with a silk purse as a result of the PAUP process, it will be in spite of the process rather than because of it. It will not be a vindication of a 'streamlined' process. Similar comments have been made about the bespoke process to produce the new Christchurch Replacement District Plan.

3.16 The key point is that it is simply too early to enshrine such processes in legislation on the flawed assumption that they have been successful.

Flawed assumptions regarding the consenting process

3.17 The Bill is also based on flawed assumptions in relation to the consenting process. The relevant Cabinet Paper[10] states that:

> *"Consenting requirements for minor or less complex projects do not always reflect the scale of the activity. As a result, applicants wishing to undertake minor or less complex projects are often subject to unnecessarily costly and time-consuming processes."*

3.18 Clearly, applicants are sometimes put to more cost and expense than they should be. But such issues are most often a result of poorly worded plan provisions, a lack of Council resources, or relevant provisions being wrongly interpreted and applied by Council officers. Indeed, recent amendments to the RMA (particularly the 2009 and 2013 Amendment Acts) have themselves contributed to costs and delays by adding complexity and new provisions that need to be understood and applied. Legislating for faster consenting processes will not address these issues – indeed, for the reasons outlined below, it is more likely to exacerbate them.

3.19 The RMA already provides for:

(a) Decisions on non-notified applications to be made within a maximum 20 working days (and discounts if these time frames are not applied);

(b) Controlled or restricted discretionary activities which can generally be dealt with quickly;

(c) A presumption that some types of applications should be processed on a non-notified basis; and

(d) The ability for potentially affected parties to provide the written approvals so that effects on them can be disregarded.

3.20 As the Cabinet Paper records[11], the upshot of these provisions is that 95% of all consent applications for the 2012-13 were processed on a non-notified basis. This is in addition to the vast number of activities that can be carried out as permitted activities. In this context, does justification really exist to introduce a ten-day (rather than 20 day) fast track consent process? Are the complications associated with providing for "deemed permitted activities" and yet further changes to the notification provisions really needed?

3.21 We suspect that any likely benefits will be more illusory than real in terms of reducing costs and delays for consent applicants - in fact, the exact opposite is likely to be true

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10 "*Cabinet Paper for the Second Phase of Resource Management Reforms: Batch 1 of policy decisions*" Page 7.

11 Page 7.

given the complexity of some of those proposed provisions and the novel concepts that the Bill introduces.

4. PROPOSALS THAT WILL INCREASE COMPLEXITY, COSTS AND DELAYS

4.1 In its 25 year history, the RMA has been subject to several substantive amendments,[12] mostly aimed at improving procedural efficiency and addressing compliance costs. As a result, the statutory tests for notification of consent applications have been substantively changed four times; the RLRB will be the fifth. Importantly, it takes some time for plans to catch up with the new notification provisions – specifically enabling some types of applications to proceed on a non-notified basis. As a result, the full benefits from the 2009 and 2013 amendments have yet to be seen.

4.2 Each round of amendments brings with it the potential to increase rather than reduce costs and delays in RMA processes as it introduces complexity and new provisions and concepts that must be understood and applied by applicants, their advisors, and Council officers. It is hardly surprising that Council officers are more cautious (and therefore slower) to process applications under a revised statutory framework or when trying to apply new concepts – particularly when the relevant plan was written to reflect an entirely different notification regime.

4.3 This problem is exacerbated when the new amendments are complex, introduce new legal concepts, or are poorly drafted. There are many examples of all of these in the 2009 and 2013 Amendment Acts and this trend has been continued in the RLRB. Indeed, all three Amendment Acts contain changes needed to address unintended consequences from previous amendments, as the RIS recognises.

4.4 The predictable result is a concern that RMA processes are "uncertain, difficult to predict and highly litigious". The Government then reacts to these by further amending the Act and almost inevitably making matters worse. And so the cycle continues. The following sections demonstrate that the RLRB contains more of the same.

5. PROPOSED AMENDMENTS TO THE NOTIFICATION PROVISIONS

5.1 The Bill would substantially amend the already complex notification provisions in the RMA for the fifth time since 1991 by introducing a new process for determining whether a consent application should be publicly or limited notified, involving three steps:

(a) Public or limited notification being precluded in certain circumstances;

(b) The ability to disregard adverse effects that are "taken into account by the objectives and policies of that plan"; and

(c) The need to consider the eligibility of certain persons.

5.2 All three have flaws.

Changes to notification for controlled and boundary activities

5.3 The Bill proposes that:

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12 Most notably for example in 1993, 2003, 2004, 2005, 2009 and 2013. That is, the Act has been subject to substantive amendment on average at least once every four years.

(a) Public notification be precluded where an application is for controlled activities or "boundary activities", subdivision or residential activity (provided for as a restricted discretionary or discretionary activity); and

(b) Limited notification is precluded where the application is for a controlled activity other than a subdivision.

5.4 Both categories can be expanded by regulation (rather than amending legislation).

5.5 The elimination of limited notification to neighbours is a cause of concern in terms of fairness and access to justice. In order to ease consenting processes, district plans generally provide for a broad range of controlled activities where it is appropriate that an activity should proceed but where some consideration of the planning merits is needed. All current plans were written knowing that neighbours might be notified and there will be many examples where immediate neighbours, at least, should have a legitimate say in relation to such activities.

5.6 If nothing else, the most obvious outcome of this provision is likely to be a significant reduction in provision for controlled activities (in favour of restricted discretionary activities) when new plans or plan changes are notified - something of an "own goal" in a Bill seeking to streamline consenting processes. This is not a theoretical risk; Auckland Council was known to be strongly considering not providing for any controlled activities in the PAUP.

5.7 The change is unacceptable and should be removed.

Disregarding adverse effects where "taken into account" by objectives and policies

5.8 When assessing whether the effects of a proposed activity will be "more than minor" (for public notification) or "minor or more than minor" (for limited notification), a consent authority will, if the Bill is enacted, be able to[13]:

> *"…disregard an adverse effect of the activity if the adverse effect, considered in the context of the relevant plan or proposed plan, is already taken into account by the objectives and policies of that plan."*
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> (Emphasis ours.)

5.9 The open-ended nature of this provision is immediately apparent to resource management practitioners. To the extent that the objectives and policies of a plan exist to set the framework for the entire document, it is difficult to conceive of any potential adverse effect that falls within the scope of a consent authority's jurisdiction that is not somehow "taken into account" by the objectives and policies of its plan. To prevent an affected party from submitting in relation the very effects that the plan was set up to control is bizarre and can only introduce uncertainty, delay and process risk – contrary to the objective of the Bill itself.

5.10 In any event, how do objectives and policies "take into account" the adverse effects of activities? Does a policy which seeks to avoid an adverse effect still take it "into account"? Does a policy which seeks to mitigate an effect (such as shading) by providing a performance standard (such as maximum height) that will trigger the need for neighbour approvals if it is breached "take into account" the adverse effects of the activity? Which of a range of competing objectives and policies will take precedence? How is it to be applied by a processing officer or consultant? The courts will have to tell us the answers to these questions – the RMA will take the blame.

5.11 We agree with the LGNZ's submission in relation this provision:

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13 Clause 127 – proposed section 95D(ca).

> *"The new sub-clause leaves significant uncertainty for a local authority in terms of how objectives and policies (and particularly more general ones) should be applied…This new provision is likely to be very litigious as the interpretation will be very uncertain. As a result, it is likely that plans will need to be redrafted so objectives and policies are more prescriptive".*

New and complex eligibility criteria

5.12 The Bill would introduce new highly complex "eligibility criteria"[14] and a new limited category of people who can be considered affected parties for the purposes of limited notification for all applications other than "regional consents"[15] and most non-complying activities.

5.13 A potentially affected party would need to establish that they are eligible to be notified of an application by reference to the type of activity for which consent is sought. For example, if the activity that is going to occur on designated land is not a non-complying activity, only the relevant requiring authority is eligible to be considered affected. This overlooks two basic facts:

(a) It will almost certainly be the requiring authority itself that is proposing the activity, e.g., discharges associated with the land use which is the subject of the designation; and

(b) The designation may well apply to a major piece of infrastructure, e.g., wastewater treatment plant, with potentially significant adverse effects that neighbours would be precluded from being notified of and therefore lodging submissions on.

5.14 The eligibility criteria identify categories of parties based on assumptions about:

(a) Who might need to have a say, e.g., the Medical Officer of Health – a first in the history of the RMA; and

(b) The likely generated effects of categories of activities based on the activity status of the activity in plans written before the provision was enacted - entirely unrelated to actual effects or any actual proposal.

5.15 If the potentially affected party establishes eligibility, they would still need to meet the threshold in proposed section 95E[16] to be entitled to limited notification.

Fundamental shift in philosophy as regards notification

5.16 The proposed notification provisions are fundamentally contrary to the basic tenet upon which the RMA was based, i.e., that there would be no standing requirement for submitters – to that extent, it would represent a fundamental shift in philosophy from that which has hitherto existed. The provisions are also highly complex and are almost certain to lead to unintended consequences and litigation.

5.17 We concur with the NZLS submission on the Bill[17]:

> *"Overall the new provisions relating to both public and limited notification introduce a greater level of complexity to the consent process. That is undesirable. There are potential costs in the lack of*

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14 Clause 128 – proposed section 95DA.
15 Which are not defined or proposed to be defined but presumably related to activities that can only be granted by a regional council.
16 Clause 129.
17 At paragraph 189.

public participation, including loss of public confidence in the consent process and a reduction in the quality of decision making."

5.18 LGNZ echoes this concern[18]:

> *"LGNZ considers that new ss95A and 95B would establish an unnecessarily complicated process, which would be more limited than the existing RMA provisions…The existing limited notification processes seem to be working well as they are. New sections 95 to 95B are unnecessary and overly complex."*

Lack of justification for the change

5.19 What justification, if any, exists to introduce these novel and difficult concepts? The National Monitoring System data for 2014/15 confirmed that 96% of applications processed to a decision in that time frame were non-notified (up from 94% in 2010/11 and 95% in 2012/13). It is therefore clear that the existing notification processes are not routinely causing undue delays such as to warrant any further substantive revision – let alone amendments of the nature and complexity proposed by the Bill

5.20 These statistics confirm that there are a range of effective avenues available to applicants to avoid their applications being notified, including designing proposals so they are a controlled or restricted discretionary activity at worst; obtaining any necessary written approvals from potentially affected parties; and appropriately addressing potential adverse effects.

5.21 Notification in appropriate circumstances is fundamental to the ability of landowners to protect their property rights (such as their reasonable expectation of amenity including privacy). Contrary to the RIS[19], it also enables consent authorities to obtain better information about the potential effects of a proposal and, in many circumstances, to become aware of important effects which otherwise have been assessed incorrectly or underplayed by applicants and council officers.

5.22 All those in involved in the RMA should be able to efficiently and clearly determine when notification will be required and the basis on which this decision will be made. This requires simple, workable statutory criteria which are easy to understand and apply – not the complex set of prescriptive and ultimately unfair provisions that are proposed in the Bill.

6. INTRODUCTION OF NOVEL AND ILL-DEFINED CONCEPTS RELATING TO ACTIVITY STATUS AND RESOURCE CONSENTS

6.1 The Bill also proposes to introduce a number of novel, ill-defined and untested concepts in relation to activity status and resource consents. These will create uncertainty and can cause process delay and costs as a result of the need for a cautious approach by council processing officers and the inevitable need for the courts to clarify the ambit of the concepts.

6.2 The Bill[20] proposes to introduce "deemed permitted activities". These are activities that, in accordance with the relevant planning instruments, would require resource consent, but which can be declared by a consent authority to be a permitted activity (before or after a consent application is made) if the following conjunctive criteria are satisfied:[21]

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18 At page 28.
19 See paragraph 1.7 above.
20 Clause 122 - proposed section 87BA and 87BB.
21 Proposed section 87BB(1).

(a) The activity would be a permitted activity but for a "marginal or temporary non-compliance" with "requirements, conditions and permissions" specified in the RMA, regulations, a plan or a proposed plan; and

(b) Any adverse environmental effects of the activity are "no different in character, intensity or scale" than they would be in the absence of this non-compliance; and

(c) Any adverse effects of the activity on a person are less than minor; and

(d) The consent authority, in its discretion, decides to notify the person proposing to undertake the activity that the activity is a permitted activity.

6.3 This clause is a source of significant concern; a number of points need to be made.

"Marginal or temporary non-compliance"

6.4 The phrase "marginal or temporary non-compliance" is not used in the RMA and therefore has no established meaning in a planning context. The term "temporary" is used in section 107(2)(b) of the RMA relating to discharges of a "temporary nature". The meaning of "temporary" has been subject to some limited judicial consideration, but there is little in those cases[22] that assists other than the inevitable observation that such provisions need to be considered in the circumstances of the case.

6.5 The term "marginal" means "minor or not important; not central".[23] It is not used in the RMA, although the similar terms "minor" and "less than minor" are. The rules of statutory interpretation tell us that if a new term has been introduced it must mean something. It follows that "marginal non-compliance" needs to be interpreted as something different to "minor" non-compliance.

6.6 So how is "marginal" different to "minor"? Is it more than minor or less than minor? If it is less than minor, is it less than "less than minor"? One can immediately see where the debate (and inevitable litigation) is headed.

6.7 Given the clear potential for these provisions to override the rights of potentially affected neighbours, etc., it is only a matter of time before the courts are called upon to clarify the scope of this language. Until we have assistance, deciding what would constitute a "marginal or temporary non-compliance" with relevant regional or district plan rules for permitted activities would be a largely subjective exercise.

Adverse effects "no different"

6.8 There is an obvious similarity between this provision and section 10 relating to existing use rights which protects activities where "the effects of the uses are the same or similar in in character, intensity and scale" as that lawfully established. In the context of section 10, we have historical activities to compare existing activities with. No such luck for the processing officer in the context of this proposed provision.

6.9 How is a processing planner meant to establish that the effects of the proposed activity are "no different" to what they would have been but for the non-compliance? Presumably they must envisage what the effects of the activity would have been without the "marginal or temporary effect" and then compare it with the temporary or marginal effect overlaid on it. That is a very fine and difficult analysis. The case law

22 *Paokahu Trust v. Gisborne DC* (A 162/03); *Marr v. Bay of Plenty RC* [2010] NZEnvC 347.
23 Oxford Dictionary.

on "existing environment"[24] will no doubt become highly relevant in the litigation that would follow the enactment of this provision.

6.10 There will be plenty to argue about. Again, there is a subtle change of wording from section 10 that we must assume was intentional. If effects are "no different" under section 87BB(1)(b) is that the same as "the same" effects under section 10? One presumes not. If not, how is "no different" different from "the same"? Or is it the same? Can section 10 cases help us?

Status of the notice

6.11 A number of legal issues arise in relation to the status of the notice that is issued if a low impact proposed activity is deemed to be a permitted activity, for example:

(a) What status does the notice have? Is it intended to be the equivalent of a certificate of compliance issued under section 139? Does a notice give rise existing use rights under section 10? One presumes so.

(b) Does the case law relating to the scope of activities apply to define and delimit the activities to which the notice is subject?

(c) Presumably conditions cannot be imposed on a notice for a deemed permitted activity – but what is the status of the performance standards (or other provisions of the plan) that the notice allows an applicant to contravene?

(d) What standards or controls is the deemed permitted activity holder required to comply with? Can a notice holder be subject to enforcement proceedings?

(e) What status would a notice have when assessing the effects of a subsequent application? Will (or should) activities allowed under a marginal or temporary notice be considered part of the permitted baseline?

6.12 The provision raises all of these questions but answers none – again, litigation is inevitable, either at the behest of an applicant who wishes to use the provision or a neighbour whose interests are affected by the issuance of one of these certificates.

6.13 The upshot is that this provision will:

(a) Cut across the integrity of planning instruments in a fundamental and constitutionally inappropriate way;

(b) Be the bane of processing officers as applicants clamour to demonstrate that they meet these criteria; and

(c) Spawn a whole new line of jurisprudence as applicants, affected neighbours and consent authorities wrangle over just what "temporary", "marginal" and "no different" mean.

6.14 Uncertainty, process costs and delay will result – applicants would be ill-advised to rely upon these provisions until they are thoroughly tested.

6.15 This provision is ill-conceived, unacceptable and incapable of repair. It should simply be deleted – especially when the benefits of the procedure as compared with the non-notified resource consent process are clearly "marginal".

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24 For example, *Arrigato Investments Ltd v Auckland Regional Council* [2002] 1 NZLR 323 (CA), *Queenstown Lakes District Council v Hawthorn Estate Limited* [2006] NZRMA 424 (CA), and *Save Kapiti Inc v New Zealand Transport Agency* [2013] NZHC 2104.

"Directly affected parties" – need for clarity / definition

6.16 The Bill introduces limited notification as an available option for discrete plan changes, in circumstances where "directly affected" parties can be easily identified. As currently drafted, the new provision (new clause 5A to the First Schedule) begins:

> *"5A Option to give limited notification of proposed change*
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> *(1) This clause applies to a proposed change to a policy statement or plan.*
>
> *(2) The local authority may give limited notification, but only if it is able to identify all the persons directly affected by the proposed change…"*
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> (Emphasis ours.)

6.17 We support this proposal in principle to the extent that it may enhance "plan agility". However, one issue needs to be addressed. The term "affected person" is already used in the context of the notification provisions of the RMA, the Bill now uses the term "directly affected" without defining what that means or providing any tests. The High Court has held that the words "directly affected":[25]

> *"…are not words of any technical meaning. They are simple words with well understood meanings and connotation in everyday use. What I think is to be emphasised is that such words apply to the particular circumstances in each case."*

6.18 On the basis of this judicial guidance, local authorities will have reasonably wide discretion to determine the scope of "directly affected" parties in respect of each plan change having regard to the "particular circumstances in each case". That is something consent authorities are capable of doing as a result of their experience with notification of resource consent applications. However, there remains some scope for confusion and an amendment is warranted – perhaps to bring it in line with the definition in section 2AA(2) if desired, or to define it in a way that clearly sets it apart.

Lack of justification

6.19 What is the justification for this amendment? What are the drafters seeking to achieve? Surely, if the effects of the proposed activity are so benign that it is appropriate for it to be deemed to be a permitted activity, then it will fall within the 95% of applications that are processed on a non-notified basis?

6.20 The documents that an applicant will prepare to demonstrate compliance with the first three criteria (in order to persuade a council to exercise its discretion in their favour, under the fourth criteria), will need to address the same material as an assessment of environmental effects that needs to comply with section 88 of the RMA. What are we achieving here, other than introducing complexity to the process?

6.21 District and regional plans perform a fundamentally important function in achieving the purpose of the RMA. They are promulgated via a thorough process involving consultation, notification, the lodging of submissions and further submissions, hearings and a reasoned decision. Property owners and businesses are entitled to rely on the provisions of the plan. We consider that introducing a mechanism into the RMA that creates a legal fiction by enabling an activity to be declared to be a permitted activity despite the clear words of the plan is constitutionally inappropriate and unjustified.

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25 *Ngatiwai Trust Board* v. *New Zealand Historic Places Trust (Pouhere Taonga)* [1998] NZRMA 1, at page 13.

7. REDUCTION OF PUBLIC PARTICIPATION / ACCESS TO JUSTICE

7.1 It will now be apparent that the Bill contains a number of provisions that will reduce opportunities for public participation with limited (if any) justification or confirmation that the Bill will achieve any significant benefits. These include:

(a) A mandatory requirement for local authorities to strike out a submission for a number of reasons, including that it does not have a sufficient factual basis, is not supported by evidence or is unrelated to the effects that were the reason for notifying the application;

(b) Restrictions on those eligible to be considered for limited notification; and

(c) Reduced time frames for some processes, in particular preparing plans under the SPP.

The founding principle

7.2 As noted at the outset, the RIS[26] justifies these amendments on the basis that public participation "…undermines the purpose of notification and seeking submissions, which is to give decision-makers useful, focused input". We fundamentally disagree and remind the reader that:[27]

> *"The founding principle of the RMA at the time of its enactment was that greater involvement by the public in resource management processes would result in more informed decision making and ultimately better environmental outcomes. As noted by the Supreme Court in Westfield (New Zealand) Ltd v North Shore City Council, it is the general policy of the Act that better substantive decision making results from public participation. The RMA has, as a consequence, afforded the public a wide scope for involvement in both the preparation of planning documents and the consideration of resource consent applications."*

7.3 Access to justice is a cornerstone of our democratic society. Participating in the preparation of planning instruments and resource consent applications represent a fundamental means of protecting property rights as well as achieving the RMA's sustainable management objective. Any restriction on these rights must only occur in a transparent manner and only with sound justification.

New power to strike out submissions

7.4 The Bill would provide a power for consent authorities to strike out submissions that are frivolous and vexatious, disclose no reasonable case or would represent an abuse of process[28] , etc., as the Environment Court[29] does. The courts have indicated that this power should be used sparingly and must to take into account the public participatory nature of the RMA.[30] As a result, the bar for striking out is set quite high. That power is acceptable given that consent authorities would be required to apply similarly stringent standards in exercising their new powers.

7.5 However, the Bill goes further than the Environment Court's current powers. An authority that is conducting a hearing is required to strike out submissions that:

(a) Do not have a sufficient factual basis;

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26 Paragraph 253.
27 *Environmental and Resource Management Law* (5th ed.), Nolan (editor), at paragraph 19.3 (with references omitted).
28 Clause 120 – proposed section 41D.
29 Section 279(4).
30 *Hauraki Maori Trust Board v Waikato RC* HC Auckland CIV-2003-485-999, 4 March 2004; *Perceptus Ltd v Waitakere City Council,* A40/08.

(b) Are not supported by evidence; or

(c) Are unrelated to the effects that "were the reason for notifying the application".

7.6 The direction striking out the submission can be made "before, at, or after the hearing" of the relevant application – clearly, if that direction is made in advance of the hearing, the authority is effectively determining whether or not a submission should be heard on the merits.

7.7 Hearing commissioners will come under intense pressure from applicants to exercise this power – if a submission is struck out, no appeal can be lodged. Applicants will request decision makers to make separate decisions on:

(a) The merits of the application; and

(b) The adequacy of the evidence in support of a submission (challenging its validity on whatever basis under proposed section 41D(2)(b) that can be made out).

7.8 There is clear potential for abuse and litigation challenging decisions to strike out submissions.

7.9 The concept is also practically flawed because the RMA does not impose specific obligations on submitters in terms of the information that needs to be provided. The regulations essentially require a submitter to state the nature of the concern and their reasons. Normally submitters will produce the evidence in support of their submission in the lead up to or at the hearing. If they are not calling expert evidence, they are not required to pre-circulate.

7.10 At what point does a consent authority decide that there is not sufficient evidence to support the submission when submitters are not even required to supply non-expert evidence? Or will expert evidence automatically trump locals' evidence from now on? Does the RMA need to be amended to require a minimum level of information from submitters? Do council officers need to be able to request further information from submitters?

7.11 Of course not. These basic underpinnings of the provision simply have not been thought through. The bottom line is that the entire concept is draconian, anti-democratic and impractical. The only sensible and fair option is to delete this provision.

7.12 In our view, if the Government wants public participation rights and access to justice significantly curtailed in the planning arena, it should do this transparently via substantive overhaul of the planning system itself – not death by a thousand cuts via the continual amendment to an Act which has public participation as a fundamental cornerstone. We strongly concur with the RMLA's submission on the Bill[31]that:

> *"…many of the processes [proposed under the Bill] remove or further diminish public participation and rights of appeal. It has not been demonstrated that the loss of these important checks and balances is outweighed by (or is proportional to) the benefits of the new processes in terms of robust and durable resource management conditions."*

Impact of reduced time frames

7.13 Access to justice is also affected when parties have rights to participate, but insufficient time and opportunity to exercise those. This could occur, for example, with

31 Paragraph 9(b).

the SPP, where the time frame allowed for participation would be completely at the Minister's discretion. This has clearly been demonstrated by the processes established in special legislation for both the PAUP and proposed Christchurch Replacement District Plan. While in no way a criticism of how those processes have been run, the issue is neatly summarised in the NZLS's submission on the Bill:[32]

> *"Experience with both these processes has demonstrated that a significant number of affected parties and residents have been prevented from engaging with these planning instruments (or simply chosen not to), because they are not able to do so effectively in the prescribed time frames. Many who tried to participate have also had difficulties in obtaining necessary professional advice (legal, technical and planning) to support and guide their involvement. This is due to the overall time frames and number of clients requiring representation resulting in those advisors simply becoming completely overwhelmed with work."*

8. EXCESSIVE POWER WITH THE MINISTER FOR THE ENVIRONMENT

8.1 The Bill contains provisions that would enable the removal of decision-making making power from local communities and their transfer to the Minister for the Environment. Key provisions from the Bill which would remove control of planning matters from local communities to the Minister include the:

(a) Mandatory introduction of the NPT and extent of the Minister's discretion as to what that contains[33];

(b) Minister's proposed new regulation making powers to dictate the content of rules in regional and district plans[34]; and

(c) SPP process, which is effectively at the Minister's complete control and discretion, including the ability to completely reject the outcome of that process with no rights of appeal[35].

8.2 We are concerned about the continued aggregation of power to the Minister. Clearly, there are RMA issues in respect of which it is useful to have national direction and guidance. This can be already achieved via the introduction of NESs and NPSs. The Government also deems it useful for some projects to be the subject of the call-in procedure. But in light of the existing procedures that are available, we consider that these provisions in the RLRB go too far.

8.3 These amendments directly contradict the principle of local decision-making on which the RMA has always been based. The Minister's powers could be used to override rules that have (at least until now) been developed through robust public consultation and (when necessary) impartial determination by the Environment Court.

8.4 With the SPP in particular, the Minister will essentially be in the position of the local authority or Environment Court and make decisions on appropriate planning provisions, without having heard the detailed evidence and submissions that would normally be available to those bodies.

8.5 In our view, these proposed amendments would:

(a) Enable a single Minister to set public policy and determine how that should be implemented in the planning context, contrary to the doctrine of separation of powers on which our democratic system is based.

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32 At paragraph 93.
33 Clause 37 – proposed sections 58B to 58J.
34 Clause 105 – proposed section 360D.
35 Clause 52 – proposed section 80C.

(b) Have the effect of making planning provisions and processes subject to the whims of the Minister of the day.

(c) Undermine public confidence in and the validity of the planning system.

8.6 We agree with the NZLS's submission on the Bill:[36]

> *"Devolution of decision-making powers to local communities and providing for public participation were two of the fundamental principles of the RMA as originally enacted, for good reason. They underpin the central purpose of the Act – the sustainable management of natural and physical resources – which relies on community input to achieve quality planning and environmental outcomes."*

9. NO QUANTIFICATION OF COST OR IMPACT OF AMENDMENTS

9.1 We have tried to understand why, as with previous amendments, a number of the Bill's proposals "miss the mark" by such a wide degree. One explanation is that little substantive, robust analysis appears to have been undertaken to establish either the nature, cause or extent of current concerns with the RMA.

9.2 We do not suggest that there are no issues with the RMA or how it is currently administered – however, it is necessary to:

(a) Understand a problem (and whether one even exists) in order to determine how it might be fixed; and to

(b) Quantify the costs and potential impacts of doing so.

9.3 The "Agency Disclosure Statement" included with the RIS effectively acknowledges that this analysis has not been done:[37]

> *"Given the nature of issues covered in the reform program, accurate quantification of the size of the problems and impacts has not been feasible across all policy options. It is also difficult to identify the exact impact from many of the proposals in this paper as they will affect tangata whenua, local government, stakeholders and communities to a varied degree and with a mix of direct and indirect costs and benefits."*

9.4 We agree with LGNZ's submission on the Bill:[38]

> *"We also consider that the financial costs to local government and communities associated with implementing the proposals needs to be fully addressed, the Regulatory Impact Statement is largely silent on these. Unless all costs and benefits are accurately identified and quantified, the merits of a proposal cannot be addressed."*

9.5 With respect, it is not good enough to say that: "it's too hard to work out the cost or effect of what we propose" – the Ministry would frown on that quality of analysis from a consent authority. There is a great deal at stake here. Our resource management processes and their outcomes have important social, economic, cultural and environmental consequences that affect us all on a daily basis.

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36 At paragraph 98.
37 Page 1.
38 Page 4.

10. TIME TO PAUSE FOR THOUGHT

10.1 This paper has hopefully demonstrated the very significant process cost and time that the proposed amendments will have – not to mention the unintended consequences that previous hurried and poorly drafted amendments have had.

10.2 The RMA, a fundamentally sound statute that deservedly started life as an internationally ground-breaking piece of legislation, has been fundamentally weakened by continual (and particularly recent) amendments. It is nearing a tipping point at which it is becoming unworkable. And two of its fundamental precepts – public participation and local decision-making by co-operative mandate – would be severely compromised by the Bill. The RMA is being brought to its knees.

10.3 Our position is that when issues of this magnitude are at stake, there needs to be strong justification for the amendments by reference to the alleged problems and quantification of the "costs and benefits" of the choices made, including the option of "doing nothing". After all, this is the bare minimum that Parliament expects of planning authorities. The proponents of this legislation readily acknowledge that this has not been done.

10.4 Sound analysis and debate is required. As a minimum, those aspects of the Bill that we have highlighted in this paper need to be revisited, preferably by their removal from the Bill and complete reconsideration in light of these remarks. Obviously the Select Committee is the fundamentally important next first port of call in that regard. The hope is that party political considerations can be put aside in favour of quality outcomes.

Simon Berry / Helen Andrews

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