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COUNTRY REPORT: NEW ZEALAND
Reforms to the Resource Management Act

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Introduction

During 2011, the Ministry for the Environment (MfE) has consulted on the Phase II reforms to the *Resource Management Act* (1991) (*RMA*). These reforms build on the Government's focus of simplifying and streamlining processes evidenced in the *Resource Management (Simplifying and Streamlining) Amendment Act* (2009). The Government's objectives for the *RMA* Phase II reforms are (inter alia): to provide greater central government direction on resource management; to improve economic efficiency without compromising environmental integrity; and to avoid duplication of processes under the *RMA* and other statutes. This report offers some preliminary views on the reform agenda and the scope for further improvements in *RMA* practice.

National and Regional Guidance

The *RMA* provides an elaborate hierarchy of planning documents to guide decision-making by local government councils. Critical components of the planning hierarchy are national policy statements (NPS) and national environmental standards (NES) prepared by central government. However, national guidance has been slow to emerge and councils have been left in a policy vacuum to decide how they should administer the *RMA* through regional policy statements (RPS), regional plans and district plans.

NPS are now being prepared, notified, and litigated before Boards of Inquiry specially

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constituted to make recommendations on how submissions should be decided. However, most recently in relation to the NPS on indigenous biodiversity, the Minister for the Environment has chosen to consider submissions himself, based on recommendations from the Ministry, as an alternative to constituting a Board of Inquiry.

Comparison with other common law jurisdictions indicates that a suite of NPS will be required. In the United Kingdom, for example, the Secretary of State for the Environment has prepared 25 planning policy guidance notes. It will therefore take some time before the suite of NPS required to administer the *RMA* has been prepared, notified and is fully operative.

By nature, NPS and NES are high-level documents. Comparison with national planning guidance in other jurisdictions indicates that they may either provide policy guidance that will be directly applicable to all persons exercising functions, powers and duties under the relevant statute including landowners and developers; or provide guidance that merely has direct effect on councils and will not have immediate effect upon other persons. Where national guidance merely has direct effect on councils there will inevitably be a time delay while subordinate documents in the planning hierarchy are prepared or changed to give effect to the national guidance. Given the critical need to provide greater central government direction on resource management within a reasonable time period, there is a strong argument that NPS should be drafted in a way that ensures they will be directly applicable on all persons exercising functions, powers and duties under the *RMA* without the need for further subordinate action by councils.

Various methods have been used in the United Kingdom to prepare national and regional planning policy guidance notes. For example, the regional planning policy guidance note (RPG) for East Anglia (United Kingdom) was prepared by a standing committee of all councils in the region with each council being represented by an elected councilor and an expert member of staff. This collaborative method removed the need for the consultation before the RPG was notified and avoided the risk of litigation after notification because relevant stakeholders were involved in the process and reached consensus on the RPG submitted to the Secretary of State for approval.

A similar approach could be adopted regarding the preparation of NPS and NES.

Relevant stakeholders would include representatives from all councils, local authority associations, network utility operators and requiring authorities, professional bodies (e.g. RMLA), business and industry associations, and non-government associations. The Land and Water Forum is an example of collaborative governance, but that model was only designed to produce issues and options for consultation and therefore does not have the same streamlining advantages as the UK experience in East Anglia.

For the 11 regions in New Zealand where a two-tier system of local government remains in place, a similar collaborative approach could be adopted regarding the preparation of RPS to replace the current process under Schedule 1 of the *RMA*. Natural justice could be safeguarded by providing persons excluded from the process with a right of appeal on questions of law. Currently, the *RMA* provides a framework in Schedule 1 for councils to agree on consultation regarding RPS preparation or change, but the framework does not guarantee that a collaborative approach will emerge from the consultation process. More importantly the consultation process is limited and does not provide for wider stakeholder engagement.

District Plans

The majority of resource consents granted (69 percent) are land use consents. The *RMA* takes a permissive approach to land use activities and consent is not required unless the proposed activity is contrary to a rule in a plan. As a result, landowners and developers will be keenly interested in the plan preparation process. They will be concerned about any adverse effect on their property rights. In the absence of any statutory entitlement to compensation in relation to the adverse effect of restrictions on private property, the provisions in section 32 which require plans to be soundly based on good evidence and Schedule 1 that provides for submission, hearing and appeal rights, are important constitutional guarantees against the abuse of discretionary power.

Generally, the *RMA* provides a litigation-based method of environmental conflict resolution. Disputes regarding notified plan provisions and notified resource consent applications are generally resolved via formal hearings before decision-makers, and alternative methods of environmental conflict resolution are optional. In the context of council decisions on resource consent applications, for example, provision is made in

the *RMA* for prehearing meetings to assist in resolving submitter concerns regarding the effects of proposed activities, but uptake of the opportunity for prehearing meetings is low (34 percent). Experience before the Environment Court is similar with mediation occurring in relation to only 39 percent of appeals filed with the court.

While the right to be heard is deeply engrained in the common law approach to administrative decision-making, it is clear from a public law perspective that the right to be heard can be guaranteed by a variety of methods. The Minister has indicated a preference that collaborative methods of environmental conflict resolution should be used as an alternative to formal litigation. When drafting legislation, the Government makes a deliberate policy choice about how natural justice will be guaranteed and the methods that will be used to provide hearing rights. As a result, there is an opportunity when considering *RMA* reform to select alternative methods of environmental conflict resolution as the primary method for hearing submissions. Internationally, a variety of alternative methods are used. For example, the United States EPA has developed negotiated rule making, a mediation-based method that encourages stakeholders to arrive at consensus on how regulations should be drafted. Negotiated rule making is also gaining some traction in Australia and is promoted by ELRANZ as a good example of collaborative decision-making.

Negotiated rule making normally works in the following way. Before the negotiated rule making commences, ground rules are prepared setting the deadline for completion of the process, the objectives of the process, the responsibilities and commitments of participants, and providing a definition of 'consensus'. A list of issues is identified for discussion, and participants are provided with relevant background materials. The mediator provides focus and manages the process, and participants discuss each issue. When participants have agreed on a conceptual solution the regulator provides a draft regulation for review. Draft regulations are subject to further discussion and review by the participants until consensus agreement is reached. Typically, the negotiated rule making process takes six to twelve months to complete and involves monthly multi-day meetings.

Giving effect to the preference for collaborative methods of environmental conflict resolution will require a change from voluntary mediation. It would also require investment in further commissioner training to ensure that all mediators would be appropriately qualified and experienced to manage the negotiated rule making

process. But it will not provide resolution of all issues in all cases, and as a result formal hearing before a decision-maker will remain a secondary method for environmental conflict resolution.

Adopting negotiated rule making should however provide consensus on the plan provisions required to address most issues. Where consensus cannot be achieved on a particular issue the process should identify the provisions where disagreement remains, the regulatory options discussed, and the reasons for disagreement. That would provide foundation for a focused hearing to decide any outstanding issues.

Whether any formal hearing that may be required to resolve any outstanding issues should be conducted before the relevant council or the court is a secondary policy consideration. But where alternative methods of environmental conflict resolution have narrowed the scope of any outstanding issues there would not appear to be any overriding public law reason why the issues should not be decided by the court.

Adopting negotiated rule making could reduce the time taken by councils to make decisions on submissions, and reduce the number and scope of any appeals. It is however interesting to note that Schedule 1 of the *RMA* was amended in 2009 as part of the streamlining and simplifying reforms. However, the reforms did not prescribe any statutory timetable for completing specific stages in the Schedule 1 process (e.g. public notice of submissions) apart from an overall requirement to complete the process from notification to giving notice of decisions on submissions within a two-year period. Prescribing a statutory timetable for submissions to be referred to negotiated rule making within a period of six months from notification of the plan could assist in meeting this requirement. While improving practice is laudable, previous research commissioned by the Ministry indicated that the time taken to prepare plans and designate infrastructure projects in New Zealand was similar to the timeframes experienced in other OECD jurisdictions. As a result, current processes under the *RMA* do not appear to place the New Zealand economy at a comparative disadvantage.

Harmonizing Laws

There are 67 councils exercising territorial jurisdiction in New Zealand via the preparation and administration of their district plans. The issues that they encounter when drafting objectives, policies and rules for a residential zone will be similar. The same position will apply regarding other land-use zoning provisions found in district plans.

Economic activity and infrastructure however does not necessarily fit neatly within the administrative boundaries of councils. There has been considerable debate in Australia at both federal and state level about the harmonization of environmental laws to reduce barriers for economic activity and streamline and simplify process.

Attention has focused on Victoria where a two-stage approach is used for land use planning. Under the Victoria Planning Provisions (VPP), the Department of Planning and Community Development is responsible for preparing a template from which district plans are sourced and constructed. The VPP provide a menu of zone provisions that can be applied to any block of land or any specific site. They provide of a range of residential, business, industrial and rural zones. For example, they provide for six different types of residential zone. Each set of zone provisions defines the purpose of the zone, contains an activities table, and sets out subdivision standards and development controls.

The menu of zoning provisions is supplemented by a menu of overlays that provide additional controls that can be applied in the context of any of the zones. For example, in the context of any one of the residential zones, it may be appropriate to apply overlays dealing with vegetation protection, heritage, design or neighbourhood character.

Other menus supplement these provisions and provide requirements for specific uses and developments (e.g. advertising signs, car parking and home occupations), general information on the administration of the plan, definitions and documents to be incorporated by reference.

Councils are responsible for preparing district plans using provisions taken from the VPP. Based on site-specific information about land use suitability they decide which

zone is most appropriate for any particular block or site in their area. The same factors determine whether any overlays or particular provisions (or any combination of them) should also apply to the subject land. The basic rules that apply to any Residential 1 Zone land in Victoria will therefore be the same, and the differentiating factor between one site and another will be any overlays or particular provisions that also apply to the site. While the combination of overlays and particular provisions will vary from site to site, the rules that apply in relation to a specific overlay or particular provision will also be the same throughout the state.

Adopting the VPP approach in New Zealand could provide a number of advantages. It would provide for a single debate about drafting objectives, policies and rules. It would reduce complexity by providing uniform provisions capable of consistent interpretation by a variety of decision-makers. It would enable councils to focus more specifically on land use suitability and zoning issues based on site-specific information, and simplify and streamline the plan preparation process. Overall, adopting the VPP approach would allow city and district councils to engage in a collaborative approach with other stakeholders and prepare template provisions for approval by the Minister as NES.

Statutory Disconnection

Another concern recorded in the consultation document is the disconnection between the various environmental statutes under which planning documents are prepared and consents and permits are required for development. There appear to be three broad points that underlie this concern.

First, environmental law in New Zealand is governed by over 35 statutes but planning documents prepared by councils focus almost exclusively on the exercise of functions, powers and duties under the *RMA*. There is no express statutory direction for councils to prepare policy statements or plans in an integrated and holistic way that give effect to their environmental management functions under all relevant statutes. While the *RMA* will remain as the cornerstone for environmental management, broadening the scope of planning documents may assist in reducing disconnection between different statutory regimes.

Second, the relationship between planning documents prepared under the *Local Government Acts* (*LGA*) 1974 and 2002 and the *RMA* is blurred. For example, city and district councils have a broad range of non-*RMA* functions regarding community wellbeing, environmental health and safety, infrastructure, and recreation and culture. The focus of *LGA* plans will therefore be much wider than environmental planning and will coordinate council functions generally. Providing a clearer distinction (or statement of relationship) between planning required for different council functions would avoid the risk that environmental management will be become subordinate to other local government objectives. For example, spatial planning evolved in the United Kingdom to provide statutory guidance in relation to land use planning in a similar way to RPS in New Zealand. Spatial planning was initially provided for under local government legislation relating to establishment of the Greater London Authority but was subsequently provided for under the *Planning and Compulsory Purchase Act* (2004). As a result, there will be a need to clearly define whether spatial planning in Auckland has a wider local government management objective, or a more focused environmental management objective.

Third, integrated management of natural and physical resources is a key feature of the *RMA*. Providing for environmental planning and land use planning in a single statute was ground breaking in 1991. Some jurisdictions, such as the United Kingdom, still manage these functions under separate legislation. While the *RMA* was designed on the premise that multiple consents may be required (in addition to any consents required under other statutes), other jurisdictions have taken the concept of integrated management further. The *Integrated Planning Act* (1997) and the *Sustainable Planning Act* (2009) in Queensland (Australia), for example, provide one system for all development related assessment by central and local government. Providing for a single application system under all 35 statutes listed in the *Environment Act* (1986) under which consents can be granted (including the *RMA*) is a matter that demands careful consideration. To date integrated development applications have not featured on the *RMA* reform agenda.

Conclusion

The time lapse between enactment of the 2009 amendments and the current reform agenda is too short for any conclusions to be made about whether the amendments have been efficient or effective or delivered the desired legislative outcome. Empirical

analysis will also be difficult as biannual *RMA* monitoring and reporting has only covered plan changes and variations since 2005, and no overall monitoring is currently undertaken regarding the Schedule 1 plan preparation process.

If the *RMA* Phase II reform proposals are to be taken further, there will need to be a mind-shift away from voluntary mediation if alternative methods of environmental conflict resolution such as negotiated rule making are to replace the current Schedule 1 process for district plan preparation. Adopting alternative methods may also require councils to relinquish control of the plan preparation process following notification and be bound by the mediated outcome. Natural justice will also require mediators to be appropriately qualified and independently appointed. The Environment Court would remain relevant as a backstop for deciding any outstanding issues. Further simplifying and streamlining could be achieved by adopting the two-stage approach used for preparing district plans in Victoria.

Overall, the success of any further reform will require national planning guidance and a collaborative approach to regional planning guidance. It now falls to the re-elected National Government to determine how it wishes to give effect to the *RMA* Phase II reform agenda through the legislative process during 2012.