Resource Management Law Association of New Zealand Inc.

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Ministry for the Environment, via email

Report of the Minister for the Environment's Resource Management Act 1991 Principles Technical Advisory Group, and RMA Reforms Phase II

1. We have, in the time available, attempted to canvas the views of the membership of our Association and the range of responses and thoughts/comments received to date about the TAG's recommendations on sections 6 and 7 are diverse. While some view the recommendations of the TAG as a "positive step", many of the membership have expressed profound concerns about the direction being proposed. We therefore do not attempt to confine our comments to any one part of that spectrum of viewpoints.

2. Above all we fully acknowledge the considerable and careful thought by an Advisory Group of substantial calibre that underpins the most significant attempt yet to revisit what the Courts have described as the 'engine room' of the RMA (Part 2); an assessment that was certainly due and not before time, and leaving aside the issue of natural hazards that provided impetus to the initiative. While aspects of the following comments may appear 'negative', they are not intended to be, but rather constructive towards ensuring any proposed reform is well considered, all potential implications are factored in, and the result is a contemporary, relevant and clearly framed Part 2 that is consistent with the modern legislative drafting.

3. The key points in respect of potential reforms of Part 2 we wish to make are:

a. If there are concerns that Part 2 of the Act has been misinterpreted from its original intention of protecting biophysical bottom lines, then the RMLA recommend amendments to Part 2 to remove that ambiguity. Any changes to Part 2 which are purporting to remove that ambiguity must involve changes to section 5 which, through its use of the word "while", has always caused uncertainty about the role of section 5(2)(a)-(c) – i.e. whether the matters in sub-clauses (a)-(c) are bottom lines that must be provided for (i.e. "while" as a subordinating conjunction, meaning “provided that”), or whether they are simply matters to be balanced against the opening phrase of section 5(2) as part of an overall judgement ("while" as a coordinating conjunction).

b. The internal hierarchy in Part 2, and the overall judgment applied to it, currently allows for comparison of conflicting considerations, the scale or degree of them, and their relative significance to the final outcome. Material, structural reforms to sections 6 and 7 do not seem necessary.

c. Removal of directive words such as "protect", "preserve", "maintain" and "enhance" removes protection of “bottom line” values and resources and would increase ability for parties to debate over the relative significance of competing values and interests, potentially compounding rather than reducing uncertainty.

d. The approach recommended by the TAG is likely to allow for trade offs when balancing the various elements in sections 5 and 6, with little guidance or requirement as how the reasonably foreseeable needs of *future generations* will be provided for within that assessment.

e. The proposal to define outstanding natural features and landscapes, and the "significance" of biodiversity, indigenous terrestrial habitats and aquatic habitats by reference to regional policy statements is supported but, on its own, will not resolve current uncertainties and costs surrounding such assessments. We recommend taking the opportunity to better effect these reforms with technical guidance on significance criteria for these matters of national importance, and progression of statutory instruments such as National Policy Statements and National Environmental Standards.

f. The transitional impacts, particularly relating to uncertainty and efficiency, of a fundamental change to Part 2, as proposed, are far reaching. Conversely (and if current plan and policy statement reviews are exempted from future legislation progressing the reforms through transitional provisions) there is a real prospect of a ‘generation’ of plans and policy statements being ‘out of sync’ with Part 2, complicating section 104 evaluations for up to a decade to come.

g. The TAG's recommended section 7 is a mix of procedural and substantive elements that are either replicated throughout the Act, or that may require material consequential amendments to the Act.

4. The TAG's recommendations in respect of natural hazards are generally supported and the RMLA endorse the need for an NPS on natural hazards to reinforce consistency, limit confusion and resolve some of the interpretation and implementation issues in respect of natural hazards.

RMLA Recommendations

5. Acknowledging that any reform has a transitional impact and cost, the Association suggests a "maxi/min" approach, i.e. confining Part 2 reform to that which is *essential* to ensure Part 2 of the Act remains relevant to contemporary and likely future circumstances; addressing natural hazards (the initial and publicised impetus for the reform). The scope and extent of review proposed in the TAG Report arguably goes well beyond that degree of change.

6. By way of example the advisory group recommends what is in effect a reframing of section 5 (codifying that it mandates a "broad overall judgment approach" and with the introductory words of proposed new section 6). Were Government to move to reframe section 5 as intended at the outset (for example by amending the word "while" to mean "provided that"), it is arguable that a much lesser extent of change to section 6 would be required (and in turn section 7). Contrary to the suggestion at Page 18 of the Report, this option would not necessarily involve the greater extent (or significant) amendment to Part 2.

Discussion - Overall broad judgment/environmental bottom lines

7. The TAG determined that while Part 2 of the RMA was originally intended to protect biophysical bottom lines, the Courts have placed more emphasis on a broad overall judgment, and therefore the TAG recommend codifying that broad overall judgment into section 6. A key (if not fundamental) premise of the TAG Review Report is that Part 2 of the Act has not therefore been applied by the Courts in the manner intended (application of an overall broad judgment approach rather than a "environmental bottom lines") - this to the point (as stated on page 18) that the section 6 and section 7 matters should be re-examined including supplementation with reference to social, economic considerations (pages 17 to 19).

8. If it is determined that this has indeed been the application of Part 2 at the expense of Parliament's original intention, and if it is determined that biophysical bottom lines should be protected in order to sustain the environment for future generations, then another option would be to correct the approach taken in case law (rather than codify it), and to reframe section 5 in a manner that better ensures the intended "bottom line" approach would be applied by the Courts. It is arguably curious to promote a reform measure that encodes a body of case law that departs from the clear intention of Parliament in enacting legislation, rather than moving to correct it.

9. It seems incongruous to implement changes in the introductory words to section 6 that effectively redefine section 5. The recommendation is "*In making the overall broad judgment to achieve the purpose of the Act*…". This is essentially a proposed amendment of section 5, which went beyond the terms of reference of the TAG. As it applies to the interpretation of section 5 directly, it is inappropriate for it to sit in section 6, and would not improve certainty of interpretation of Part 2 generally.

10. Retaining the overall broad judgment approach and clarifying environmental bottom lines are not mutually exclusive. Sections 6 and 7 currently flesh section 5 (2)(a) and (b) (and in some but not all cases indicate where the "bottom line" threshold is).

11. Another essential premise of the TAG Report is that the internal hierarchy within Part 2 has not been consistently applied by the Courts (refer opening sentence to section 4.1.1 "… *The fundamental reason for our proposed new approach is to reaffirm the pre-eminence of the sustainable management statutory purpose …*".

12. At that section of the Report, reference is made to a body of case law that we (the writers at least) consider **has** in fact confirmed the relative internal hierarchy within Part 2, commencing with the seminal decision of the High Court in *New Zealand Rail v Marlborough District Council* (confirming that section 6 matters are subordinate to the primary purpose as expressed in section 5). Any Environment Court decisions to the contrary would be open to correction under existing precedent and established authority. The one case cited in the Report (page 65) and as suggesting that there is some conflict in the approach (*Unison Networks Limited v Hastings District Council*) simply involved a weighting of a section 6 factor over a section 7 matter; as is in fact consistent with the internal hierarchy established under the existing Part 2, and so this is not a case in support of a need for correction or reform to those provisions.

13. To the extent that in any individual case, a section 6 or section 7 matter is found to prevail, that is in fact as envisaged by the overall broad judgment approach in any event (refer reference to *North Shore City Council* decision on page 17 of the Report "*allowing for the comparison of conflicting considerations and the scale or degree of them, and their relative significance or portion in the final outcome*").

14. There may be implications that have not been anticipated by the TAG from the proposed reform (codifying the "overall broad judgment approach") for example in the context of water management. To illustrate by way of one example, the NPS (Fresh Water Management) requires Regional Councils to establish fresh water objectives and set limits to give effect to the objectives of that instrument, and which in turn seek to safeguard life supporting capacity *in sustainably managing the taking, using [etc] of fresh water* (Objective A1). An issue arises as to whether, applying an (expressly mandated) overall broad judgment approach to sustainable management, "hard limits" to protect in stream ecological values would be warranted, or whether each limit itself (and instead) would need to be set applying an overall broad judgment at that level.

15. Our last concern in the discussion on biophysical bottom lines relates to the proposed removal of the directive words "protect" "preserve" "maintain" and "enhance". Some members consider this reduces the direction, guidance and certainty as to the relative significance of the resources and values involved and also the level of protection afforded to those matters, even if that was not the intention of the TAG.

Discussion – Section 6 amendments

16. There are undoubtedly members of the Association that would strongly support the references to social and economic considerations proposed for inclusion in the new section 6 (and 7) and including proposed section 6(h). Others would bemoan other elements removed or amended as discussed above. We confine our comments to those already given on that score (and as set out below), and without advocating any specific approach to the overall content of Part 2 itself, or in its own right.

17. Outstanding natural features, outstanding natural landscapes, areas of significant biodiversity, areas of significant indigenous terrestrial habitat and areas of significant aquatic habitats - the TAG recommends these be defined by reference to identification in operative provisions of regional policy statements. While the aim of providing greater certainty to resource users and interested or affected communities alike is supported, this effectively creates a circularity whereby Part 2 relies on each RPS as to what qualifies as "significant" or "outstanding", and in turn for consideration as a Part 2 matter. . There is a risk that inconsistency between RPSs in terms of what is identified, and an inconsistent recognition of these matters throughout the country, will either remain or result. Also, use of just a regional focus and context for defining significance and what is outstanding does not take into account matters that may be common in a region, but scarce nationally. The assessment on matters such as this is complex, and we consider documents such as NPSs have great potential to provide meaningful guidance on complex issues that cannot be boiled down to one or two sentences.

18. In addition a substantial burden will be placed on Regional Councils to undertake the requisite, highly contentious evaluations and within a relatively tight proposed timeframes (five years). As an alternative central government could assist with that task by providing greater guidance at a national level as to the manner in which significance is to be assessed. This opportunity should be taken as a supplement to this element of the proposed reforms if they are to be progressed. There is otherwise a risk that the very uncertainties currently 'dogging' resource management practice around these issues would simply be more directly transferred to the Regional Council's to resolve, and at a time where under local government reform, there is considerable pressure for fiscal restraint. Ministry initiated and supported collaboration by relevant expert and professional associations (ecology, landscape) may be a useful initial stage in development of such national guidance.

19. The consequences of removal of a range of existing Part 2 matters also need to be considered. For example in removing reference to "amenity values" and "quality of the environment", to what extent would district plans be able to incorporate standards to protect such amenity (noise limits, design criteria for buildings). Appreciating concerns at the extent to which planning interventions in that realm have evolved (list at page 52 of the Report), it is conversely unclear whether such controls or measures of any kind would be mandated under the provisions of Part 2 as proposed (except to the extent necessary for protecting health and safety of communities (section 5(2), or under proposed new section 6(j)- planning and design of the built environment, and which would exclude rural or recreation zones from that ambit in any event).

20. Similarly, care needs to be taken in making decisions about what to include or exclude within any reframed Part 2. For example, there are cases which suggest that the lack of any express reference to the need to safeguard the life supporting capacity of soils in section 6 has relegated the importance of that issue relative to the former Town and Country Planning Act [*Becmead v Christchurch City Council, Selwyn District v Canterbury Regional Council*]. Would the converse reference to a need to provide for reasonably foreseeable availability *of land* for urban expansion as proposed for inclusion within section 6 undermine attempts by Councils to "ring fence" or control urban expansion (including through encouraging higher density housing)?

21. There are issues of wording that need to be carefully considered including for example:

    a. Why is reference made to the "physical qualities" of outstanding natural features, but the "visual qualities" of outstanding natural landscapes (current law and practice suggests both categories of qualities apply to both resource sets)?

    b. Does the phrasing of proposed section 6(e) "commencing with the words *in relation to Maori*", confine the relevance of those interests to the context of Maori communities, or does more widespread application of the need to provide for that set of relationships remain in place?

    c. As to the definition of archaeological site, and in terms of proposed subclause 2, could not *any place or site* have the potential, through investigation by archaeological methods, to provide evidence relating to the history of New Zealand?

Discussion - Section 7

22. Section 7 does appear to some members to be a rather curious assemblage of both procedural and substantive elements. The way this is written it appears more like a guidance note than legislation and may not add significantly as to what is required, or allowed for, throughout the Act in any event.

23. The introduction of the concept of environmental compensation in section 7(c) is incongruous. One could question whether there is a need to provide for express reference to voluntary forms of environmental compensation, when such is already (and under the case law referenced in the Report, page 87) able to be considered under s104(1)(c), where volunteered by an applicant and as part of the overall judgment that is applied. Many actions that come under the broad heading of compensation clearly qualify as mitigation (under section 5(2)(c)) and the remaining actions (such as compensation when mitigating offsets are not possible) are either classified again as mitigation, or as potentially a positive effect/benefit. Specific acknowledgement is therefore not essential and in the manner proposed may create uncertainty and lead to arguments about the weight to be afforded to environmental compensation versus other mitigation, given its specific recognition.

24. Section 7(d) makes a general statement in favour of collaboration. If collaboration is to be incorporated formally into RMA processes we suggest it needs to be progressed at a detailed process level rather than the level of principle. The expectation in terms of implementation and weight to be attributed to collaborative outcomes versus other outcomes should be clear and transparent, and we consider better established in practice before inclusion as an expressly stated sustainable management method.

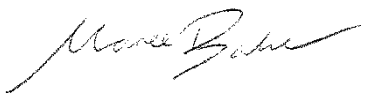
Discussion - Transitional issues

25. There are significant concerns within the membership that, whether or not within the scope of the TAG terms of reference, the sheer extent of proposed amendment to Part 2 will have substantial impact on existing second generation policy statement and plan review procedures underway, and which many Councils have commenced within the last one to two years, arguably without “fair warning” that the ratepayer and community/stakeholder investment in those processes may be (in effect) wasted. If Part 2 is fundamentally reformed as proposed, it is likely that everything from the New Zealand Coastal Policy Statement 2010 down would need to be substantially revisited, including draft or notified second generation regional policy statements and plans as currently being prepared or initiated throughout New Zealand, and with reference to achieving sustainable management outcomes as currently framed in Part 2 of the Act. Conversely, and if the conventionally applied transitional provisions would exempt this generation of plan and policy statement reviews (as currently in train) from legislative change to the RMA reflecting the proposed reforms, then there is a real prospect of a ‘generation’ of plans and policy statements being ‘out of sync’ with Part 2, complicating section 104 evaluations for up to a decade to come.

26. The proposal to have "significance" of various section 6 matters defined in RPSs is accompanied by the TAG's recommended 5 year transitional period. However, even if that was realistic (which is unlikely) in the interim that leaves at the minimum a period of 5 years where there is effectively no definition of these new matters. Furthermore, the litigation likely to be involved between vested interests in every region over the new definitions is likely to be significant.

27. In conclusion, we are happy to make ourselves available to meet with the Minister and officials to discuss these points further.

Yours sincerely
Resource Management Law Association
Of New Zealand Inc



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