COUNTRY REPORT: NEW ZEALAND
Recent Developments in Resource Management Law and Climate Jurisprudence

TREVOR DAYA-WINTERBOTTOM*

Introduction

This Country Report focuses on further proposals for reform of the *Resource Management Act* (1991) (RMA), and the ongoing debate about the legitimacy of climate change litigation in New Zealand.

Further Proposals for RMA Reform

Since the RMA came into force on 1 October 1991, it has been the subject of ongoing debate about streamlining and simplifying processes to avoid costs and delays, and has been amended on seventeen occasions. The debate remains ongoing and shows no real sign of abatement, with the most recent *Resource Management Reform Bill* being introduced into Parliament on 5 December 2012.[1] The Bill passed its first reading on 11 December 2012 following preliminary debate in the House of Representatives, and has been referred to the Local Government and Environment Select Committee for report back to the House after considering submissions on the Bill. Submissions close on 28 February 2013, and the Bill is due to be reported back to the House on 11 June 2013.

The current reform agenda has been dominated by freshwater allocation, and the aftermath of local government amalgamation in Auckland. The underlying theme of these twin debates is that a streamlined and simplified plan preparation process is required to deliver more agile policy development. Both strands of the debate have concluded that merits appeals to the Environment Court should be repealed and replaced with appeals on questions of law only to the High Court.

* Associate Dean: Research, Faculty of Law, University of Waikato, New Zealand. Email: trevordw@waikato.ac.nz.

[1] Bill No 93-1.

Land and Water Forum

The reform agenda for freshwater has been driven by a non-governmental stakeholder group, the Land and Water Forum, that has produced three reports on freshwater allocation and quality.[2]

Under the RMA, prior authorisation is required from the relevant regional council or unitary authority to take and use water,[3] and to discharge contaminants into the environment.[4] Absent regional plans, these activities require discretionary activity resource consent,[5] and both freshwater resources and the assimilative capacity of the environment to absorb contaminant loads are allocated on a first come first served basis.[6] The preparation of regional plans, with the sole exception of regional coastal plans, is optional and there has been a time lag between issues regarding freshwater allocation and quality being identified, and the preparation of regional plans to address these issues. As a result, complete regional plan coverage has not yet been achieved by all relevant local authorities, and the default rules under the RMA continue to influence resource consent decision-making.

These problems have been exacerbated by the failure, until recently, to prepare national policy statements or national environmental standards under the RMA to provide guidance on the preparation of regional freshwater plans. The *National Policy Statement on Freshwater*, gazetted in May 2011, is unlikely to resolve issues quickly as it requires full compliance by local authorities by 31 December 2030. In the interim, local authorities in Canterbury, Otago and Waikato continue to grapple with competing demands for freshwater allocation from hydro-electricity generation, dairy and other uses.

To provide for a streamlined process, the Land and Water Forum recommended in its second and third reports that proposed regional plans should be prepared by stakeholder groups following a collaborative process. Putting aside problematic questions about qualification for membership of the stakeholder group,[7] the process does not avoid the need for public notification of the proposed plan or the need for local authority hearings to make decisions on submissions about the plan. As a result, the streamlining effect of the Forum's

[2] Land and Water Forum: *A Fresh Start for Freshwater* (August 2010), *Second Report of the Land and Water Forum* (May 2012), and *Third Report of the Land and Water Forum* (November 2012).
[3] RMA, section 14.
[4] RMA, section 15.
[5] RMA, section 87B.
[6] *Fleetwing Farms Ltd vs Marlborough District Council* [1997] 3 NZLR 257 (CA).
[7] See: D. Nolan et al, 'Faster, Higher, Stronger … Or Just Wrong? – Flaws in the Framework Recommended by the Land and Water Forum's Second Report' (2012) August *RMJ*, 6.

recommended process would be dependent on the quality of the stakeholder process, and considerable investment would be required to enable the collaborative process to produce publicly acceptable mediated outcomes.[8] Ultimately, there is no guarantee that the collaborative process would actually streamline the process by reducing the time required for plan preparation compared with the current system under Schedule 1 of the RMA.

More importantly, the Forum has also recommended that the hearing process following public notification of the proposed plan should merely make recommendations to the local authority about how submissions should be decided, and provides the local authority with the ability to depart from the hearing panel recommendations where reasons for the departure are given by the local authority. Effectively, this provides the local authority with a power of veto that would not be subject to any statutory appeal rights, apart from appeals to the High Court on questions of law only.

Similar recommendations have been made by Local Government New Zealand,[9] and by Dormer and Payne in a report prepared for Waikato Regional Council.[10] But these recommendations differ from the Forum's reports in a number of important respects. For example, they do not recommend that a collaborative stakeholder process should be used to prepare the proposed plan. They rather recommended that the local authority hearing should be chaired by an independent person appointed by the Minister for the Environment. Furthermore, they did not recommend that the local authority should be given greater latitude to depart from hearing panel recommendations about decisions on submissions.

Dormer and Payne based their recommendations on an analysis of three proposed variations to the Waikato Regional Plan, and the time taken for them to be progressed under the Schedule 1 of the RMA from public notification until they became operative. For example, in the case of Variation 6 dealing with water allocation, they noted that the proposed variation was notified in October 2006 and was finally made operative in April 2012. In particular, they focused on the time taken to resolve merits appeals to the Environment Court. Appeals were filed in February 2009 and the Court hearing took place between February-August 2011. However, the raw data masks the fact that resolution of the appeals was delayed by the attempt made by the regional council to negotiate with some appellants, and to engage in mediation facilitated by a council appointed mediator.

[8] Ibid, 7.
[9] Local Government New Zealand Regional Sector Group, *Enhanced Policy Agility - Proposed reforms of the Resource Management Act*, December 2011.
[10] See: www.rmla.org.nz.

Subsequent analysis by the Court has identified that local authority attempts at negotiation are one of the primary sources of delay in the appeal process,[11] and other commentators have noted that mediation is unlikely to succeed unless facilitated by an independently appointed mediator.[12]

Auckland Governance

The Royal Commission on Auckland Governance (2008) recommended that seven territorial authorities and the regional council should be amalgamated to create a single unitary authority. In particular it proposed that the opportunity to streamline and simplify RMA planning for the new unitary authority by replacing all statutory planning instruments with a single unitary plan provided a strong catalyst for this recommendation.

Auckland Council prepared a briefing paper for the Government following the 2011 General Election that suggested that: the council was in a unique position; that it needed to implement the unitary plan quickly; and that the preparation the plan under the Schedule 1 process could be protracted and take up to 10 years to be made operative after any appeals had been resolved.[13] However, local government amalgamation is not unique. In 1989 the number of local authorities was reduced from over 700 to 86 as part of the reform agenda of the Lange Government, with the corresponding need to prepare new RMA plans.

Despite considerable debate, the *Reform Bill* proposes that the unitary plan preparation process should be streamlined by providing for a single council hearing,[14] with appeals being limited to appeals on questions of law only to the High Court (where the council adopts the recommendations of the hearing panel) and for merits appeals to the Environment Court (where the council decides to depart from the hearing panel's recommendations). Auckland Council suggested that the single hearing process could embody the "essential elements" of the council and Environment Court hearings under Schedule 1 of the RMA, as it proposed that the single hearing sould be chaired by a retired judge and that the hearing panel should include a mix of independent commissioners and elected councillors.

[11] L. Newhook, 'Current and Recent-Past Practice of the Environment Court Concerning Appeals on Proposed Plans and Policy Statements' (2013) *RM Theory & Practice*, 241-251.
[12] M. Oliver, 'Implementing Sustainability – New Zealand's Environment Court-annexed Mediation' (2012) *RM Theory & Practice*, 220-248.
[13] Auckland Council, *Briefing Paper to the Incoming Government* (November 2011).
[14] See: T. Daya-Winterbottom 'Blue Horizons' (2011) August *RMJ*, 21-24; D. Nolan et al 'A Better Approach to Improving the RMA Plan Process' (2012) *RM Theory & Practice*, 63-96; Nolan et al (supra note 7), 4-12; T. Daya-Winterbottom 'Blue Horizons 2' (2012) August *RMJ*, 18-23; D Nolan et al 'An Experiment in Expediency' (2012) November *RMJ*, 11-13; Newhook (supra note 11), 241-251.

Fundamental Rights and Natural Justice

Natural justice is provided for by a series of procedural safeguards in the RMA that require cost benefit analysis of objectives, policies and rules to ensure that proposed plans are soundly based on evidence of probative value;[15] and that guarantee access to justice by requiring public notification of proposed plans, and by providing for submission, hearing and appeal rights on merits and law. These safeguards reflect the fact that compensation is not available for adverse planning decisions that affect the reasonable use of property,[16] and the fact that there is no right to judicial review unless RMA appeal rights are exhausted.[17]

Leading authors have underscored the constitutional character of property rights,[18] the constitutional importance of compensation rights,[19] and constitutional guarantees designed to safeguard natural justice.[20] As a result, it is not surprising that previous attempts to limit appeal rights under the RMA to appeals to the High Court on questions of law only have not met with success.[21]

While it is clear that provision for natural justice is flexible in times of emergency (e.g. war time regulations),[22] the case for limiting appeal rights based on arguments about "unique" situations pertaining after local government amalgamation or the crisis arising from competing demands for freshwater allocation in the absence of regional plans, does not appear to be clear-cut or fully justified.

The arguments for limiting plan appeal rights are less clear-cut when the safeguards identified by the proponents for legislative amendment (e.g. the appointment of a retired judge to chair the council hearing panel) do not feature in the *Reform Bill*;[23] or where key aspects of Court process designed to streamline the hearing in a collaborative way (e.g. expert witness conferencing and mediation) are adopted in a hybrid way that departs from

[15] RMA, section 32.
[16] RMA, section 85.
[17] RMA, section 296.
[18] P. Joseph, 'Property Rights and Environmental Regulation' in T. Daya-Winterbottom (ed) *Frontiers of Resource Management Law* (2012), 124-143.
[19] S. Ratnapala, 'Environmentalism Versus Constitutionalism: A Contest Without Winners' (2007) *RM Theory & Practice*, 110-164.
[20] B. Barton, 'The Legitimacy of Regulation' in T. Daya-Winterbottom (ed) *Frontiers of Resource Management Law* (2012), 144-190.
[21] See: *Resource Management (Streamlining and Simplifying) Amendment Act* (2009).
[22] See: *Ridge vs Baldwin* [1964] AC 40 per Lord Reid.
[23] Resource Management Reform Bill, s 155 and s 156. There is no requirement in the Bill for the chair of the hearing panel to be a retired judge.

the integrity and independence of Court process;[24] or where the local authority is provided with the ability to depart from the recommendations of the hearing panel and afforded the privileged status of being able to re-litigate the merits of the departure via a separate hearing process.[25]

Most recently, extra judicial commentary and writing suggests that a rights-based approach to resource management decision-making may provide a more just way of balancing human rights to natural justice and property rights against other conflicting considerations.[26]

The Legitimacy of Climate Change Litigation

The debate in New Zealand regarding the use of consent conditions to mitigate greenhouse gas emissions was concluded in *Environmental Defence Society vs Taranaki Regional Council*,[27] and *Environmental Defence Society vs Auckland Regional Council*,[28] concerning proposed power stations. The Environment Court held that a national approach was required to address climate change. The Court deferred to the preferred policy package selected by Government to implement the *Kyoto Protocol*. It considered that mitigating greenhouse gas emissions had national and international implications, and required assessment of the social and economic consequences of imposing "offset" conditions. The Court considered that such matters were "quintessential policy decisions" that were best made in the political arena following an informed research led debate.

Subsequently, the opportunity for climate change litigation in New Zealand has been reduced under the *Resource Management Act* (1991) (RMA) as a result of the *Resource Management (Energy and Climate Change) Amendment Act* (2004), which inserted into the RMA section 70A and section 104E that preclude local authorities from considering the adverse effects of climate change when preparing regional rules pertaining to air discharges or when deciding air discharge permit applications.

[24] *Resource Management Reform Bill*, section 127, section 129, and section 130. For example, no provision is made for matters agreed via pre-hearing meetings or mediation to be resolved by consent order; and the facilitator is responsible for preparing reports from conferences of experts rather than reports being prepared by the experts themselves in the form of joint statements of evidence.
[25] *Resource Management Reform Bill*, section 143 and section 150.
[26] C. Whata, 'Environmental Rights in Times of Crisis: The Canterbury Experience' (2013) *RM Theory & Practice*, 42-72.
[27] (A184/2002).
[28] [2002] NZRMA 492.

The Court of Appeal and Supreme Court decisions in *Genesis Power Ltd vs Greenpeace New Zealand Inc,*[29] confirmed that regulation of greenhouse gas emissions is not possible under the RMA.

Most recently, the debate regarding climate change considerations was revisited in *Royal Forest and Bird Protection Society of New Zealand Inc vs Buller Coal Ltd*,[30] where the High Court held that such considerations were not relevant when deciding resource consent applications under the RMA. The Society had previously applied to the Environment Court for decalarations that the climate change effects of two South Island coal mining projects from CO2 emitted when coal was burnt by overseas exporters, should be considered when the land use consent applications were decided by the relevant local authority.

Based on the *2004 Amendment Act*, the Supreme Court had found in *Genesis Power* that adverse effects on climate change could not be considered by the relevant regional council when deciding air discharge permit applications for non-renewable energy generation projects. But that decision had not expressly addressed the issue in the context of the functions, powers and duties of territorial authorities when deciding land use consent applications.

The Society argued that the legal effect of the *2004 Amendment Act* was ambiguous and that it did not preclude the relevant territorial authority from considering the "down stream" effects on climate change of burning the coal when deciding land use consent applications. This argument was not accepted by the Environment Court, which found that the *2004 Amendment Act* left no room for "ambiguity, uncertainty, or … discretion" in relation to this issue. The High Court on appeal reached a similalr conclusion but like the Environment Court in the 2002 *Environmental Defence Society* litigation, the Court found it difficult to contemplate that local authorities were legally competent under the RMA to exercise jurisdiction outside their administrative areas. Justice Whata stated:

> One leviathan of environmental law (i.e. the RMA) is more than enough for lawyers, experts, environmental managers, planners, the local authorities and the courts of this country. The prospect of a district council assessing whether and end use of coal … is subject to sustainable environmental policy … in … foreign jurisdictions is palpably unattractive. [31]

[29] [2007] NZCA 469 and [2008] NZSC 112.
[30] [2012] NZHC 2156.
[31] [2012] NZHC 2156.

Subsequently, the Society has filed a further appeal and leave has been granted by the Supreme Court for the appeal to be heard direct by the Supreme Court, leap-frogging the Court of Appeal. The appeal has been set down for hearing by the Court on 12 and 13 March 2013.

It is for note that New Zealand's commitment to implement the *Kyoto Protocol* provided a powerful catalyst for the Environment Court to find that a national approach should be preferred to deal with the adverse effects of climate. Most recently, Tim Grosser, the Minister for Climate Change, announced that New Zealand has decided to pull out of the next phase of the *Kyoto Protocol* because it will have "disasterous consequences" and is "toxic".[32] Whether this change of heart will have an effect on the Supreme Court decision is a matter for speculation.

Conclusion

As a result, 2013 is likely to be an active year as the debates about further RMA reform and the legitimacy of local authority controls on the effects of climate change are litigated before the Parliamentary Select Committee and the Supreme Court. The decision to repeal merits appeals to the Environment Court in relation to plan decisions would be a strange way to celebrate the 60th anniversary of enactment of the *Town and Country Planning Act* (1953) that established the statutory predecessor of the Court. Similarly, the consequences for New Zealand's clean and green image of pulling out of the next phase of the *Kyoto Protocol* may not have been fully considered.

[32] TV 3 News, 10 November 2012.