

Addressing the Shortcomings of the RMA and RMA Processes – Where to from here?

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INTRODUCTION

Recent criticisms of the Resource Management Act 1991 (RMA) have resulted in calls by high-level commentators for major reform and even the wholesale repeal of the RMA and its replacement with a new statute. We are undoubtedly facing the biggest shake-up of the legislation since it was enacted. No one would doubt that the RMA now requires significant amendment, if only to improve its workability after several years of ill-conceived tinkering.

The stakes are very high. The decisions that are made in relation to this issue will shape the policy and regulatory context in which resource managers and resource management practitioners will be required to operate over the next generation. The way in which the issues are approached is therefore of critical importance. So, where to from here?

This is the third and final of three related articles on the RMA and RMA reform. This article seeks to complete our analysis by considering calls for reform of the RMA and RMA processes and “where to next for the RMA?” in light of the commentaries and recommendations in three high-level reports on this issue by Local Government New Zealand (LGNZ), the Environmental Defence Society (EDS) and the Productivity Commission.

CONTEXT

The RMA was introduced with cross-party support in the late 1980s but has been a political football since even



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before its enactment. Ever since then, the RMA – rather than the planning “system” or the administration of it – has been criticised for creating costs, delays and uncertainty; discouraging investment and innovation; and a multitude of other sins, including the “housing crisis”.

As addressed in more detail in this paper, many of the criticisms directed at the RMA are flawed to the extent that they fail to adequately distinguish between the RMA as an empowering and assessment statute – essentially a piece of paper – and shortcomings of the “planning system” in

implementing the legislation, including lack of national direction, poor agency resourcing, agency capture by sector groups and a lack of monitoring and enforcement – none of which are attributable to the legislation per se.

Unfortunately, this simplistic thinking has resulted in a mistaken assumption that if the Act is amended, difficulties associated with its flawed implementation will be addressed. This has resulted in amendments to the RMA that have missed the mark and increased (rather than reduced) the complexity and cost of RMA processes – setting up a vicious cycle of blame and harmful “repair”. The upshot is that a once concise and workable statute has become increasingly hefty and unworkable to the point at which further reform of the RMA is not only inevitable but necessary to address the unintended consequences, costs and delays caused by misguided attempts to “simplify and streamline” the legislation.

It is also worth bearing in mind that, when enacted, the RMA was administered by existing central and local government structures. The Environment Court was constituted but that was simply a carry forward of the existing Planning Tribunal. The last decade has seen the introduction of an array of new processes and new institutions, which generally bypass existing processes and institutions, including the Environment Court, for example, bespoke plan processes and independent hearing panels for Auckland and Christchurch, and boards of inquiry to sit on proposals of national significance and Exclusive Economic Zone matters, supported by a new Environmental Protection Authority.

The position we find ourselves in was succinctly stated in the LGNZ review of the future of the RMA (LGNZ *Planning our future 8 point programme for a future-focused resource management system* (July 2016)) as follows:

“A quarter of a century of tinkering and a tendency to promote statutory changes to fix ‘issues of the day’ have made the resource management system unwieldy and complex. ... We believe that further tinkering treats symptoms of dysfunction, diverts attention away from the root cause of problems and forces us to spend time and money trying to understand what these changes mean in practice. This simply prolongs New Zealanders’ concerns with the resource management system and actually risks making the situation worse.” (at 8)

In that regard, and to briefly recap the first two papers in

this series:

- (a) Our August 2016 Resource Management Journal (RMJ) article (*“The Final Straw for the RMA? Some Shortcomings of the Resource Legislation Amendment Bill 2015”*) examined the Resource Legislation Amendment Bill (RLAB), identifying significant shortcomings in the legislation; flawed assumptions to justify it; and disturbing trends that have crept into the RMA and RMA processes under the current administration – being an aggregation of power to the Minister and steady erosion of access to environmental justice. Before looking at the reform-related papers, we propose to “close the loop” on that paper by making some brief comments on the Resource Legislation Amendment Act 2017 (RLAA) as enacted.
- (b) Our April 2017 RMJ article (*“The Death of the RMA by a Thousand Cuts – The Next Two Incisions”*) examined the Urban Development Authority proposals and the Point England legislation and concluded (at 10) that both initiatives represent “more of the same, but worse” in terms of the trend towards undemocratic ad hocery that aggregates power to the Minister.

THE RLAA AS ENACTED

Given the contentious nature and poor quality of some aspects of the RLAB, the Bill had a difficult passage through what was described by the Labour and Green parties in the Local Government and Environment Select Committee final report as a “shambolic” and politically-driven Parliamentary process, which included three extensions to its reporting date (Resource Legislation Amendment Bill 2015 (101-2) (Commentary) at 43 and 45). Tempting though it may be to comment on the politicisation of the RMA and the deal done with the Māori Party to achieve a single vote majority, it is beyond the scope of this paper to do so.

Positive aspects

The RLAA introduced a number of worthwhile amendments into the RMA. These include:

- (a) Making the management of significant risks from natural hazards a s 6 matter of national importance.
- (b) Introducing new procedural (albeit woolly) principles for efficiency, clarity and collaboration in Council RMA processes which require RMA functionaries to:
 - (i) Use timely, efficient, consistent and cost-effective

processes; and

- (ii) Ensure that planning instruments only address matters relevant to the RMA's purpose and are clear and concise.
- (a) Conferring on local authorities a new function to ensure there is "sufficient development capacity in respect of housing and business land" to meet the expected demands of the region and district.
- (b) Clarifying that Councils may have regard to measures proposed by applicants to offset environmental effects, when considering both consent applications and notices of requirement for designations.
- (c) Providing for plan changes to be processed on a limited notified basis, where directly affected parties can be identified and are given the opportunity to participate in the plan change.

Concerns addressed

Many concerning aspects of the RLAB that we commented on in our August 2016 article (cited above) were addressed or ameliorated via the Select Committee process, for example:

- (a) The mandatory requirement to strike-out submissions in some circumstances is now discretionary.
- (b) The more concerning grounds for striking out submissions (including that the submission was not supported by evidence or was unrelated to the effects that "were the reason for notifying the application") have been removed.
- (c) The requirement for parties to meet new "eligibility" criteria in order to receive limited notification of certain consent applications has been removed.
- (d) In considering notification, consent authorities will not be required to disregard effects that are "taken into account by the objectives and policies of that plan".
- (e) The extent of the Minister's power to recommend the promulgation of regulations has been substantially reduced and can now only be used to override rules or types of rules that duplicate, overlap or deal with the same subject matter as other legislation.

Remaining concerns

Despite the above, some of the RLAB's more concerning provisions or features have now been enacted as part of the RLAA. Our overriding concern with the RLAA is the

willingness by the Government to override RMA processes and planning instruments, and significantly erode access to environmental justice to the extent that the RLAA continues the trend towards reduction in opportunities for public participation through amendments to the notification regime; reduction of rights of appeal to the Environment Court; and sidelining the Environment Court in favour of ad hoc boards of inquiry or specially appointed tribunals.

As demonstrated at a recent international symposium ("Environmental Adjudication in the 21st Century", Auckland, April 2017), the thinking that spawned the RLAA is contrary to international best practice in terms of environmental adjudication but now appears to have become the norm, as demonstrated by both the UDA proposals and the Point England Development Enabling Bill 2016 (see Berry Simons "RMA Reforms Out of Step with Decision Making Best Practice" (13 April 2017) <www.berrysimons.co.nz/news/entry/rma-reforms-out-step-decision-making-best-practice/>).

The RLAA also continues the unwelcome aggregation of power to the Minister. Such provisions include the Minister's new regulation-making power and the extent of control the Minister can exercise through "National Planning Standards" and the streamlined planning process.

Some aspects of the RLAA – the main one being the bizarre concept of "deemed permitted activities" – still have the potential to cause confusion and additional transaction costs, including inevitable litigation.

COMMENTARIES ON THE RMA AND RMA PROCESSES

As noted, such is the concern about the RMA and RMA processes that three high-level independent reports have been produced in the last two years. We briefly discuss these below in the order in which they were released.

Local Government New Zealand report – December 2015

LGNZ established a review group of experts and practitioners to consider issues with the RMA and what a "fit-for-purpose" system might look like. The group produced a discussion document (LGNZ A 'Blue Skies' discussion about New Zealand's resource management system (Discussion Document, December 2015)).

The review group found it difficult to take a clear position on how effectively RMA processes are working, given the lack of monitoring and reporting on key indicators of environmental performance. It concluded that there was evidence of environmental decline (particularly around freshwater quality and biodiversity) and that:

"... processes under the resource management system are time consuming, complex and often not proportional to the risk or impact of a proposal. There is also evident misalignment between the planning statutes under which decisions are made on the use and development of natural and physical resources. These factors are compounded by persistent issues around information, capacity and capability in councils and central government agencies. What is more difficult to say is whether these issues are due to the design of the resource management system, or whether they are due more to the way the Acts that make up the system are implemented[.]" (at 29)

Consensus was reached that action is necessary, but the group cautioned against rushing into substantial reforms without fully understanding their potential benefits and costs. It favours:

"... a progressive or 'stepped' programme of change. One that starts with and builds from the current programme of change, and that increases the scope and degree of change only once the impact of amendments [has] been evaluated and understood." (at 38)

In July 2016, in response to pressing issues (such as freshwater management in Canterbury and urban-growth management in Auckland), LGNZ released an "8 point programme for a future-focused resource management system", as cited above, for immediate reform of the RMA system. That programme includes the following proposals (outlined at 4–5):

- (a) Introducing a regional spatial planning process to establish an overarching "vision" for each region and which has the power to carry that vision into action.
- (b) Introducing "special economic zones" to enable tailored policy, regulatory and funding structures to be developed to suit local conditions.
- (c) Enabling councils to request that the Government plays

an "active partner" role in resolving local issues that are in the national interest.

- (d) Developing a framework for evaluating the performance of the resource management system and using the results from this to make improvements.
- (e) Introducing standard tools and methods for cost / benefit assessments.
- (f) Refocusing central and local government efforts on gathering and reporting data necessary to understand environmental states and trends, so that we can prioritise between competing demands for our natural and built environments.
- (g) Establishing a two-tier planning system by which:
 - (i) First tier spatial planning determines where development can occur via uncontested policy decisions.
 - (ii) Second tier planning focuses on decisions about "how" and "when", which can be contested on their merits to ensure that development aligns to first tier goals.
- (h) Introducing resource charges for using public resources, to incentivise resource users to pursue greater efficiency in resource use on an ongoing basis.

LGNZ considers that this, coupled with establishing a multi-stakeholder process for developing the future shape of New Zealand's resource management system, will deliver a simpler, more strategic resource management system.

Environmental Defence Society report – June 2016

The EDS report (EDS *Evaluating the environmental outcomes of the RMA* (June 2016)) (EDS Report) was commissioned by Infrastructure New Zealand (formerly the New Zealand Council for Infrastructure Development), the Property Council New Zealand and the Employers and Manufacturers Association (EMA) Northern. It is the second stage of a three-stage project that EDS is undertaking to explore whether the RMA has delivered desired environmental outcomes for New Zealand, in order to enable an informed discussion on the future of the RMA.

The overall conclusion of the EDS Report is that the environmental outcomes of the RMA have not met expectations, primarily (although not exclusively) as a result of poor implementation. It identifies the key reasons for these underwhelming outcomes as including (summarised at 53):

- (a) a lack of national direction;
- (b) poor agency capacity;
- (c) political “capture” of the agencies charged with implementing the RMA (primarily local authorities); and
- (d) weak monitoring and enforcement.

The EDS Report notes that the Government’s reluctance to provide clear guidance and policies (primarily through national policy statements and national environmental standards) has “left the 78 regional and local government agencies to formulate their policies and plans in the absence of any clear notion of the end game” (at 57). This lack of direction has been particularly damaging when combined with other implementation issues, notably agency capture and capacity.

The EDS Report authors are also critical of the action the Government has taken to address issues with the RMA and its implementation, saying that:

“Central government activity regarding the RMA has mainly focused on repeat amendments to the Act, often without evidential background, and with significant public opposition. The same enthusiasm was not applied to the provision of either direction or direct support to agencies charged with day to day implementation.” (at 57)

We concur with that assessment. Agency capacity has often been insufficient to successfully implement the RMA and opportunities for central government to provide financial and logistical support have generally not been taken. The report observes that:

“... the agencies charged with responsibilities under the Act often do not have access to the resources to match their delegations. ... Reviewing funding of local government would provide an opportunity to address the resource shortfall, to put in place a more resilient fiscal basis and to enable local government to have capacity where it matters.” (at 58)

This lack of national direction and under-resourcing have made those agencies vulnerable to capture by vested interests and sector groups. While the EDS Report authors found there was a level of variation throughout the country, the clear outcome was that where local authority politics is dominated by a particular sector group, this reduces the

power of the RMA to appropriately manage effects on the environment.

Finally, the EDS Report concludes that there has been limited evaluation and monitoring of outcomes, which erodes the potential for adaptive governance and robust implementation.

EDS identifies the two key outcomes from their Stage 2 work as follows:

- a the weight of evidence available points to serious implementation issues with the Act; and
- b prior reform has often proceeded with limited evidentiary basis to the demise of the overall coherence of the system. This means that reform endeavours should pay close heed to whether unrealised outcomes are a result of poor design, or poor implementation. Only one of those can be significantly addressed through regulatory change. Where regulatory change is contemplated, it should only be undertaken on a strong evidential basis to ensure that solutions fit problems.” (at 60)

EDS has commenced work on the third and final stage of that project, which involves analysing the material gathered in the first two stages and proposing practical, legal, policy and practice recommendations to improve environmental outcomes under the RMA.

Productivity Commission report – February 2017

In its 2015 report (Productivity Commission *Using Land for Housing* (September 2015), the Productivity Commission found that New Zealand’s current land use system is not fit for purpose and that a deeper review of the planning system was required if it is to perform significantly better. In October 2015, the Government asked the Commission to:

“... review New Zealand’s urban planning system and identify, from first principles, the most appropriate system for allocating land use through this system to support desirable social, economic, environmental and cultural outcomes.” (Letter from Hon Bill English (Minister of Finance) to Murray Sherwin (Chair of the Productivity Commission) regarding the Terms of Reference for Inquiries into the System of Urban Planning in New Zealand (30 October 2015)

In February this year, the Commission released its final report

(Productivity Commission *Better Urban Planning* (February 2017)) (Productivity Commission Report). A key finding was that to make the greatest contribution to wellbeing, a planning system needs to meet the following goals (at 371):

- (a) enable land use to be flexible and responsive to changing needs, preferences, technology and information;
- (b) provide sufficient development capacity to meet demand;
- (c) promote the mobility of residents and goods through the city;
- (d) ensure that land use activities fit within well-defined environmental limits; and
- (e) recognise and actively protect Maori Treaty interests in the built and natural environments.

The Commission concluded that the current system is failing to cope with the challenges of high-growth cities and to protect important parts of the natural environment and that these failures point to weaknesses in how New Zealand's planning system is designed and operated. It said:

"The weaknesses of the planning system lie in unclear legislative purposes and environmental limits, too little direction and guidance from central government, difficulties in weighing benefits and costs, and in various barriers that prevent timely and flexible responses to the demand for development capacity." (at 4)

The Commission made a number of recommendations as to key changes that should be incorporated into our future planning system. These included:

- (a) A clear distinction should be made between the natural and built environments. The former needs standards that must be met, while the latter should recognise the benefits of urban development and allow change.
- (b) Councils in high-growth areas should be pushed to do more to meet the demand for development capacity and planning instruments should:
 - (i) Prioritise land use and only contain rules that offer a clear net benefit; and
 - (ii) Place greater reliance on pricing and market-based tools, not regulation.
- (c) More responsive infrastructure provision needs to be

enabled through the use of user and congestion charges, public-private partnerships and imposition of targeted rates.

- (d) Plan making, plan review and rights of appeal must be substantially revamped, including that:
 - (i) There should be mandatory "regional spatial strategies" that must be followed by district and unitary plans, transport and other infrastructure plans.
 - (ii) All notified regulatory plans should be subject to a one-stop merits review by an Independent Hearings Panel, with appeals only on points of law to the Environment Court.
- (e) Consultation requirements should be less rigid, so councils can select the consultation or engagement tool most appropriate to the issue being considered.
- (f) The need to build capability and change the culture of both central and local government, by requiring greater emphasis on rigorous analysis of policy options and planning proposals.

Common themes

All three reports adopted the crucial distinction between the RMA and RMA processes. A number of common themes emerged from the three reports, including the following:

- (a) Many of the existing issues with the RMA and RMA processes are due to problems with implementation.
- (b) The key problems with implementation result from lack of national direction on key issues; agency capture; lack of resources, innovation and tools to achieve regulatory mandates.
- (c) The RMA has now reached the point at which it has become unworkable and requires significant reform.
- (d) RMA processes are struggling to deal with complex issues, such as urban planning / housing affordability, freshwater and climate change, and greater national direction is required on these matters.

WHERE TO FROM HERE?

Adopting the distinction between the RMA and RMA processes, it is clear that:

- (a) The RMA clearly requires reform, not because it is fundamentally flawed but because it now lacks coherence

and is becoming increasingly difficult to implement.

- (b) Aspects of the processes and planning “system” that implement the RMA (and related legislation) require attention to address more systemic or “cultural” issues and issues relating to guidance and resourcing.

Apart from the Productivity Commission favouring independent hearing panels to determine plans, there is general agreement between EDS, LGNZ and the Productivity Commission about the key elements of a good planning system and the outcomes the system should achieve. The main difference in approach between the three commentators is whether the RMA needs to be repealed and replaced and the process for that to occur.

Reform the RMA or new statute?

EDS and LGNZ consider the fundamental basis of the RMA remains sound, that there is no need to repeal it. The comment in the EDS report says:

“While there are doubtless areas in which improvement of the regime are possible, there is little evidence that the basis for the Act, and framework it provides, is seriously lacking. Primary weaknesses are found in the interpretation and implementation of the provisions[.]” (at 17)

In contrast, the Productivity Commission is advocating for the replacement of the RMA with a new statute, which contains separate frameworks for regulating activities in the built and natural environments.

We need to bear in mind what problems can be remedied via legislation and what issues can only be addressed through systemic changes. In our view, the Productivity Commission’s reasoning tends to fall into the old trap of conflating the RMA with shortcomings of the “planning system” – indeed, the Commission’s report points more to issues with planning capability and culture than with the RMA itself and to that extent does not represent a compelling case for completely repealing and replacing the RMA. Many of the elements of a planning system sought by the Productivity Commission could be implemented with little or no amendment to the RMA itself.

For example, amendments to the RMA are not required in order to make significant improvements to the implementation and administration of the RMA and RMA processes, including the provision of more (and more

effective) national direction and improving the culture and capacity of both central and local government so they have sufficient skill and resources to meet their functions under the Act.

We therefore agree with EDS and LGNZ that their analysis does not indicate a complete replacement of the RMA is required and this should not be embarked upon until such radical reform is demonstrated to be necessary. We are concerned that the Productivity Commission’s recommendation reflects the same flawed approach that we have seen with recent reform – moving too quickly with the risk of premature amendments based on flawed assumptions which lack a solid evidential basis

Facilitate a mature, well-informed, non-partisan debate

We also agree with EDS and LGNZ that any future reform of the RMA should proceed only on the basis of well-directed evidence gathering and a mature, informed debate. We need to properly understand the nature of the current problems with the RMA and RMA processes (and continue to recognise the distinction between the two) and how we should best prepare New Zealand to face the challenges ahead (adapting to climate change, accommodating significant population growth and managing scarce resources) before determining how they should be addressed.

These thoughts are neatly captured by comments made by Gary Taylor of EDS on the release of the Productivity Commission Report (*EDS EDS congratulates the Productivity Commission on urban planning report* (Media Release, 29 March 2017)):

“A range of other recommendations including a one-stop shop for planning hearings, with rights of appeal to the Environment Court limited to points of law, need more thought. Public participation rights should not be curtailed.

The big question is what’s next? EDS contends that while this review establishes a sound basis for reform, we need to think carefully about a process that works for all. Reform of the resource management system will affect all New Zealanders and has constitutional implications. EDS is therefore embarking on its own major review of the system and expects to generate further useful ideas over the next 18 months.

In terms of process, we favour the appointment of a Royal Commission on Resource Management. The way forward must be depoliticised, have huge integrity and focus on our country's needs over the next 30 years."

In short, the Government needs, for once, to resist the temptation to rush into further reform that is not sufficiently based on sound analysis and solid evidence.

Potential amendments in the interim

This process could take some time. There is no need for any further RMA reforms to be pushed through in the next 12 or even 24 months and, as past amendments have demonstrated, rapid reform does not necessarily mean good reform.

In the interim, if there was a desire to address some of the difficulties with the RMA itself (institutional arrangements aside), it would not be difficult to identify some "low hanging fruit" in terms of aspects of the current RMA that could be addressed to increase its workability, effectiveness and coherence.

Given that there was wide political and public acceptance of the RMA at the time it was enacted, we would start with the core statute and then work through each of the amendments, starting with the most recent, to assess its necessity and effectiveness by reference to the "mischief" it was intended to address. A key focus should be on removing uncertain provisions, multiple jurisdictions and duplicated procedures.

At the top of our list would be the following tasks:

- (a) Review and simplify the notification regime.
- (b) Remove or clarify the novel, ill-defined and untested concepts that have been introduced (for example, "deemed permitted activities").
- (c) Reinstate the mana of the Environment Court by repealing the amendments made to s 120 of the RMA by the RLAA and trust that specialist court with the functions that are currently being referred to independent or ad hoc bodies, including nationally significant proposals that are referred to Boards of Inquiry.
- (d) Retain the sch 1 process as the mechanism for preparing and changing planning instruments on the basis that there are no benefits in the new collaborative planning process (introduced via the RLAA) that cannot be

achieved through the current sch 1 provisions, and the streamlined planning process provides too much power and discretion to the Minister.

CONCLUDING COMMENTS

Having regard to the above, we consider that there are a number of key factors that need to inform the debate in relation to the RMA and RMA reform:

- (a) There is a clear need for reform of the RMA and to closely scrutinise the institutional arrangements and processes that support that Act. However, it is fundamentally important to recognise and maintain the distinction between the RMA as an empowering and assessment statute from shortcomings of the planning system. Conflating the two in the past has resulted in ineffective reforms that are now making the RMA unworkable.
- (b) There is no need to repeal and replace the RMA. We agree with EDS that the fundamental framework of the RMA remains sound and should form the basis of our planning system going forward, albeit with some significant "repairs". It would be hugely wasteful of 25 years of jurisprudence and experience to repeal it.
- (c) Reform of the RMA and RMA processes should only proceed on an informed basis and once the potential benefits and costs of the amendments are fully understood. Time needs to be allowed for evidence gathering, analysis and debate to occur before embarking on any further reforms. There is no good reason why we cannot take the time to do so.
- (d) The way forward for the RMA should be depoliticised and have huge integrity, possibly via the appointment of a Royal Commission.

Our environmental regulation will never be perfect, but as the OECD's third environmental report on New Zealand has reminded us, it is in the interests of all New Zealanders that we make every effort to get it right (OECD *Environmental Performance Reviews: New Zealand 2017 (20 March 2017)*). The issues at stake are too important for us and the generations that will follow us to be determined by political whim and expediency. It is time for the RMA to once again be a world-leading example of environmental regulation.