August 2016 RMJ

Resource Management Journal

Official Journal of the Resource Management Law Association of New Zealand Inc.
Te Kahui Ture Taiao

The Final Straw for the RMA? Some shortcomings of the Resource Legislation Amendment Bill 2015

Simon Berry, Partner and Helen Andrews, Senior Associate, Berry Simons Environmental Law

Introduction

The Resource Legislation Amendment Bill 2015 (RLAB or Bill) represents the second phase of the National-led Government's reform of the Resource Management Act 1991 (RMA), as signalled by the February 2013 discussion document (Ministry for the Environment *Improving our resource management system* (2013)) which indicates (at 6) 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

Inside

> 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.

This is typical of language that has always surrounded the RMA, which has been a political football since even before its enactment. It also reflects the misconception that it is the RMA that is the problem and not its implementation.

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 RLAB represents a significant 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. The four key concerns relate to:

(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;

(c) further reductions in opportunities for public participation and access to justice; and

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

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

The severe erosion of rights of public participation seems to spring from a mindset reflected in the Regulatory Impact Statement (RIS) (at [253]) that such amendments are required because the RMA's current scheme of broad public participation:

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

With all due respect, this is an extraordinary non sequitur that is inconsistent with the basic concept of 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 if enacted would strike at the very heart of the RMA.

Despite these shortcomings, the Bill has received little substantive attention. 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. 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.

The Resource Legislation Amendment Bill – Overview

The Bill was introduced to Parliament in 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.

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).

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's proposes to:

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

   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, or 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".

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

Flawed assumptions on which the Bill is based

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 are not of a sufficient 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

The first example of a flawed assumption (per the Explanatory Note to the Bill) is the rationale for introducing the CPP and SPP as alternatives to the current First Schedule process, namely that:

> … 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.

Contrary to that, the RIS itself notes (at [143]) that over the last ten years more than three-quarters of all plans (77 per cent) and the vast majority of plan changes (92 per cent) have been successfully determined within two years of notification. This is consistent with analysis in the Environment Court's Annual Review for 2014.

Practitioners know that where plans or plan changes have exceeded the two-year time frame, it is generally because the issues were of such complexity and importance, and attracted the attention of so many vested 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.

Either way, the time taken in the minority of cases need not be seen as a failure of the First Schedule process. 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.

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. The reality is summarised in the Environment Court's 2015 Annual Review (at 19):

> In recent sets of such appeals, mediation has been undertaken commencing as soon as all parties have been identified under s 274, and brought 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.

As an example, proactive 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.

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 (indeed, this is specifically anticipated by cl 3(2) of the First Schedule). One wonders whether encouraging this practice requires the introduction of a whole new alternative planning process.

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 (Environment Court Annual Report 2015), both these factors are resulting in faster planning processes and reduced need for appeals.

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

Plan making is a complex exercise which directly affects property rights and financial viability – 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 itself. The desire for speed can overlook that existing provisions remain appropriate in the meantime while the new plan is put through its paces.

The Proposed Auckland Unitary Plan (PAUP) is a good example. The speed with which it was prepared resulted in a very poor plan to kick the process off with. 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 complex and important issues. This is not a criticism of the Independent Hearing Panel which has done an exceptional job. But if Auckland ends up with a silk purse as a result of the PAUP process, it would have done so in spite of the process rather than because of it. Similar comments have been made about the bespoke process to produce the new Christchurch District Plan.

The short 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

The Bill is also based on flawed assumptions in relation to the consenting process. The relevant cabinet paper (Ministry for the Environment *Cabinet Paper for the Second Phase of Resource Management Reforms: Batch 1 of policy decisions* (February 2016) states (at 7) 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.

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. Paradoxically, recent amendments to the RMA (particularly those in 2009 and 2013) 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.

The RMA already provides for decisions on non-notified applications to be made within a maximum 20 working days; controlled or restricted discretionary activities which can generally be dealt with quickly; a presumption that applications should be processed on a non-notified basis; and the ability for potentially affected parties to provide the written approvals so that effects on them can be disregarded.

The upshot is that 95 per cent of all consent applications for 2012–13 were processed on a non-notified basis (Cabinet Paper at 7). This does not take into account 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" justified? Are yet further changes to the notification provisions really needed?

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

Proposals that will increase complexity, costs and delays

The RMA has been subject to several substantive rounds of amendment – on average at least once every four years. The statutory tests for notification have been four times since the RMA's enactment in 1991; the RLAB will be the fifth. Each round of amendments brings with it the potential to increase rather than reduce the costs and delays in RMA processes, as it introduces complexity and new provisions that must be understood and applied by applicants, their advisors, and council officers.

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 RLAB contains more of the same.

Proposed amendments to the notification provisions

The Bill would amend the already complex notification provisions 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".

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

All three have flaws.

Changes to notification for certain activities

The Bill proposes that:

(a) public notification be precluded for controlled activities or "boundary activities", subdivision or residential activities (as where they are non-complying activities); and

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

The elimination of limited notification to neighbours is a 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.

If nothing else, an obvious outcome of this provision is likely to be a significant reduction in provision for controlled activities (in favour of restricted

discretionary activities) in plans – something of an "own goal" in a Bill seeking to streamline consenting processes.

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

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 (cl 127), be able to (emphasis added):

> … *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*.

The open-ended nature of this provision is immediately apparent. 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 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.

In any event, how do objectives and policies "take into account" the adverse effects of activities? Can a policy set its face against an adverse effect and still take it "into account"? 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.

We agree with the LGNZ's submission on the Bill that:

> 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

The Bill would introduce new highly complex "eligibility criteria" (cl 128) 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" (which are not defined but presumably relate to activities that can only be granted by a regional council) and most non-complying activities.

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.

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

(a) who might need to have a say; for example, 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 but entirely unrelated to effects or any actual proposal.

If the potentially affected party establishes eligibility, they would still need to meet the threshold in proposed s 95E (cl 129) to be entitled to limited notification.

Fundamental shift in philosophy as regards notification

> These 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 represents 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. It is inevitable that these provisions, if enacted, will be the subject of a great deal of litigation.

We concur with the NZLS submission (at [189]) that:

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

Lack of justification for the change

What justification, if any, exists to introduce these novel and difficult concepts? The National

Monitoring System data for 2014/15 confirmed that 96 per cent of applications processed to a decision in that time frame were non-notified (up from 94 per cent in 2010/11 and 95 per cent in 2012/13). These statistics confirm that existing notification processes are not routinely causing undue delays such as to warrant any further substantive revision.

Introduction of novel, ill-defined and untested concepts relating to activity status and resource consents

The Bill introduces 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.

Key amongst these (cl 122) is the concept of "deemed permitted activities", namely activities that, in accordance with the relevant planning instrument, would require a 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:

(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.

"Marginal or temporary non-compliance"

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 s 107(2)(b) of the RMA relating to discharges of a "temporary nature", but there is little in the cases dealing with that provision (*Paokahu Trust v Gisborne District Court* EnvC Auckland A 162/03, 19 September 2003; *Marr v Bay of Plenty Regional Council* [2010] NZEnvC 347, (2010) 16 ELRNZ 197) that assists other than the inevitable observation that such provisions need to be considered in the circumstances of the case.

The term "marginal" means "minor or not important; not central". 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.

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 that debate is headed.

Given the clear potential for these provisions to override the rights of potentially affected neighbours, amongst other things, 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"

There is an obvious similarity between this provision ("no different in character, intensity or scale") and s 10 of the RMA which provides existing use rights for activities where "the effects of the use are the same or similar in character, intensity and scale" as that lawfully established. In the context of s 10, we have historical activities to compare existing activities with.

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 fine and difficult analysis. The case law on "existing environment" (for example, *Arrigato Investments Ltd v Auckland Regional Council* [2002] 1 NZLR 323 (CA), *Queenstown Lakes District Council v Hawthorn Estate Ltd* (2006) 12 ELRNZ 299) will become highly relevant in the litigation that would inevitably follow the enactment of this provision.

Again, there is a subtle change of wording from s 10 that we must assume was intentional. If effects are "no different", is that the same as "the same" effects under s 10? One presumes not. If not, how is "no different" different from "the same"? Or is it the same? Can s 10 cases help us?

Status of the notice

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 s 139? Does a notice give rise to existing use rights under s 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?

The upshot of this 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; and

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

Applicants would be ill-advised to rely upon these provisions until they are thoroughly tested.

Lack of justification

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 per cent of applications that are processed on a non-notified basis?

The documents that an applicant will prepare to demonstrate compliance with the criteria will need to address the same material as an assessment of environmental effects that needs to comply with s 88 of the RMA. What are we achieving here, other than introducing complexity to the process?

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. 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 considered constitutionally inappropriate and unjustified.

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

Reduction of public participation / access to justice

The Bill contains a number of provisions that will reduce opportunities for public participation. These include:

(a) a requirement for local authorities to strike out a submission in certain circumstances;

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

(c) deemed permitted activities; and

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

The founding principle

As noted, the RIS (at [253]) justifies these amendments on the basis that public participation "undermines the purpose of notification and seeking submissions, which is to give decision-makers useful, focussed input". We fundamentally disagree. Submitters frequently raise relevant and valid issues, which significantly assist the consent authority in areas that it would not otherwise be aware of.

This is particularly the case where the application documents are not robust or comprehensive.

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

The Bill would provide a right for consent authorities to strike out submissions that are frivolous and vexatious, disclose no reasonable case or would represent an abuse of process (cl 120), amongst other reasons – powers that the Environment Court already has under s 279(4). The courts have indicated that this power should be used sparingly and must take into account the public participatory nature of the RMA (*Hauraki Maori Trust Board v Waikato Regional Council* HC Auckland CIV-2003-485-999, 4 March 2004; *Perceptus Ltd v Waitakere City Council EnvC Auckland* A40/08, 4 April 2008). As a result, the bar for striking out is set quite high. That power is considered to be acceptable given that consent authorities would be required to apply similarly stringent standards in exercising their new powers.

However, the Bill goes further. An authority that is conducting a hearing is required to strike out submissions that do not have a sufficient factual basis; are not supported by evidence; or because they are unrelated to the effects that "were the reason for notifying the application" calls for particular comment in this context.

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.

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 the merits of the application and the adequacy of the evidence in support of a submission (or whatever basis under proposed s 41D(2)(b) that can be made out). There is clear potential for abuse and inevitable litigation challenging decisions to strike out submissions.

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. 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?

Of course not. The 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 option is to delete this provision.

Impact of reduced time frames

Access to justice is also affected when parties have rights to participate, but insufficient time and opportunity to exercise those. This could occur with the SPP, where the time frame allowed for participation would be at the Minister's discretion. This has clearly been demonstrated by the processes established in special legislation for both the PAUP and the 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 (at [93]):

> 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 … because they have not been able to do so effectively in the prescribed time frames. Many who tried to participate have also had difficulties in obtaining necessary professional … advice to support and guide their involvement.

Aggregation of power with the Minister for the Environment

The Bill contains provisions that would enable the removal of decision-making powers 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;

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

We are concerned about the continued aggregation of power by the Minister. Clearly, there are RMA issues in respect of which it is useful to have national direction and guidance. This can already be achieved via the introduction of National Environmental Standards and National Policy Statements. 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 RLAB go too far.

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.

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

(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.

We agree with the NZLS's submission on the Bill (at [98]):

> 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.

There is insufficient evidence or assessment to establish that such significant and fundamental changes are a proportional and appropriate response to the current issues with the RMA. Most importantly, the changes in our view are unlikely to achieve better quality, more robust planning decisions and outcomes.

No quantification of cost or impact of amendments

We have tried to understand why 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 the nature, cause or extent of current concerns with the RMA. The "Agency Disclosure Statement" included with the RIS effectively acknowledges that this analysis has not been done.

With respect, it is not good enough for the Ministry to effectively say that it is too hard to work out the cost or effect of the proposed reforms – 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.

Time to pause for thought

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.

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 cooperative mandate – would be severely compromised by the Bill. The RMA is being brought to its knees.

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.

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. ■

Editorial

■ **Professor Jacinta Ruru, University of Otago; Co-Director Ngā Pae o te Māramatanga New Zealand's Māori Centre of Research Excellence; RMLA General Editor**

Welcome to the August issue of the *Resource Management Journal.*

Outstanding. We know and celebrate that Aotearoa New Zealand is a unique place with complex challenges. This year the Resource Management Law Association's annual conference will dig deep into this notion of outstanding. The President of RMLA, Maree Baker-Galloway, invites us to reflect on "How should we address those problems that will clearly take decades to rectify? How do we protect the environments, places and experiences we know to be priceless and irreplaceable? How can we secure New Zealand's future in a manner in respect of which we can all be proud?".

These are always pertinent issues and are certainly at the forefront of politics at the moment. Mid this year, the Parliamentary Commissioner for the Environment released a mixed report card in her assessment of New Zealand's environment. On 29 June, Dr Jan Wright exclaimed in her commentary on *Environment Aotearoa 2015* "We are lucky to live in an exceptionally beautiful country, but we have some big issues to face up to".

Statistics New Zealand and the Ministry for the Environment welcomed this commentary recognising that this "serves as valuable guidance at this early stage of the environmental reporting journey" and a government commitment to wanting "environmental reports to be useful to as many people as possible". *Environment Aotearoa 2015* is the first time the Ministry for the Environment and Statistics NZ have worked in partnership to tell the story of New Zealand's whole environment in the spirit of the new environmental reporting framework. Government Statistician Liz MacPherson said the Ministry for the Environment and Statistics NZ will carefully consider Dr Wright's recommendations. "Where we can, we will work to incorporate some of these ideas into the marine domain report due to be released in October and the freshwater domain report out next April," Ms MacPherson said.

Dr Jan Wright emphasised that the most serious environmental issue we face is climate change. On this front, it is important to note that this month, on 17th August, the Climate Change Issues Minister Paula Bennett announced that the Government plans to ratify the Paris agreement on climate change by the end of the year. Discussion of the Paris Agreement is in our previous April issue of *Resource Management Journal*. Ms Bennett announced "The Paris agreement is historic and changed the way the world thinks about climate change. Ratifying it early reinforces our commitment to this deal and our support for the global momentum to grow with lower emissions."

Working its way through Parliament right now is far-reaching legislative reform designed to "create a resource management system that achieves the sustainable management of natural and physical resources in an efficient and equitable way". But according to Simon Berry and Helen Andrews in the opening article of this issue of the *Resource Management Journal* the Resource Legislation Amendment Bill 2015 is based on some fundamental flawed assumptions and untested concepts. They implore sound analysis and debate. This is a significant opening article that deserves close attention by all of us. An article by Associate Professor Nicola Wheen follows with an insightful look at another dimension of the Resource Legislation Amendment Bill 2015: namely how this Bill intends to reform many other environmental statutes beyond just the Resource Management Act 1991. Wheen focuses on the "not insignificant" four