REFORM OF THE ENVIRONMENT COURT – DOES IT MAKE SENSE?

Comments from Martin Williams and Simon Berry, Court Convenors

National Committee, Resource Management Law Association

1. INTRODUCTION

1.1 The Environment Court is a specialist court that deals with appeals from council decisions on resource consent applications and submissions on the plans and policy statements that guide development throughout New Zealand. Its functions are performed by specialist judges supported by suitably qualified commissioners with expertise in resource management, engineering, science, etc.

1.2 The Court is tasked with making decisions that are of fundamental importance in relation to allocation of resources and the stewardship of New Zealand's environment. The decisions it makes can involve investments in developments worth several hundred million dollars. Indeed, the scope of the Environment Court's role is such that its decisions have the potential to affect New Zealanders' day-to-day quality of life more than any other court in the judicial system.

1.3 As successor to the Planning Tribunal (and before it the Town and Country Planning Appeal Board), the Environment Court performs the role of a specialist appellate body in relation to planning issues that has existed since 1953. The Board, Tribunal and now the Environment Court have always had a separate specialist jurisdiction, with its own registry and administration.

1.4 The Government has recently embarked on the most wide-ranging and significant reform of the Environment Court since the establishment of the Appeal Board. Recent developments have seen the Court's role in plan appeals completely removed in the case of the Canterbury Regional Plan, and its role would be significantly reduced under the "bespoke" process proposed for the Auckland Unitary Plan process.

1.5 Although details are sparse given the lack of consultation, thus far, with the legal or planning professions, it appears to be an open secret that Government is considering the integration of the Environment Court into the District Court such that it would no longer have separate status and function as a specialist Court with judges (and commissioners) devoted to resource management proceedings.

1.6 These developments appear to be fuelled by what we consider to be misconceptions in relation to the role and effectiveness of the Court.

1.7 Many people who are involved in Resource Management processes; practitioners, applicants and submitters alike, would dispute the need for radical reform of the Environment Court's role and function. They express a concern that alternatives that do not include a substantive role for the Court are likely to put huge pressure on council resources, and potentially result in decision-making processes that are more costly, as well as time consuming and less certain. Council hearings would also be more formal, and so less accessible to the general public, at least without legal representation. The quality of decision making and plan content may ultimately suffer; at greater overall cost to the environment and economy.

1.8 Some would also say that the recent Government interventions in the Resource Management field, not only involving the Environment Court but also in relation to recent issues such as the threat to override Auckland plan-making processes, reflects an issue of constitutional significance involving the over-reaching of the Government in judicial processes. The recently introduced (under urgency) Housing Accords and Special Housing Areas Bill, whereby the Government can effectively insist on new special housing areas, and whereby there is very limited scope to appeal decisions to approve housing in special housing areas, is perhaps a further (and the latest) case in point.

1.9 Whichever view is taken, these matters are too significant not to be aired and debated in an open and democratic way before any further decisions are made or legislative action taken.

Resource Management Law Association Inc.

1.10 The Resource Management Law Association (RMLA) is a multi-disciplinary body, the membership of which includes lawyers, planners, engineers, etc., who are involved in the New Zealand Resource Management process, and also central and local government functionaries.

1.11 The RMLA is concerned to promote within New Zealand:

(a) An understanding of resource management law and its interpretation in a multi-disciplinary framework;

(b) Excellence in resource management policy and practice;

(c) Resource management processes which are legally sound, effective and efficient and which produce high quality environmental outcomes.

1.12 Decisions made by the Government regarding the role of the Environment Court in relation to policy statement, plan and resource consent appeals, and to integrate the specialist Environment Court within the District Court, are of central relevance to the objects that the RMLA is concerned to promote (in particular, resource management processes which are legally sound, effective and efficient, and which produce high quality environmental outcomes).

1.13 The National Committee of the RMLA has therefore requested the Court Convenors on that Committee to prepare a paper for RMLA members to provide a perspective on the significance of the current reform proposals, to assist RMLA members to form their own views and adopt or progress any position or response to the reforms they wish to take.

Scope of paper

1.14 Aside from their implications for Resource Management practice, the issues addressed in this paper warrant at least some consideration from a constitutional and

International law perspective. It is therefore proposed to consider the issues arising under the following headings:

(a) Broader issues – International law and constitutional implications;

(b) Recent and current developments;

(c) Removal of the Environment Court as a separate specialist court;

(d) The Environment Court – its role and importance to the economy;

(e) Consequences- who pays and what price?

(f) Concluding comments.

2. BROADER ISSUES – CONSTITUTIONAL AND INTERNATIONAL LAW IMPLICATIONS

2.1 It is basic to New Zealand's constitutional arrangements that:

(a) There is a separation of powers between Parliament, the Executive and the Courts (each providing a check or balance on the other).[1]

(b) Parliament is supreme as to the expression of law, which is binding on the Executive,[2] but determined and applied by the Courts.[3]

2.2 Under International Environmental law (including Rio Declaration 1992, Principle 10) the following principles are relevant:

(a) As to rights participation in decision making about natural and physical resources upon which communities depend;

(b) Devolution of decision making to most appropriate level, relative to impact of the decisions involved.[4]

2.3 The relevance of these constitutional and International law principles is evident in the discussion of recent and proposed reforms discussed below.

3. RECENT AND CURRENT DEVELOPMENTS

Recent reforms to the role of the Environment Court

3.1 Since 2009 there have been a number of reforms affecting the role of the Environment Court in RMA decision making including:

(a) Establishment of the EPA administered Board of Inquiry (BOI) process for proposals of national significance. This has in effect displaced the Environment Court function for all major infrastructure and large scale development projects since 2009 – superseded by broader BOI format as

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1 PA Joseph *Constitutional and Administrative Law in New Zealand* (2nd ed., Brookers, Wellington, 2001) at 8, 236 and 269.
2 At 3, 8, 16, 237.
3 At 239 – 240, 252.
4 Refer *Justice Whata Salmon lecture 2012 –Environmental Rights in a Time of Crisis*

consent authority, but at the same time substantially 'capturing' Environment Court judicial resources.

(b) Interventions under Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 including removal of the right of appeal to the Environment Court regarding a number of planning instruments and water conservation orders, and replacing that right with appeals to the High Court on questions of law only. These changes affected processes then in train.[5]

3.2 It is worth noting in this context, that the BOI process has been able to take advantage of Environment Court case management processes, skills and resources. It would be fair to say that BOI's have drawn heavily on those skills and resources, and would almost certainly not have performed as well, and within the time frames allowed for the process, without that legacy of experience. Increasing recourse to the BOI avenue by proponents of projects of national significance, and the availability and use of the direct referral option, signal confidence in the Court.

3.3 The most recent proposals, such as they are, tend to turn their back on these resources and that expertise – both substantive and procedural.

Resource Management Bill 2012

3.4 The Resource Management Amendment Bill (including as referred back by the Select Committee) includes proposals for a radically different procedure and decision making structure for preparation of the Auckland Combined (Unitary) Plan including:

(a) Establishment of an independent hearings panel to hear submissions and make recommendations to Auckland Council (with ability to allow cross examination);

(b) Reduced or removed right of merits based appeal to Environment Court regarding Council decisions (unless Council rejects recommendations of hearings panel).

3.5 Somewhat alarmingly, the Bill also includes provision for regulations to be made that alter or displace any element of the process (Henry VIII clause). This provision has been tempered by the Select Committee.

3.6 Further, the Bill contains a restriction on the ability of the Minister for the Environment to direct that plan changes (that are called in) be referred to the Environment Court (as opposed to a Board of Inquiry).

Resource Management Reforms (RM3)

3.7 Under the most recent reform discussion documents (*Improving Our Resource Management System, Freshwater Reform -2013 and Beyond*) a similar reduced (or removed) role for the Environment Court in relation to plan making procedures is proposed, but with the reform also including:

(a) Greater provision for collaborative procedures preceding plan notification (plan partnership agreements); a model and initiative which the RMLA supports, but not at the expense of the Court's current appeal role and function.

[5] This Act also included provision under s.31 for Regulations changing the commencement and duration of powers and functions under the Act (altering substantive legislation through regulation – Henry VIII clause).

(b) Appeals by way of rehearing (rather than *de novo*) where a right of appeal to the Environment Court is retained (i.e. where Council rejects recommendations of hearings panel).

(c) Resource consent appeals by way of rehearing (rather than *de novo*).

3.8 Of considerable significance is that appeals by way of rehearing would necessitate a first instance hearing of 'Environment Court rigour' (including rights of cross examination and a transcript) as the appeal is based on the record of that hearing, with no further evidence unless leave is granted.

3.9 In addition, along with proposals to further improve and integrate procedures for preparation of national policy statements and standards, greater scope for Ministerial intervention is proposed as to the manner in which significant resource management issues are addressed (including, ultimately, a power to directly amend plans).

Other interventions

3.10 In October 2012, the Government publicly expressed clear disquiet over the Environment Court's decision on the Horizons *One Plan*; and in particular as to the level of information considered by the Environment Court on the 'costs to farming' of the rule framework it set in its decision.

3.11 As an apparent reaction to that concern, the Government has since proposed strengthening section 32 obligations as part of the 2012 Reform Bill, including a requirement that decision makers must have 'particular regard' to section 32 assessments, and that they must specifically address (if not quantify) the economic costs of regulation.

3.12 The Housing Accords Bill is the latest, and perhaps most radical, intervention in resource management decision making and planning processes this country has seen. It was introduced under urgency. Limited opportunity for submissions on the Bill were afforded.

4. POTENTIAL REMOVAL OF A SPECIALIST COURT

4.1 Although no official announcements have been made, concern has recently been expressed[6] which suggests that there is a proposal to "fold" the Environment Court "back" into the District Court (along with the Employment Court).

4.2 As noted, no consultation has occurred in relation to this proposal and the New Zealand Law Society and the RMLA have made requests under the Official Information Act 1981 for any papers that are being considered. However, for present purposes, we will assume that:

(a) The Environment Court would no longer operate exclusively with its own bench of specialist Judges and Commissioners devoted to Resource Management appeals, nor have its own Registry.

(b) Any District Court Judge could be warranted to adjudicate resource management appeals, and the current Environment Court bench would operate across the District Court system.

4.3 While this may at first look like a simple change in administrative arrangements, we take the view that this would involve substantive changes in institutional

[6] Gary Taylor, NZ Energy and Environment Business Alert, 17 April 2013.

arrangements that would strike at the very heart of the effectiveness of the Environment Court.

4.4 The first point to note is that the notion of "folding the Environment Court back" into the District Court involves a misconception - the Environment Court has never been part of the District Court. Right from its inception as the Town and Country Planning Appeal Board under the Town and Country Planning Act 1953, the Court and its predecessors have had a separate jurisdiction and separate institutional arrangements. It has always been a specialist Court in its own right.

4.5 More substantively, we consider that there are a number of significant differences between the jurisdictions of the Environment Court and the District Court (addressing criminal and civil matters) including the following:

(a) District Court judges sit alone, whereas the Environment Court is supported by Commissioners with expertise in planning, engineering and other relevant disciplines to the type of disputes they are required to determine.

(b) Environment Court decision making is generally predictive as to a future state of affairs, rather than being based on determination of past facts (what happened, and as observed by those witnessing).

(c) Juries are frequently the trier of fact in criminal cases before the District Court, rather than specialist Judges (and/or Commissioners). Juries are not of course required to give reasons for their decisions.

(d) Expert evidence plays a critical role in resource management litigation, and to a much greater extent than in the civil or criminal jurisdictions.

(e) Resource management decision making has a significant "public law" dimension with implications extending well beyond the parties to any given case (including as to sustainable management of resources, of intergenerational significance).

4.6 The legacy of the specialist and distinctive role of the Environment Court to date is that the Environment Court bench has developed a pedigree of expertise in evaluating expert opinion, predictive decision making, and as to the requirements of sustainable management generally, over now two decades since the RMA came into force. Indeed, the Court has spawned a substantial body of case law; establishing invaluable guidance over a complex statute that is routinely applied by Councils in making decisions and developing planning instruments. With significant reform to Part 2 of RMA clearly signalled, the importance of the Court's function in providing such guidance would be renewed.

4.7 Also significant is the vital and valuable role played by Environment Court commissioners, who comprise top professionals from their fields of expertise – planning, civil engineering, science – and who are selected to sit with Environment judges having regard to the needs of the case. The commissioners are all trained in alternative dispute resolution (ADR) techniques and the Court has had a great deal of success in the settling of appeals before hearing as a result of Court assisted mediation processes.

4.8 That is just one example of a highly efficient code of practice and case management system tailored to the nature of resource management disputes that the Environment Court has also developed over time. These processes would not be suitable for case management across the District Court system generally. The converse also applies regarding civil and criminal procedures in the District Court, themselves significantly reformed and streamlined on a 'bespoke' basis in recent years.

4.9 A further distinction is that Environment Court decisions are generally reserved, released in writing, and different in both character and extent to those released in civil or criminal matters. The demands and work requirements placed on judges are unique relative to the District Court generally, with 'reserve day' capacity for decision writing (we understand) seriously constrained in the District Court, and there is a greater emphasis on 'oral' decisions being made.

4.10 There is a maximum cap on any claim to be determined by the District Court ($200,000). Even the most minor Environment Court appeal involving (say) a two lot subdivision would involve an asset or resource value greater than that (more than $200,000 would be at stake). Environment Court decisions can involve infrastructure or developments worth hundreds of millions of dollars, or issues, such as water allocation, that have huge implications across a region.

4.11 The more significant resource management cases, such as those relating to water allocation or controls on development, raise important issues which often involve a significant number of stakeholders – farmers, developers, infrastructure operators, iwi, environmentalists, councils – so cases are frequently multi-party and multi-issue.

4.12 Such cases can involve a large number of expert witnesses with substantial volumes of technical and complex evidence produced and exchanged by the various parties, which is typically pre-read. It is very unlikely that any civil or criminal trial in the District Court would involve anywhere near the volume and complexity of written material that the Environment Court would need to digest either prior to or at the hearing and have tested before it by way of cross-examination.

4.13 We mean no disrespect to the District Court in making these points; it might equally be said that a Judge on the Environment Court bench and with specialist experience in operating in that jurisdiction would struggle with the range and nature of cases that a District Court Judge must contend with on a routine basis.

4.14 Allocating hearing dates and time frames can be more complex for the Environment Court given the many parties potentially involved; and the need to set a three member bench including two commissioners with expertise as may be relevant to the substantive issues in any given case (engineering, environmental science, ecology, economics, business, Maori cultural affairs, landscape architecture, planning). Tailored case management is essential.

4.15 This is quite unlike a conventional District Court civil or criminal trial scenario where there is a greater degree of uniformity and predictability over case loads and hearing time frames; hearings are shorter, and with fewer parties to cater for, such that "off the shelf" case management procedures and decisions can more readily be applied, and scheduling decisions made further in advance. Rostering is equally a simpler task with individual judges presiding.

4.16 Overall, we consider these significant (if not fundamental) differences between the work of the District Court and Environment Court, and the way they operate and function to conduct that work, make any proposal to integrate the two both questionable in concept, and at least difficult to realise in practice.

4.17 Basic but very important questions need to be asked:

(a) Just how would judicial resources and skills be allocated across both systems within the one Court?

(b) Would any overall or net efficiency of judicial 'resource use' be achieved, and at what cost?

4.18 These points aside, effective loss of a highly valued specialist Court institution that is the 'envy' of many other countries is at stake.

4.19 It is interesting to note that in its thorough review of the Judicature Act 1908 (towards a new Courts Act) no consideration was given of the legislation governing the specialist courts such as the Employment Court, Maori Land Court or Environment Court.

4.20 Nor was there any recommendation within the Law Commission's review therefore upon which to found any such initiative, that is, against a background of independent robust analysis such as Law Commission review may provide.

5. THE ENVIRONMENT COURT – ITS ROLE AND IMPORTANCE TO THE ECONOMY

5.1 Since the RMA came into force in 1991, the Environment Court has made decisions about the most significant economic developments progressed in the country over that time frame[7].

5.2 The Environment Court has also, via its jurisdiction to deal with appeals on policy statement and plans, played a very significant role in setting the regulatory frameworks for sustainable management of critical resources, for example through which people and the economy generally can access water for electricity generation, agriculture, municipal water supply and the like (most recently within the Waikato Region). The Court's sophisticated systems for case management and dispute resolution has frequently resulted in the settlement of appeals or the significant narrowing of issues where the parties had reached intractable positions at the end of the Council hearing process.

5.3 Since the 2009 reforms, Environment Court judges and commissioners have served on Boards of Inquiry considering and determining Transmission Gully, Waterview motorway extension (Auckland), King Salmon Marine Farm, Tauhara II Geothermal power station, HMR Raglan wind farm; Wiri Women's Prison.

5.4 Many of the above projects involved investments of hundreds of millions of dollars (individually), and billions of dollars cumulatively. The Waterview extension alone had a capital value of over $1.7billion.

5.5 The issues at stake in each case comprised a complex amalgam of social, cultural, economic and environmental issues, contested by many parties, each retaining numerous experts in a diverse range of specialist fields.

5.6 Many of the cases were substantially resolved (by significantly narrowing the range of issues the Court had to actually decide) through employment of the case management techniques mentioned above.

5.7 At the end of the day, however, the Court was (in virtually all cases) called upon to make the "hard decisions", and where issues of principle, economic or environmental significance were such that complete resolution simply was not realistic.

5.8 We doubt there would be many civil trials even in the High Court involving litigation over issues of equivalent social or economic significance, or indeed complexity.

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[7] Examples include establishment, expansion and renewal of all of New Zealand's major electricity generation infrastructure (existing and new hydro-electricity generation facilities, new geothermal power stations, wind farms, Huntly coal-fired power station; coal and aggregate extraction activities (e.g., Hunua Quarry, Three Kings, Denniston Plateau; transport infrastructure such as motorways and runway extensions; Mangere Wastewater Treatment Plant upgrade, and over major and complex planning frameworks, e.g. Waikato Water Allocation variation; Lake Taupo Nitrogen Leaching variation.

5.9 Achieving a balance between the broader interests of the economy in making such decisions, with an eye to the interests of future generations, and against a background of sometimes very strong concern by those communities who will feel the effects most directly, is a complex and difficult task. We consider that the specialist Environment Court has served New Zealand well in fulfilling this essential public function over decades (including prior to RMA under its former guise as the Planning Tribunal).

5.10 Against that background, it is telling that there is support for a continued role for the Environment Court 'across the spectrum' from environmental interest groups to large business and industry players. This includes those public and private companies that submitted against recent reform proposals to reduce or remove the role of the specialist Environment Court in deciding resource management planning frameworks, designations and resource consent applications.

5.11 For example, submitting in support of retention of full "merits based" appeals to the Environment Court for policy statements and plans include Ports of Auckland Limited, Westfield, Winstone Aggregates, Auckland International Airport and Progressive Enterprises. From this one clear message should be apparent; that the Environment Court is not 'against' business, nor is business against the Environment Court. Any such view is a myth.

6. CONSEQUENCES - WHO PAYS AND WHAT PRICE?

6.1 The reform proposals for the Auckland (Combined) Unitary Plan and under RM3 both involve dispensing with a right of appeal to the Environment Court, except where the recommendations of the hearings panel are not upheld by the local authority (and then, in the latter case, any appeal may be by way of re-hearing only).

6.2 'Council level' hearings will necessarily have to become more formal and "legalistic", including rights of cross-examination.

6.3 While issues of cost and delay are undoubtedly "drivers" of the reform initiatives, no consideration appears to have been given to the additional cost burden that would be imposed on local authorities (and in turn their ratepayers) in being required to conduct the more formal hearings as would now be required. We are not aware of any attempt to quantify these costs (saved or increased), and the 'business' case for the reforms in this area seems to be lacking. Councils will need to develop expertise in robust case management systems, and acquire skills and techniques for encouraging parties to identify and narrow issues, to conduct mediation between submitters, facilitate expert conferencing, as well as record and transcribe all hearings etc. Many regional councils may have this capability; less so district councils.

6.4 The chair of any hearings panel will need to manage rights of cross-examination for (likely) all witnesses called by numerous submitters. The Ministry for the Environment recently significantly overhauled the training of hearing commissioners to improve decision-making at Council level and, eventually, reduce the scope of issues to be heard by the Environment Court. The training that commissioners receive is focussed on basic decision-making techniques and is working quite well. However, this training does not extend to cross-examination. Managing hearings involving cross-examination will involve a legal skill set and would be likely to reduce the increasing role of planners and other non-legal resource management professionals being able to chair hearings.

6.5 It follows that the skill sets for the new type of hearing that would need to be provided for will not generally be available within local authorities and so will need to be procured through additional staff or consultants being employed or retained by each and every one of them. Yet the specialist Environment Court which has built up

that expertise over 20 years of applying those very techniques is being displaced from the role, for reasons of 'cost saving' and (purportedly) to reduce plan preparation time frames.

6.6 The reality is that the additional formality, complexity and resultant duration of Council hearing processes may very well expand overall costs beyond any saving relative to the current Environment Court phase. That is, overall costs and time frames would almost certainly increase, and even substantially on a net national basis.

6.7 The reform proposals and assumptions upon which they are based need to be put into perspective. In that regard, it is important to note that only about 1.5% of Council decisions are appealed to the Environment Court. Of those, only around 15% actually require hearing time. The rest settle through application of case management, alternative dispute resolution and related techniques as employed by the Environment Court very successfully, and increasingly so.

6.8 The upshot of the above is that there is then only a very small fraction of 1% of Council decisions (on planning instruments and resource consents) that the Court actually needs to decide. Those types of cases are typically for the very "major" projects or issues listed above, and requiring the Court to make the 'hard decisions' referred to earlier.

6.9 Despite this reality, and out of concern at perceived 'costs and delays' associated with Environment Court hearing and appeal processes, the currently accessible and informal "lower cost" Council hearing format is going to be swept aside and replaced with something of a 'behemoth' that Councils are as yet ill-equipped to conduct, all funded no doubt by the ratepayer; while the experience and skills of the specialist Environment Court is 'put out to pasture'.

6.10 The National Committee of the RMLA recently issued a "Position Statement" regarding issues of "Plan Agility and First Schedule Reform". It recorded support for increasing collaboration as part of plan preparation procedures, and certainly prior to notification of new planning instruments. However, we queried the level of current "capacity" and skill to facilitate effective collaboration to the point that contested plan provisions over issues of principle would not remain. We observed that the objective of collaboration should not necessarily be consensus but rather a substantial reduction or narrowing of potential disagreement applying something like an "80/20" model whereby if 80% of participants are satisfied with 80% of the product of a planning instrument prior to notification, the procedure would have been well worthwhile.

6.11 In that context, we seriously question how realistic any reform assumption would be that the remaining "hard issues" either could or necessarily should be avoided through employing greater collaboration. Such issues would likely remain live at the first instance Council hearing, but now as the 'Court of last resort' if the proposed reform model set for the Auckland Unitary Plan gains wider traction.

6.12 There is also a very real concern that the necessarily more formal first instance hearings will become practically inaccessible to lay parties who currently enjoy the type of hearing format required by section 39 of RMA (that such hearings be without unnecessary formality).

6.13 Somewhat ironically, the proposed reforms may actually be something of a 'boon' to the legal profession, as legally qualified hearing commissioners and legal representation would be increasingly necessary. The consequence of that is that very real barriers to entry to the process, relative to that currently enjoyed, would be established.

6.14 The final cost that the RMLA is concerned about and which also has not been quantified is that resulting from any reduction in the 'quality' of planning instruments

resulting from a reduced or removed right of recourse to the Environment Court. The position paper referred to earlier (and various other written contributions referenced in it) confirms the significant value that the Court has added to the quality and content of planning instruments dealing with the most complex issues faced under the RMA (including water management and allocation). As stated in that paper:

> *Any reform would become a self-defeating exercise if the quality of the end product suffers to such an extent that the overall social, economic or indeed environmental costs are imposed through inferior planning outcomes, than are saved through more timely preparation.*

A case in point – the Auckland Unitary Plan

6.15 Take the Auckland Unitary Plan as a case in point. Anyone with even a modicum of experience in the RMA, and who has had time to give even cursory consideration to the nature and extent of the issues the draft Unitary Plan raises (for example, the intensification debate within many of Auckland's oldest suburbs) could be forgiven for "shuddering" at the prospect of attempting to contest those issues through a more formal Council hearing process. This would inevitably involve the need for hundreds (possibly thousands) of witnesses to appear; and have their evidence tested by cross-examination in relation to the numerous significant issues arising under a complex (of itself) unitary plan model. The process could very well take 5 or more years to complete. With this type of process; the three year time frame in the Bill is ambitious to say the least.

6.16 There is no doubt that there is a 'storm brewing' around the content of much of the draft Unitary Plan.

6.17 But the Council hearing process for this Plan would no longer operate in a relatively informal way, and as a filter to distil the more significant issues for (potential) determination by the Environment Court (or at least 1.5% of issues that would in the ordinary course likely find their way to the Court).

The $64,000 question

6.18 One might legitimately ask: what is the current problem? And is it being solved, or instead a greater one created? Time will tell, but we strongly suspect the Auckland ratepayer may come to rue the day this path was pursued.

7. CONCLUDING COMMENTS

7.1 The RMA deliberately established a devolved decision making and planning model; building upon that in place under the Town and Country Planning legislation since the mid-1950s, and with the Environment Court (former Town and Country Planning Appeal Board and Planning Tribunal) having a central role in supervising resource management decision making at the local government level.

7.2 The RMLA has engaged with what can only be described as 'serial reform' to the RMA 'system' or model in recent years.

7.3 In our view the real issues that have 'dogged' experience under the RMA are those associated with aspects of the process that have now been substantially resolved through reform to the Act over the 20 odd years since it was first passed. Those reforms are now beginning to work and paying dividends, as is the highly efficient and tailored case management regime developed and applied by the Environment Court itself.

7.4 As a specialist institution, however, the Environment Court was never the issue; we seriously question whether the proposed reforms as to the role of the Environment Court therefore provide anything like a solution to whatever continued concerns remain. We have grave concerns that quite the opposite may result.

7.5 As well as substantially altering (reducing or eliminating) the role of the Environment Court through the sequence of initiatives outlined above, we understand it is now proposed to integrate the specialist Environment Court into the District Court.

7.6 With a reduced place or function under the RMA, the consequences of integration with the Environment Court (as a specialist Court) into the District Court generally are arguably reduced as well.

7.7 However, the current round of reforms seems to be heading in completely the opposite direction or in 'reverse' to the 2009 amendments establishing the BOI and direct referral options; abandoning the long developed skill set of the Environment Court and thrusting the burden and obligation of resolving the 'hard issues' upon local authorities for the final call.

7.8 There is an evident trend towards greater 'national guidance' under RMA, but also to greater use of executive powers to influence and even direct resource management decision making. A reduced role for the Environment Court as a check on such use of executive powers is of constitutional significance, at least in that context.

7.9 The reforms substantially alter the ability of Resource Management 'users', (industry, business, environmental interest groups and other relevant sectors) to participate in the procedures through which resource management decisions affecting them are made.

7.10 First instance hearings will necessarily become more formal and 'legalistic' including necessary rights of cross examination, creating an effective barrier to entry of any stage of the process without legal representation. This will also result in significant additional resource burdens on local authorities to set up legally robust, fully transcribed hearings. Ratepayers will bear that burden. Neither better nor timelier decisions may result.

7.11 Conversely, the right of recourse to the Environment Court as a check on the exercise of the broad discretions conferred upon decision makers under RMA is 'at stake'; at the same time as greater scope for intervention by the Executive branch of government in such decision making is enhanced, including to the point of overriding the will of Parliament.

7.12 At the systemic level, judicial resources are under both financial and (one might argue, in light of the above) constitutional pressure. The outcomes the RMLA was set to promote are under challenge, and the interests of some or all members may be affected.

7.13 We invite members and indeed the broader public to give serious consideration to the significance of the proposed reforms; bearing in mind the broader context including the constitutional and international law framework within which these reform decisions are proceeding; the clear differences between resource management litigation and civil or criminal cases, and the public law and intergenerational significance of resource management decision making.

Martin Williams and Simon Berry

Court Convenors, National Committee, RMLA

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