



## **Environmental and Planning Reforms and Updates Conference**

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### **THE RESOURCE MANAGEMENT ACT 1991 AND NEW ZEALAND'S RESOURCE MANAGEMENT SYSTEM – WHERE TO NEXT?**

**Simon Berry, Partner  
Helen Andrews, Senior Associate**

**Berry Simons, Environmental Law**

#### **1. INTRODUCTION**

- 1.1 The Resource Management Act 1991 ("RMA" or "Act") was introduced with cross-party support in the late 1980s but became a political football even before its enactment and has been so ever since. The Act has been criticised for having processes that are too cumbersome, costly and time-consuming, and which result in outcomes that are difficult to predict, and for discouraging investment and innovation.
- 1.2 Such comments often fail to recognise the distinction between the RMA itself – as an empowering / process statute - and the Resource Management ("RM") "system", including culture and competency of the institutions that administer the Act (which no amount of amending the RMA will address).
- 1.3 Be that as it may, perceived shortcomings of the RMA have resulted in a large number of substantive amendments<sup>1</sup> in its 26 year history. Although well-intentioned, many of the amendments have been based on a misconception that it is the RMA rather than its implementation that is lacking. Many amendments have therefore "missed the mark" and have added to the complexity and costs of RMA processes, setting up a vicious cycle of blame and harmful repair.
- 1.4 The upshot is that the once concise and coherent Act – now at more than 700 pages more than twice the length it was when enacted - has then been weakened through a series of often misconceived and hurried amendments that have not been given time to "bed in" before the next round of changes was introduced. As succinctly stated by Local Government New Zealand ("LGNZ")<sup>2</sup>:

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<sup>1</sup> Most notably for example in 1993, 2003, 2004, 2005, 2009, 2013 and 2017. That is, the Act has been subject to substantive amendment on average at least once every four years.

<sup>2</sup> Local Government New Zealand, *Planning our future – Eight Point Programme*, 26 July 2016, page 8.

*"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."*

1.5 The most recent amendment, the Resource Legislation Amendment Act 2017 ("RLAA"), was enacted in April 2017. It contains some striking examples of ill-conceived tinkering and has only made matters worse. In a paper published in August 2016<sup>3</sup>, we expressed a concern that the amendments introduced by the then Resource Legislation Amendment Bill ("RLAB") could be the straw that would break the camel's back in terms of the Act's practical workability. We identified four key areas in which we considered that the amendments in the the Bill went too far:

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

(Emphasis ours.)

1.6 Some of the worst features of the RLAA were rectified as a result of Select Committee consideration but a number of undesirable features remained and now form part of the RMA.

1.7 In summary, we have over recent years witnessed:

- (a) A significant decline in the coherence and workability of the RMA as a result of ill-conceived, misdirected and poorly drafted amendments to the RMA;
- (b) An ongoing erosion of access to environmental justice through reduction in rights to participate in RMA processes;
- (c) An increasingly *ad hoc* approach to environmental governance, including a proliferation of new procedures in the guise of "simplifying and streamlining" the RMA, including a discernible whittling away of the jurisdiction of the Environment Court in favour of bespoke processes; and
- (d) A continued aggregation of power to Ministers, particularly the Minister for the Environment.

### **The new paradigm and the two key issues arising**

1.8 The Labour Party Manifesto (Environment) 2017 made a clear commitment to reverse "objectionable changes" that were made to the RMA by the previous government and

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<sup>3</sup> Resource Management Journal "The Final Straw for the RMA? Some Shortcomings of the Resource Legislation Amendment Bill 2015."

to improve the Act's workability. Thus, following the 2017 General Election, it appears we may have seen the "high water" of the ill-conceived and substandard legislation that has marked the last several years.

- 1.9 The time is therefore ripe for an intelligent, informed and measured debate about the amendments that should be made to the RMA.
- 1.10 Two key issues arise in this context:
- (a) What short term fixes are necessary or desirable to "roll back" the worst of the amendments enacted via the RLAA?
  - (b) How should we approach the broader issue of considering whether the RMA is "fit for purpose" and whether wholesale changes are necessary; and whether the wider RM system needs a makeover?

#### **The short term issue – is there a need for short term fixes?**

- 1.11 Given the commitments made in the Labour Party Manifesto to reverse the objectionable changes to the RMA, what (if anything) should be done in the short term to achieve that?
- 1.12 In order to contribute to an informed debate, the Environmental Defence Society ("EDS") and Berry Simons have worked together to identify potential amendments to the RMA (and related) legislation which would not pre-empt any outcomes of a broader reform process but which:
- (a) Would meet the objective of addressing the "objectionable changes";
  - (b) They consider the Government has a mandate to deliver in terms of, for example, reducing potential for Ministerial intervention, providing clearer central government guidance, restoring rights of public participation, etc.
- 1.13 This paper will address those amendments, without going through them in any detail.

#### **The broader issue of RMA reform**

- 1.14 The broader issue that needs to be addressed is that the RMA is under scrutiny as to its fitness for purpose and its ability to deal with modern (particularly urban) issues. High level reports / "think pieces" by LGNZ<sup>4</sup>, EDS<sup>5</sup> and the Productivity Commission<sup>6</sup> provide some very useful insights into the problems with the planning system and issues of culture and capability versus the RMA itself<sup>7</sup>. Probably the greatest contribution of those papers to the discussion that needs to be had over the next months and years is that it is New Zealand's resource management system ("RM system") that needs attention, rather than to exclusively blame, and tinker with, the Act itself.
- 1.15 Since then, further initiatives are afoot including important work by EDS which resulted in the publication of a very useful working paper<sup>8</sup> in February 2018 and a

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<sup>4</sup> Local Government New Zealand, *A 'Blue Skies' Discussion about New Zealand's Resource Management System*, December 2015 ("the LGNZ Report").

<sup>5</sup> Environmental Defence Society, *Evaluating the Environmental Outcomes of the RMA: A report by the Environmental Defence Society*, June 2016 ("the EDS Report").

<sup>6</sup> New Zealand Productivity Commission, *Better Urban Planning*, February 2017 ("the Productivity Commission Report").

Our paper *Addressing the Shortcomings of the RMA and RMA Processes – Where to from Here?* August 2017 Resource Management Journal considered calls for reform of the RMA and RMA processes and "where to next for the RMA?" in light of these commentaries.

<sup>8</sup> Raewyn Peart and Greg Severinsen, *Reform of the Resource Management System – the Next Generation* – Working Paper 1

major symposium convened by a newly formed alliance, Resource Reform NZ, held in Auckland on 26 February 2018 and attended by two of the architects of the RMA, Sir Geoffrey Palmer QC and Parliamentary Commissioner for the Environment, Rt. Hon. Simon Upton.

- 1.16 This paper considers those commentaries and current initiatives that will inform the way forward in terms of reform of the RMA and New Zealand's RM system.

### **Scope of paper**

- 1.17 Specifically, this paper:

- (a) Addresses the current policy context in light of the Labour Party's Election Manifesto (and any relevant statements by the Greens and New Zealand First) insofar as they are relevant to environmental institutions and RMA reform (Section 2);
- (b) Outlines the potential amendments identified by EDS and Berry Simons and the rationale for them (Section 3);
- (c) Considers whether the RMA is fit for purpose and what the problems with our "planning system" are in light of recent high level commentaries (Section 4);
- (d) Comments on the way forward from here in terms of substantive RMA and system reform in light of current initiatives (Section 5); and
- (e) Set out some brief conclusions (Section 6).

## **2. THE NEW POLICY CONTEXT – WHERE ARE WE HEADED?**

- 2.1 This section briefly considers the current policy context in light of the manifestos or comments made by the governing coalition partners.

### **The RMA is unlikely to be repealed but requires amendment**

- 2.2 Labour's view (per its Manifesto) is that it "is not persuaded that the RMA needs to be replaced" and it has committed to convening a specialist panel to undertake a "stocktake" on the collective outcome of amendments to the RMA since 1991 and advise on how to ensure the RMA remains fit for purpose. This is likely to be supported by both New Zealand First and the Greens.
- 2.3 Initial indications, then, are that the RMA is unlikely to be scrapped in favour of a single planning and resource-management statute which contains separate objectives and principles for the natural and built environments, as has been recommended by the Productivity Commission (as addressed in Section 4). The previous government had indicated that it was likely to pursue this proposal.
- 2.4 Consistent with that, the Labour Manifesto committed to reversing "objectionable changes" made by the previous government to the RMA (and associated legislation<sup>9</sup>) and improving the Act's workability.
- 2.5 The "objectionable changes" identified in the Manifesto comprise:<sup>10</sup>

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<sup>9</sup> Including associated legislation, specifically the Conservation Act 1987 and the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 ("EEZ Act").

<sup>10</sup> New Zealand Labour Party Manifesto 2017, Environment, page 3.

- (a) Draconian ministerial powers<sup>11</sup> to override council functions and plan provisions, thus preventing local communities from making planning decisions about their local environments;
- (b) The power to standardise plan formats and definitions extending inappropriately to the content and substantive provisions of plans;
- (c) Limits to public notification and participation;
- (d) Insufficient safeguards to ensure that single-step processes are fair and robust when appeal rights are abrogated; and
- (e) Appeal rights being curtailed to the detriment of adversely affected private parties, councils, communities and the environment.

### **Improving the workability of the RMA**

2.6 Labour is likely to have strong support from its coalition partners for a bill containing amendments that “roll back” some of the provisions introduced into the RMA by the RLAA, particularly changes that reinstate access to environmental justice and address the aggregation of Ministerial power. To illustrate, during the RLAB’s second reading:

- (a) Eugenie Sage said that the Greens “oppose the Bill because of the restrictions on the right to appeal to the Environment Court and the value that the Court has in being a check on decision making”; and
- (b) Denis O’ Rourke of New Zealand First concurred, saying his party “deplore [sic] the loss of many important appeal rights ... It could not be a worse process as far as local communities are concerned.”

2.7 And as regards the aggregation of Ministerial powers under section 360D:

- (a) David Parker called the new powers “sweeping” and “Trump-like”;
- (b) Phil Twyford referred to them as “draconian” and “Muldoonist”; and
- (c) Denis O’Rourke said that the powers are “thoroughly objectionable, unnecessary and excessive”.

### **Improving RMA Processes**

2.8 Labour’s agenda 2017 Manifesto also indicated that it is looking for ways to improve RMA processes and reduce costs and delays, without compromising the Act’s fundamental purpose or opportunities for public participation. The Manifesto states that Labour will<sup>12</sup>:

- *“Promote meaningful community participation in resource management decision-making.*
- *Ensure that NGOs and community groups can get fair access to the Environmental Legal Assistance Fund.*
- *Ensure that local government engages effectively with iwi in planning, policy-making, and decision-making.*
- *Support local government, RMA practitioners and stakeholders to develop best practice in the use of the Act.*

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<sup>11</sup> Section 360D.

<sup>12</sup> New Zealand Labour Party Manifesto 2017, Environment, page 4.

- *Work with the Environment Court to encourage shorter hearings and limit expensive and complex expert evidence.*
- *Investigate opportunities for better integrating processes between the RMA and other legislation."*

### **Improving the effectiveness of the EPA / monitoring of local authority performance**

2.9 Labour considers that the Environmental Protection Authority ("EPA") should be put to better use. The Manifesto includes:

- (a) Strengthening the EPA to be a strong environmental regulator with clear powers and purposes, including protecting the environment (which, ironically, it is not currently charged with).
- (b) Ensuring the EPA governance / Board is fit for purpose and has an appropriate balance of industry, environmental and Iwi expertise.
- (c) Mandating the EPA (or potentially the Audit office) with auditing how well consent authorities perform their monitoring and compliance obligations under the RMA. This is particularly important in light of the observations made by EDS and LGNZ as outlined later in this paper.

### **Greater use of NPSs and NESs**

2.10 It is Labour's view that having a full suite of national policy statements ("NPSs") "will make the RMA more effective". The Labour Manifesto promises that Labour will strengthen existing NPSs and national environmental standards ("NESs") where they are clearly inadequate, such as the NPS for Freshwater Management 2014 (amended in 2017).

2.11 There are a range of broader environmental policies in Labour's Manifesto that need not be reviewed for the purpose of this paper.

### **Major announcement from Minister Parker imminent**

2.12 It is clear from that the above analysis that in the wake of the 2017 General Election, we are headed into new territory in terms of the manner in which the RMA will be administered at a national level. Further detail of this direction will no doubt be outlined when Minister Parker addresses members of the Resource Management Law Association on 28 March 2018, in which he will set out the Government's environmental policy priorities for the next 12 months.

### **The Affordable Housing Authority proposal**

2.13 Also relevant in this context due to the nature of the procedures being mooted is the likely progression of an alternative form of the Urban Development Authority ("UDA") proposal – Labour has called this the "Affordable Housing Authority" in its Manifesto, which will be given access to "fast tracked planning powers to cut through red tape and speed up development".

2.14 No doubt such proposals will include a "carve out" or abbreviation of RMA processes which will need to be seen alongside short or long-term amendments to the Act. In order to avoid yet another set of *ad hoc* changes to the RMA, these proposals need to be principled and consistent with the overall objectives for resource management outlined in Labour's manifesto and articulated by the coalition and support parties.

### 3. **POTENTIAL AMENDMENTS IDENTIFIED BY EDS / BERRY SIMONS**

- 3.1 Immediately after the General Election, Berry Simons decided to draw on insights from our recent articles we had written and in light of our analysis of the manifestos, etc., to identify 'low hanging fruit', in terms of potential amendments that could be the focus of a relatively straightforward RMA reform bill that would address the "objectionable changes" and address the issues outlined above.
- 3.2 When we learned that EDS was undertaking a similar analysis, we worked together to develop an agreed table (**attached**) showing 32 potential amendments grouped under a range of headings, including:
- (a) Remove ministerial powers to inappropriately influence the content of RMA planning instruments and processes;
  - (b) Remove objectionable limits to public notification and participation;
  - (c) Ensure RMA practices and procedures are fair and robust and subject to sufficient safeguards;
  - (d) Restore the proper role and scope of jurisdiction of the Environment Court; and
  - (e) Remove novel, uncertain and confusing concepts.
- 3.3 The table has been provided to the Minister for the Environment, the Ministry for the Environment and a range of key stakeholders to ascertain the appetite for the scope of any short term amendments. Although we are not keen on piecemeal RMA amendments, EDS and Berry Simons are confident that most or all of these amendments could be made easily and without pre-empting any "bigger picture" decisions about the future of the RMA and New Zealand's RM system.

#### **Recommended approach**

- 3.4 EDS and Berry Simons have recommended that the Minister consider a two-stage approach to enacting these amendments by making two separate "tranches" of changes, with more straightforward, less contentious amendments being enacted first.

#### ***Tranche 1 amendments***

- 3.5 Tranche 1 ("Green Light") amendments comprise relatively straightforward amendments which EDS / Berry Simons consider could (and should) be progressed in the short term.
- 3.6 The criteria that were applied in identifying Tranche 1 amendments were as follows:
- (a) The proposed amendment addresses an RLAA amendment which is "objectionable" to such an extent that it ought to be reversed before it creates too much process / legal risks and delays;
  - (b) The Government clearly has a mandate (primarily via the Manifesto) to make the amendment, e.g., restoring rights of public participation;
  - (c) There is already evidence of support for the amendment (including via submissions on the RLA Bill, so there is no reason for any further delay; and
  - (d) The proposed amendment does not affect the architecture of the RMA or pre-empt the outcomes of the broader debate on RMA reform.

- 3.7 In general, the Tranche 1 amendments will restore the proper role and scope of jurisdiction of the Environment Court, reverse the introduction of novel, uncertain and confusing concepts, provide clearer central government guidance, restore rights of public participation and protect environmental bottom lines.

### ***Tranche 2 amendments and rationale***

- 3.8 Tranche 2 (“Red Light”) are potential amendments which did not meet the criteria for Tranche 1, may be too complex or problematic to be addressed in the initial Bill and are likely to require further advice, consideration, consultation and debate.
- 3.9 It may be that some of the Tranche 2 amendments could be elevated to Tranche 1, depending upon the Minister’s view, the outcome of feedback and consultation and how quickly the UDA / Affordable Housing Authority proposal is progressed. These amendments include:
- (a) Removing the Streamlined Planning Process;
  - (b) Removing deemed permitted activities;
  - (c) Reinstating the provisions which provided for regional council and territorial authority functions relating to the control of hazardous substances; and
  - (d) Requiring that decision makers “give effect to” or implement certain planning instruments in considering resource consent applications.
- 3.10 Those amendments which remain as Tranche 2 following further consideration and consultation could be undertaken in conjunction with Labour’s proposal to convene a panel to review the RMA to ensure that it remains fit for purpose.

## **4. THE BROADER ISSUE - RECENT COMMENTARIES ON THE SHORTCOMINGS OF THE RMA AND THE NEED FOR RM SYSTEM REFORM**

- 4.1 We now turn to the broader issue of whether the RMA is “fit for purpose” or whether other forces are at work in creating the frustrations around New Zealand’s RM system. Our starting point in addressing this issue is to consider substantive reports on the fitness for purpose of the RMA and what reforms should take place that have been prepared since December 2015 by the Productivity Commission, LGNZ and EDS. We address them in the order in which they were released.

### **Local Government New Zealand – December 2015**

- 4.2 LGNZ established a review group of experts and practitioners to consider current issues with the Act and what a “fit-for-purpose” system might look like. The result was the LGNZ Report, a “blue skies” discussion document which was released in December 2015.
- 4.3 The review group found it difficult to take a clear position on how well (or poorly) RMA processes are working, given the lack of monitoring and reporting on key indicators of environmental performance, which needs to improve. In the meantime, it concluded that there was evidence of environmental decline (particularly around freshwater quality and biodiversity) and that<sup>13</sup>:

*“We can also say 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 evidence of misalignment between the planning statutes under which decisions are made on the use and development of natural and physical resources. These factors are*

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<sup>13</sup> The LGNZ Report, page 29.

*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."*

- 4.4 On this basis, there was a consensus that inaction is not an option and that change is necessary. However, it cautioned against rushing into substantial reforms without fully understanding their potential benefits and costs. The review group therefore favoured<sup>14</sup>:

*"... 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 have been evaluated and understood."*

- 4.5 Building on the LGNZ Report, LGNZ prepared an "Eight Point Programme of Action" for immediately reforming the RMA system, including the following proposals<sup>15</sup>:

- (a) Introduce a regional spatial planning process to establish overarching "vision" for each region;
- (b) Develop a framework for evaluating the performance of the resource management system and using the results from this to make improvements;
- (c) Establish a two tier planning system in which:
  - (i) The first tier spatial planning determines where development can occur. This involves making policy decisions which the Courts should not be involved in; and
  - (ii) The second tier planning focuses on "how" and "when". These decisions may be contested on their merits to ensure that development aligns to first tier goals.

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

#### **Environmental Defence Society – June 2016**

- 4.7 The EDS Report<sup>16</sup> was commissioned by Infrastructure New Zealand ("INZ"), the Property Council of New Zealand ("Property Council") and the EMA. It represents Stage 2 of a 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.

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

- (a) A lack of national direction;
- (b) Poor agency capacity;

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<sup>14</sup> Ibid, page 38.

<sup>15</sup> Local Government New Zealand, *Planning our future – eight point programme*, 26 July 2016.

<sup>16</sup> "Evaluating the Environmental Outcomes of the RMA: A report by the Environmental Defence Society."

- (c) Political “capture” of the agencies charged with implementing the RMA (primarily local authorities); and
- (d) Weak monitoring and enforcement.
- 4.9 The EDS report notes that the Government’s reluctance to provide clear guidance and policies (primarily through NPSs and NESs) “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”<sup>17</sup>. This lack of direction has also been particularly damaging when combined with other implementation issues, notably agency capture and lack of capacity.
- 4.10 The authors of the report were also critical of what action the Government has taken to address issues with the RMA and its implementation, stating that<sup>18</sup>:
- “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 support to agencies charged with day to day implementation.”*
- (Emphasis ours.)
- 4.11 The clear conclusion on agency capacity is that this “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”<sup>19</sup>. The report goes on to observe<sup>20</sup>:
- “It was evident from the interview responses and literature review, that the agencies charged with responsibilities under the Act often do not have access to the resources to match their delegations...It is not fair to simply blame councils for not achieving outcomes – there are systemic issues at play...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.”*
- (Emphasis ours.)
- 4.12 Both the lack of national direction and the under-resourcing of local government have made those agencies vulnerable to capture by vested interests and sector groups. While it varies throughout the country, a 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<sup>21</sup>.
- 4.13 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<sup>22</sup>.
- 4.14 EDS’s recommendations for improving the environmental outcomes under the RMA will be provided in its Stage 3 report. They identify the two key outcomes from their Stage 2 work as follows<sup>23</sup>:

*“This report demonstrates two key outcomes:*

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<sup>17</sup> The EDS Report, page 57.  
<sup>18</sup> Ibid, page 57.  
<sup>19</sup> Ibid, page 58.  
<sup>20</sup> Ibid.  
<sup>21</sup> Ibid, page 56.  
<sup>22</sup> Ibid, page 59.  
<sup>23</sup> Ibid, page 60.

- 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 solutions fit problems.*

(Emphasis ours.)

- 4.15 EDS has just initiated the third 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. It is expected that at the end of 2018 this work will propose a small number of principled-based scenarios for reform and indicate which one is favoured and why.

### **The Productivity Commission – February 2017**

- 4.16 In its September 2015 report "*Final Report on Using Land for Housing*", the Productivity Commission expressed the view 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.

- 4.17 In October 2015, the Government asked the Commission to:

*"...review New Zealand's urban planning system and to identify, from first principles, the most appropriate system for allocating land use through this system to support desirable social, economic, environmental and cultural outcomes."*

- 4.18 The Commission released its final report in February 2017. One of its key findings was that to make the greatest contribution to wellbeing, a planning system needs to meet the following goals<sup>24</sup>:

- (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.

- 4.19 The Commission concluded that our "current system is failing not only to cope with the challenges of high-growth cities, but also to protect important parts of New Zealand's natural environment. These failures point to weaknesses in how New Zealand's planning system is designed and operated"<sup>25</sup>. The Commission summarised the reasons why our present system is failing as follows<sup>26</sup>:

*"The weaknesses of the planning system lie in unclear legislative purposes and environmental limits, too little direction and guidance from*

<sup>24</sup> The Productivity Commission Report, page 2.

<sup>25</sup> Ibid, page 4.

<sup>26</sup> Ibid.

*central government, difficulties in weighting benefits and costs, and in various barriers that prevent timely and flexible responses to the demand for development capacity.*"

4.20 The Commission recommended that our future planning system should incorporate a number of key changes, including:

- (a) That a clear distinction be made between the built and natural environments. The natural environment needs standards that must be met, while the built environment 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. In urban areas, planning instruments should prioritise land use and only have rules that evidence indicates offer a clear net benefit. Plans should put greater reliance on pricing and market-based tools, not regulation.
- (c) We need to enable more responsive infrastructure provision, 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 mandatory "regional spatial strategies" that must be followed by district and unitary plans, transport and other infrastructure plans.
- (e) 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.
- (f) Consultation requirements should be less rigid, so Councils can select the consultation or engagement tool most appropriate to the issue being considered.
- (g) 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.

4.21 Overall, the Commission's view was that the current planning system is not fit for purpose and requires a substantive overhaul. Its recommendations for a future planning system include that<sup>27</sup>:

*"R13.2 Future planning legislation should provide a clear statutory purpose covering the built and natural environments and their relationship; clear statutory objectives to guide regulation of activities impacting on each of the built and natural environments; and clear principles to guide decision makers on how to give effect to the statutory objectives.*

*R13.3 Future planning legislation should set out principles to guide the content of plans and the conduct of planning processes and decision making, so that planning is efficient, fair, transparent, focused on clearly defined and restrained statutory objectives and proportionate to the planning matters being regulated or decided.*

*R13.4 The primary statutory base for a future planning system should be a single piece of legislation covering land-use planning and resource management. The single piece of legislation should have clear and separate objectives for regulating the built and natural environments. There should continue to be separate legislation*

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<sup>27</sup> Ibid, page 452.

*covering land transport management and the constitution and operation of local government."*

### **Common themes**

- 4.22 To the credit of their authors, all three reports adopted the crucial (but frequently overlooked) distinction between the RMA as an empowering statute and the RM system / 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; and 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.

### **Differences**

- 4.23 Despite the agreement that the RMA requires reform, a key difference between the three reports is how RMA / RM system reform should proceed. Can the RMA be "fixed" or do we now need to introduce completely new legislation?
- 4.24 The Productivity Commission has recommended that the RMA requires a substantive overhaul and should include different and "distinctive regulatory approaches" for the natural and built environments.
- 4.25 In contrast, LGNZ is not convinced that we need to scrap the RMA entirely and start again. Rather, it considers that further reform should only proceed following an informed debate involving all key stakeholders as to what our future resource management legislation should look like and how we best achieve that.
- 4.26 EDS strongly believes that we need to work from first principles and avoid proceeding with any preconceived notions. At this stage of its work programme, EDS is open-minded as to the preferred way forward.
- 4.27 It would appear that the view that the RMA should not be scrapped entirely holds sway in Government, at least for the moment. As noted at the outset, Labour's view (per its Manifesto) is that it "is not persuaded that the RMA needs to be replaced".

### **The need for greater integration between local government, transportation and resource management legislation**

- 4.28 Another theme that has emerged which will need to be factored into a broader reform package is the criticism that there is insufficient integration or interplay between the Land Transport Management Act 2003 ("LTMA"), Local Government Act 2002 ("LGA") and the RMA, being the major statutes under which decisions are made about the allocation of resources in relation to patterns of land use, the sequencing of the provision of infrastructure in the form of water and wastewater services, roading, etc.
- 4.29 The principal commentators in relation to this issue have been EMA, Property Council and INZ. The main concern is that the complex processes by which decisions are made under each piece of legislation have inadequate regard to or do not factor in

decisions made under the other. The only way they can achieve that is for each sector to participate in the decision-making processes of the other – in that regard, transport agencies such as the New Zealand Transport Agency (“NZTA”) lodge submissions on regional policy statements, regional plans and district plans, while local authorities must in turn provide input into NZTA’s National Land Transport Strategy.

4.30 In that regard, Resource Reform NZ<sup>28</sup> has recently said<sup>29</sup>:

*New Zealand’s central and local government system is fragmented, complex and under-resourced. Making matters worse, the principal laws under which government, local government, business and communities operate – the Resource Management Act, the Local Government Act and the Land Transport Management Act don’t work well together, are difficult to navigate and create a maze of statutory regulatory processes.*

*Consequently, local government is spending too much time on administration, managing negative effects, balancing the budget, and dealing with the costs of growth; and not enough on capitalising on opportunities, supporting strong local economies, improving the environment and building vibrant communities.*

(Emphasis ours.)

## 5. WHERE TO FROM HERE? CURRENT INITIATIVES AND THE WAY FORWARD

5.1 It is clear from these reports that there is an emerging consensus that the RMA / RM system is struggling to deal with complex issues such as urban planning / housing affordability, freshwater and climate change<sup>30</sup> and that there is a need for significant reform of the RMA / RM system. It is also clear that further tinkering will not do.

5.2 A key question is: is the RMA capable of repair or do we need an entirely new framework?

5.3 We agree with the EDS Report that the RMA’s overall framework remains sound and we do not need to “throw the baby out with the bathwater”. The EDS Report concluded<sup>31</sup>:

*“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.”*

5.4 We also agree with Gary Taylor of EDS that it would not be appropriate to embark on further reform until further and deeper thought has been given to our options. On the release of the Productivity Commission Report, he said<sup>32</sup>:

*“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*

<sup>28</sup> Comprising EDS, EMA, INZ, Productivity Commission and Business NZ.

<sup>29</sup> Paper prepared for symposium on 26 February 2018 – “Resource Reform NZ – the Case for Change.”

<sup>30</sup> Resource Legislation Amendment Bill 2015 Submission to the Local Government and Environment Committee, Dr Jan Wright Parliamentary Commissioner for the Environment, 14 March 2016.

<sup>31</sup> The EDS Report, page 17.

<sup>32</sup> EDS Media Release, 29 March 2017.

*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."*

(Emphasis ours.)

### **Facilitate an informed debate on the way forward**

- 5.5 In terms of required legislative reform, it is clear that we do not yet have a sufficient level of analysis or evidence for anyone to determine whether the best solution for our planning framework going forward should be based on a substantial reform of the RMA, or a more radical change to a completely new planning framework. The OECD's third environmental report on New Zealand, released in March 2017, concluded that<sup>33</sup>:

*"No comprehensive evaluation has analysed the performance of the RMA in order for it to deal with implementation problems and deliver its objectives."*

- 5.6 Put simply, we need to properly understand the nature of the current problems with the RMA 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 we can determine how they should be fixed. This is in direct contrast to the previous Government's *ad hoc* reform programme, which has often proceeded on the basis of little evidence and routinely failed to assess what the potential costs of its amendments might be.
- 5.7 We endorse EDS's comments that "the way forward must be depoliticised, have huge integrity and focus on our country's needs over the next 30 years"<sup>34</sup>.

### **Focus on the real issues – culture, capacity, capture and lack of direction**

- 5.8 The three reports outlined above identified a number of issues that need to be addressed that do not depend on the legislation and need to be progressed in conjunction with any reform programme. These include:
- (a) Improving the culture and capacity of both central and local government so they have sufficient personnel and the skill set to meet their functions under the Act;
  - (b) A commitment by the Government to provide more (and more effective) national direction. Freshwater, natural hazards management and biodiversity are the critical topics where this is required, amongst others. This would also reduce the potential for "agency capture"; and
  - (c) The constant introduction of bespoke legislation that overrides the RMA would also have to be curtailed and employed as a "solution" only in exceptional circumstances (e.g., Canterbury earthquakes).

### **Current initiatives to facilitate that debate – EDS and RRNZ**

- 5.9 Two important initiatives are afoot that will be invaluable in informing this "big picture" conversation about the reform of the RMA / RM system.

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<sup>33</sup> OECD (2017), *OECD Environmental Performance Reviews: New Zealand 2017*, OECD Publishing, Paris ("the OECD Report"), page 27.

<sup>34</sup> EDS Media Release, 29 March 2017.

## **EDS Project – “Reform of the Resource Management System – the Next Generation”**

- 5.10 With funding from the Law Foundation and some other organisations, EDS has launched the next stage of its RMA / RM system analysis project, the purpose of which is to<sup>35</sup>:

*“...to take a first-principles look at the resource management system in New Zealand and outline options for reform...By ‘first-principles’ we generally mean that we are asking fundamental, future-focused questions about how our overall package of relevant laws and institutions should and can work. We are not just reacting to particular problems or looking at better ways to do the same things. We are asking why we do certain things, whether we should be doing them, and how we should be doing things in the future.”*

(Emphasis ours.)

- 5.11 The first working paper<sup>36</sup> has been issued and is available on the EDS website<sup>37</sup>. It is a substantial and impressive piece of work that outlines the conceptual analytical framework; context; worldviews and ethics; principles relevant to a resource management system; and lessons that the EDS project team learned from an international study tour they undertook in Europe and North America.
- 5.12 The inputs to the project and its primary focus is neatly summarised in the following passage:

*“The project involves a phased programme of research and analytical work that considers a range of themes, topics and issues. Its primary lens is a legal one – focused on the optimal regulatory and institutional arrangements – but it also investigates non-legal matters. The analysis encompasses diverse topics, including international law, legal principles and environmental ethics, legislative design, governance and institutional structures, participatory arrangements, and legal/economic tools. It involves analysis of primary and secondary written sources, targeted interviews, an international study tour and workshop sessions. The project will culminate in a series of working papers (of which this is the first) and tangible options for reform.”*

(Emphasis ours.)

- 5.13 The Peart / Severinsen paper is a comprehensive and thought-provoking piece of work that demonstrates just how complex and interlocking the pieces are that make up this puzzle and a “must read” for anyone interested in the issues addressed in this paper.
- 5.14 A final report will be produced in late 2018 and will no doubt form a very useful contribution to the discussion we need to have on “where to from here?” for the RMA / RM system.

### **The Resource Reform NZ initiative**

- 5.15 Resource Reform NZ (“RRNZ”) is a new alliance that comprises:

*“... a group of like-minded organisations seeking prosperity for all New Zealanders through development of a nationally integrated governance, planning, funding and delivery system. That system must encompass central and local government, the private sector and communities.*

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<sup>35</sup> “Reform of the Resource Management System – the Next Generation – Working Paper 1”, page 9.

<sup>36</sup> “Reform of the Resource Management System – the Next Generation – Working Paper 1”,

<sup>37</sup> [http://www.eds.org.nz/assets/Publications/RMLR%20Working%20Paper%201\\_WEB.pdf](http://www.eds.org.nz/assets/Publications/RMLR%20Working%20Paper%201_WEB.pdf)

*True prosperity is about more than wealth. It means a clean environment, affordable housing, good health, strong communities, and access to employment, education and leisure. It is about New Zealand's economic, social, cultural and environmental well-being<sup>38</sup>.*"

- 5.16 Currently that group comprises EDS, EMA, INZ, the Property Council and Business NZ. RRNZ members see the problem as follows<sup>39</sup>:

"1. New Zealand's prosperity is being held back by a national and local government system and the legal framework in which the wider planning system operates that is no longer fit for purpose.

*2. The evidence for that can be seen through escalating housing unaffordability and consequent health and social issues, the high-cost of commercial development and the struggle to fund much needed upgrades and expansion to stressed infrastructure. In short, New Zealand is simply not building enough, quickly enough, and with the quality and innovation needed to service its growing and changing population.*

*3. For businesses those issues are stifling their ability to grow the pie for themselves, their workers and their families. That limits all of our incomes, livelihoods, social services and our overall well-being.*

*4. The environment is suffering too. While the RMA is New Zealand's pre-eminent environmental law, the cumulative effects of permitted land use activities, have, over the lifetime of the Act, led to a slow but significant deterioration in the quality of monitored streams, rivers and lakes. Despite the imperative to protect our unique biodiversity, leading environmentalists describe New Zealand as being at the point of crisis.*

*5. Looking into the future, we face even bigger challenges in managing growth and responding to demographic change, advances in technology, rising consumer expectations and climate change."*

(Emphasis ours.)

- 5.17 Having attended the symposium convened by RRNZ on 26 February 2018, it is clear that there is a broad range of interests and sectors who are prepared to work together to address the issues raised. A key focus was identifying a process by which these issues can be fully aired and solutions identified.
- 5.18 A communique issued following the symposium<sup>40</sup> contains the following important messages:

"A high level symposium on resource management organised by Resource Reform NZ and hosted by EMA in Auckland last week agreed that there's a pressing need for fundamental, wide ranging reform.

A fit-for-purpose modern resource management system was identified as a crucial component of New Zealand's future, especially when issues such as climate change and changing generational needs were taken into consideration. It was also acknowledged that the current system had become complex, was demanding of local authorities and was not delivering to either the environment or economic growth.

...

*Keynote speaker and architect of the Resource Management Act (RMA), Sir Geoffrey Palmer QC... contended that now was the time to look at*

<sup>38</sup> Symposium Flyer, 26 February 2018.

<sup>39</sup> Ibid.

<sup>40</sup> Val Hayes, Communique – 5 March 2018.

*how we could improve the system and railed against the many ad hoc amendments that have weakened the original vision. He recommended a stripped down version of the Act to address immediate needs, but impressed upon the audience that a much longer term rethink was urgently required, which included the need to have an integrated solution including the structure, powers and functions of local government.*

...

*The Symposium firmly cemented what Resource Reform NZ has been working on for the past few years. The question of how New Zealand manage its resources now and in the future, needs addressing urgently. The key principles which need to be addressed in any process are environmental bottom lines, planning, funding, governance, monitoring and enforcement.*

(Emphasis ours.)

- 5.19 An action identified from the day was:

*Resource Reform NZ to further develop concepts outlined from the day such as identifying an expert advisory group, mapping what needs to happen in this parliamentary term and what needs to be done by 2020 to progress a review of the resource management system.*

- 5.20 Again, the concepts being developed by RRNZ and discussion around it will no doubt represent an invaluable contribution to the broader debate around New Zealand's planning system and RMA reform.

## 6. CONCLUDING COMMENTS

- 6.1 As a result of the 2017 General Election, we now have a policy / political context in which the outcome of sound analysis and an informed debate regarding the current state and future of the RMA and New Zealand's RM system will be taken notice of. The new Labour-led Government has signified a desire to closely review the legislation. We have moved beyond hyperbole and exaggerated claims about RMA restrictions (the many variations on the "deck addition" being a case in point) into a more considered and informed discourse.
- 6.2 The Productivity Commission, LGNZ and EDS reports have provided a solid foundation in terms of insights into failings of the system – noting the vital distinction between the legislation and the competency and capacity of the institutions that administer that legislation. Clearly some change is called for – the questions are: How much? and When? Sector groups with a vital interest in a sound and efficient RM system have already mobilised in order to facilitate and feed the informed discussion and debate that needs to be had in relation to the future of that system.
- 6.3 New and important work being undertaken by EDS and RRNZ is playing a valuable role in bringing sector groups together to have an intelligent and well informed discussion over the coming months and years. A concern is that New Zealand's three year electoral cycle makes comprehensive reform problematic given the enormity of the issues to be addressed and the difficulty of identifying and achieving some degree of consensus on a solution.
- 6.4 We do not wish to foreshadow the outcome of the broader conversation which needs to be had about RMA reform. What seems clear is that the conversation should proceed on the assumption that one option is that the RMA may remain in some form but that the principles-based analysis being undertaken by EDS and the work being undertaken by the RRNZ will be important in determining that.

- 6.5 In the short term, we consider that there would be significant value in proceeding with all or some of the 32 potential amendments identified in the EDS / Berry Simons table. That would "roll-back" some of the more "objectionable" changes brought about by the previous government and would also restore the appropriate jurisdiction of the Environment Court, rights to public participation and access to environmental justice.

**Simon Berry / Helen Andrews**

**March 2018**