SUBMISSION ON THE DRAFT REPORT BY THE NEW ZEALAND PRODUCTIVITY COMMISSION, "BETTER URBAN PLANNING", BY BERRY SIMONS ENVIRONMENTAL LAW

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TO: NEW ZEALAND PRODUCTIVITY COMMISSION

ON: BETTER URBAN PLANNING, DRAFT REPORT

1. INTRODUCTION

1.1 This submission on the New Zealand Productivity Commission's Draft Report "Better Urban Planning" ("Draft Report") is made by Berry Simons, Environmental Law.

1.2 Berry Simons is an Auckland based boutique law firm specialising in Resource Management and Environmental law. The founding partners, Simon Berry and Sue Simons, each have in excess of 30 years' experience practising in the specialist area of planning and resource management law. Sue is on the Auckland Executive of the Property Council. Simon is on the National Committee of the Resource Management Law Association. The expertise in Berry Simons enables informed responses to be made to the Productivity Commission based on combined decades of experience within the resource management legislative regime.

1.3 Berry Simons acts for a wide range of clients, including major national residential development companies with a significant presence in the Auckland Region, local government and infrastructure providers.

1.4 This submission addresses the following:

(a) Our general comments on the Draft Report (Section 2);

(b) Our specific comments in relation to:

(i) The proposal for a new legislative framework, including separate frameworks for urban and natural environments (Section 3); and

(ii) Proposed process amendments for plan-making and resource consents, including the appointment of an Independent Hearings Panel ("IHP") and more narrow appeal rights (Section 4); and

(c) Key contacts (Section 5).

2. BERRY SIMONS' GENERAL COMMENTS

2.1 The Draft Report is a comprehensive look at New Zealand's planning regime through the lens of urban planning and identifies shortcomings in the regime which hinder good urban planning.

2.2 To a large extent, the issues identified by the Productivity Commission are commonly known by resource management practitioners and are also reflected in the recent work jointly commissioned by the New Zealand Council for Infrastructure Development, Employers and Manufacturers Association, the Property Council of New Zealand, and the Environmental Defence Society ("EDS"): *"Evaluating the environmental outcomes of the RMA"* ("Brown Report").

2.3 In that regard, both the Draft Report and Brown Report identify broadly similar themes, including:

(a) A lack of national direction since the inception of the Resource Management Act 1991 ("RMA"), including the use of national instruments (NESs and NPSs), to give substance to Part 2 matters

and prioritise issues at a national level as well as set "environmental bottom lines";

(b) A lack of effective and strategic decision making at local government level and the organisational culture of councils, including what the Draft Report calls "political risk tolerance" and the Brown Report calls "agency capture" which inhibits creative, innovative planning; and

(c) Issues around the capability and culture of councils and the planning profession, which inhibits a bold, creative and innovative approach to planning and which has resulted in a narrow range of instruments, including economic instruments, being employed to change behaviour.

2.4 We agree that, broadly speaking, these issues are among those that contribute to the less than effective implementation of the RMA. To the extent that the Draft Report highlights these issues, it is a useful contribution to the conversation about how to extract the best from our planning regime. We also agree that there would be benefit in:

(a) A more integrated approach toward infrastructure planning and resource management planning; and

(b) Infrastructure pricing and funding that more accurately reflects actual costs, use and impacts.

2.5 However, we submit that there are a number of problems with the Draft Report which should not be overlooked and we request that the final report reflect the matters set out below.

2.6 Before turning to those matters, we note that some of the Productivity Commission's recommendations are very similar in nature to proposals which are currently before Parliament in the form of the Resource Legislation Amendment Bill 2015 ("RLAB"), including alternatives to the First Schedule process, reduction of public participation by narrowing notification requirements, and reduction in access to justice by restricting appeal rights. We have not addressed these matters in detail in this submission, but we refer the Productivity Commission to:

(a) An article that was written by Simon Berry and Helen Andrews in relation to the RLAB and which was published in the Resource Management Law Journal, entitled "*The Final Straw for the RMA? Some Shortcomings of the Resource Legislation Amendment Bill 2015*" (**attached**); and

(b) The Auckland District Law Society Inc ("ADLSi"), New Zealand Law Society, Resource Management Law Association and Local Government New Zealand submissions on the RLAB.

2.7 We turn to our general comments on issues that we see with the Draft Report now.

Terms of reference for report are narrow

2.8 The Draft Report was commissioned as a result of the Productivity Commission's findings in its previous reports on housing affordability and using land for housing. Its purpose is to "review New Zealand's urban planning system"[1] (emphasis ours). The Draft Report has therefore been prepared through that lens, which is largely focussed on enabling the

[1] Draft Report, Terms of Reference, page iii.

development of urban areas to increase housing capacity and therefore affordability and better planning for urban environments.

2.9 There is nothing inherently wrong with undertaking a "blue skies" exercise to identify issues which arise in the context of urban planning and, in particular, why our planning system has not provided for sufficient development capacity in some urban areas. Indeed, there is merit in doing so.

2.10 However, we do perceive a danger in the Productivity Commission developing recommendations, including replacing the RMA with a new legislative framework, which provides different regulatory regimes for urban and natural environments, having only considered the issue through the lens of "better *urban* planning".

2.11 We agree with EDS' submission on the Draft Report in that regard that "*...the terms of reference for your report are narrow and are restricted to urban planning matters. We consider that it would be dangerous to proceed from a narrowly focused report on cities to wholesale reform of the resource management system covering all of New Zealand: the system embraces resources other than urban ones.*"

Productivity Commission recommendations are premature

2.12 We are also concerned that the Productivity Commission has developed a range of recommendations without full and thorough consultation with all stakeholders and, in particular resource management practitioners, who have a wealth of experience with respect to the implementation of both the RMA as well as previous legislative regimes.

2.13 In our submission, the Draft Report goes a step too far in having identified both the problems and (for the most part) the solutions, with the result that the questions posed by the Draft Report are of minor detail in comparison to the decisions that appear to have already been made. This approach appears to leave little for us to realistically contribute.

2.14 In that regard, we also support the EDS submission that "*Better Urban Planning [is] a useful contribution to the wider community conversation about the future of the resource management system*" but that "*any overarching reform should be based on a comprehensive examination that takes account of urban, rural and marine areas. It should examine all the environmental domains, be evidence based, free of ideological positioning and as far as possible represent a consensus on the way forward.*"

2.15 We therefore request that the final report reflect that:

(a) It has identified problems with the current planning framework from an urban planning / development capacity perspective; but

(b) The potential solutions identified need to be the subject of a comprehensive national conversation about the future of the planning framework; and

(c) Those potential solutions have been identified having regard to the need for greater urban development capacity and have not adequately considered the wider issues that we face in the context of environmental and resource management planning in general.

Focus on need for new legislative regime misconceived

2.16 The Draft Report identifies a range of perceived problems with the current planning system and seven main features that a future planning system should have.

2.17 Those features are characterised as follows:

(a) Clear priorities;

(b) Price information as a major driver of planning decisions;

(c) Faster processes for changing land use controls;

(d) More focused notification and more representative consultation;

(e) More immediate checks on regulatory decision-making;

(f) Targeted infrastructure investment for communities facing change; and

(g) More engaged and better informed Central Government.

2.18 In our view, the majority of these features can be generally achieved within the existing RMA framework, even if some amendment is required.

2.19 For example, clear priorities can already be expressed by Central Government via the use of National Policy Statements and National Environmental Standards. These instruments have not been used by Central Government until very recently. If it is considered that, despite the availability of those tools, a Government Policy Statement is required, that can be achieved via amendment to the existing RMA framework.

2.20 In terms of paragraph 2.17(b) and (c) above, linking land release to price information and enabling responsive rezoning in which land use controls can be set in anticipation of predetermined and objective triggers are planning tools which could be implemented by councils under the current regulatory framework. For example, there is no reason why rules in a district plan cannot be drafted which provide for land zoned for future urban use to "switch" to a live zoning on the basis of a price trigger without the need for a plan change, provided the planning is done up front. This is similar to any large scale, comprehensive staged development where a developer cannot proceed to a next stage until certain triggers (e.g., infrastructure) are met.

2.21 Similarly, it is open to councils to adopt consultation procedures beyond the specific requirements of the RMA, provided that the requirements of the First Schedule are met. Waikato Regional Council have successfully employed a collaborative approach to the Healthy Rivers Plan Change (Plan Change 1) without the need for legislative amendment which specifically provides for that process.

2.22 Finally, amending the legislative framework will not assist in developing a more engaged or better informed Central Government.

2.23 Thus, there is no apparent link between the problems identified and the proposal to replace the RMA with new legislation.

2.24 It appears to us that the vast majority of issues identified by the Productivity Commission relate to planning capability, the boldness and creativity of local and Central Government, the lack of guidance for councils from Central

Government and the relationship between those parties. Changing the legislative framework will not address those issues.

2.25 The Brown Report supports that view, and concludes:

> *"This report demonstrates two key outcomes: (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 evidence basis to ensure that solutions fit problems."*[2]

3. LEGISLATIVE REFORM - URBAN v NATURAL ENVIRONMENT

3.1 As noted above, the Draft Report identifies a range of issues which relate in large part to the implementation of the RMA, through an urban planning lens. The last chapter of the Report (Chapter 13) outlines the Productivity Commission's view as to the changes that are needed and the key features in terms of operation and design of a future planning regime.

3.2 The first change identified is "clearer distinctions between the built and natural environment". In that regard, the Draft Report asserts that:[3]

> *"The natural and built environments require different regulatory approaches. The natural environment needs a clear focus on setting standards that must be met, while the built environment requires assessments that recognise the benefit of urban development and allow change. Current statutes and practice blurs the two environments, and provides inadequate security about environmental protection and insufficient certainty about the ability to develop within urban areas."*

3.3 Having determined this, the Productivity Commission then identifies (in the final pages of the Report) an issue left to be resolved, which is whether there should be:

(a) Two statutes – one which is "planning law" (including built environment regulation, infrastructure and land transport planning) and one "natural environment law"; or

(b) One statute – which contains a "built environment section" and a "natural environment section", with linkages to land transport and infrastructure laws clarified.

3.4 We perceive a number of issues with this aspect of the Draft Report.

3.5 First, there is little or no linkage between the problems which have been identified throughout the Draft Report and this proposed solution. The proposal appears "out of the blue" at the end of the Draft Report. Similarly, there is no analysis in the Draft Report of the benefits and costs of the proposal, nor any detail as to what the legislative framework would look like, how built environments and natural environments will be defined or how linkages between either the planning and natural environment statutes or the resource management and infrastructure statutes will be enshrined. The Draft Report has determined that the built and natural environments need

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[2] Brown Report, page 60.
[3] Draft Report, page 332.

to be split, without justifying the proposal or enabling experienced resource management practitioners or key stakeholders to comment on that proposal.

3.6 Second, to the extent that the Productivity Commission considers that this approach will assist in setting environmental bottom lines, biophysical bottom lines are already enshrined in sections 5 and 6 of the RMA and NPSs and NESs are tools available to achieve the further setting of bottom lines. Amending the legislative framework will not produce greater prioritisation or more bottom lines – they need to be set via policy, which requires action from, and building capability and culture within, government at all levels.

3.7 Third, it is a fallacy in our view to perceive a difference between a built environment and a natural environment. "The environment" cannot be sliced and diced in that way. All aspects of the environment, including natural and physical resources, people and communities, are intertwined. Further, what is a rural environment? Some would argue that a rural environment is not a natural environment. Nor is it a built environment. What happens when there is pressure to develop a "natural environment"? Is it then treated as a "built environment"? It is not possible to provide any meaningful comment on this proposal without its further definition.

3.8 Finally, this aspect of the Draft Report represents an overly simplistic view of what constitutes the environment. It represents a significant regression from the integrated management approach that is enshrined in the RMA and essential for the protection of ecosystem values as well as anthropocentric values associated with the environment in a broad sense. In that regard, we support the ADLSi submission on the Draft Report, which notes:

(a) The complex and subtle interfaces between built and natural environments, especially in the coastal environment; and

(b) The potential to simply exacerbate existing legislative misalignments and lead to a further deterioration of the environment.

3.9 We also note that the Brown Report says:[4]

> *"Integrated management was a key aspiration of the RMA. Integrated management was a response to the recognition that siloed consideration of environmental and development matters had limited basis in ecology and ultimately reduced the efficacy of environmental law. For example, the 1987 United Nations report Our Common Future (also known as the 'Brundtland Report') noted:*
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> > *'Failures to manage the environment and to sustain development threaten to overwhelm all countries. Environment and development are not separate challenges; they are inexorably linked. Development cannot subsist upon a deteriorating environmental resource base; the environment cannot be protected when growth leaves out of account the costs of environmental destruction. These problems cannot be treated separately by fragmented institutions and policies. They are linked in a complex system of cause and effect.'"*

3.10 The ADLSi submission also makes the point that one of the key purposes of the RMA was to integrate the laws relating to resource management and rectify the considerable problems of there being multiple individual pieces of legislation dealing separately with the environment. In that regard, it was acknowledged in promulgating the RMA that having separate planning legislation and "natural environment" legislation was cumbersome, complex and did not achieve good environmental outcomes. The Explanatory Note to

[4] Brown Report, page 11.

the Resource Management Bill 1989 (which became the Resource Management Act 1991) stated:[5]

> *"The objective of this Bill is to integrate the laws relating to resource management, and to set up a resource management system that promotes sustainable management of natural and physical resources.*
>
> *This Bill integrates existing laws by bringing together the management of land, including land subdivision, water and soil, minerals and energy resources, the coast, air, and pollution control, including noise control. It sets out the rights and responsibilities of individuals, and territorial, regional and central government.*
>
> *...*
>
> *A large number of existing laws deal with procedures for managing and regulating the effects on the environment (including people) of various forms of development, and with the allocation of public resources such as water and minerals.*
>
> *In the past these laws have been seen as conflicting, overlapping and confusing to users. They have not allowed all relevant values to be taken into account, and often did not achieve good environmental outcomes."*

3.11 In light of the above, we submit that the Draft Report goes a step too far in recommending a new legislative framework which separates built and natural environments. At best, the final report should identify that a potential future work stream is to assess whether such an approach would address the issues that it has raised, including by collaborating with experienced resource management practitioners and key stakeholder groups including local government, environmental agencies, the Property Council, etc.

3.12 Having said that, our submission is that:

(a) The key issues which arise in the context of the existing planning framework relate to capability and culture, not the legislative framework; and

(b) Central Government and local government should invest in developing the capability and cultural change at both levels of government which supports innovative and creative planning solutions and the development of robust policy, including providing guidance as to priorities via NPSs and NESs. In other words, Central Government should focus on the meat (i.e. the policy) and not the bones (i.e., the legislative framework).

4. PROCESS AND PROCEDURE AMENDMENTS

4.1 This section of the submission addresses the key changes to various planning processes and procedures recommended by the Productivity Commission, being:

(a) Improving the agility of plan making, and in particular the introduction of a permanent IHP;

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[5] Explanatory Note to the Resource Management Bill 1989, as quoted in *Nolan Environmental and Resource Management Law* (looseleaf ed, online) at 3.3.

(b) The role of the Environment Court; and

(c) Reducing the ability for public participation and access to justice.

Decision making on plans – proposed introduction of a permanent IHP

4.2 A key aspect of the Productivity Commission's recommendations to improve plan making is that a permanent IHP should be established to consider and review new plans and changes to plans. It is proposed that:

(a) Councils retain the rights to accept or reject recommendations from the permanent IHP; and

(b) Once a council accepts a recommendation from the permanent IHP, appeal rights should limited to points of law.

4.3 While we can envisage benefits from establishing an IHP in terms of improved decision making, our submission is that the recommendation by the Productivity Commission is premature. In that regard both the Auckland Unitary Plan ("AUP") and the Christchurch Replacement District Plan ("CRDP") processes are still ongoing and the outcomes of those processes have not yet been evaluated. While the AUP IHP's responsibilities have concluded, the appeals have only just been lodged. This process has already highlighted aspects of procedural uncertainty which need to be worked through.

4.4 The IHP processes involved retired High Court judges, Environment Court judges and a broad range of resource management practitioners including lawyers, planners and other experts. In our submission, any proposal to introduce an IHP framework for decision making on all plans or plan changes should be put on hold until we have had the opportunity to take stock of the AUP and CRDP processes and identify what has worked and what has not. That process should not commence until the High Court appeals have been heard and should also involve consultation with the High Court, given the additional burden being placed on that Court as a result of the 41 appeals from the PAUP.

4.5 In that regard, a commonly held view is that the time frames for the AUP process were too tight. Before enshrining the IHP process, it is therefore necessary to consider the extent to which desire for speed:

(a) May result in sub-standard outcomes both in terms of the process and the plan itself. It is clear from the Auckland IHP's recommendations that the AUP as notified was prepared with too much haste and with a lack of supporting data or assessment on a number of key issues. This resulted in much hearing time having to be devoted to issues, errors or gaps in the AUP which should not have been required. Given the quality of the Panel members, the IHP's recommended version of the AUP was a vast improvement on the notified version. However, even this still contained aspects which could have been further improved and refined had the IHP had sufficient time to do so. Some of these matters are now having to be addressed either through appeals or will require a subsequent plan change process.

(b) Significantly reduces the ability for public participation. It is common knowledge that there are many parties who wanted to participate in the AUP process, but either accepted from the outset it would be too overwhelming to do so, or having filed a submission were "burnt off" by the pace at which mediations, pre-hearing meetings and hearings

had to proceed. We are also aware of parties who simply could not access necessary professional advice to support and pursue their submission, given the limited number of experts and time available.

(c) Creates unreasonable workloads on all those involved in an IHP process. The intensity of workload the AUP process demanded and timeframe over which this extended (in some cases, for in excess of two years) was simply unsustainable for many practitioners and experts involved. This has significant implications for being able to continue attracting people to work in this area. The progress of several private development projects was also significantly impacted during this period, as necessary experts were simply overwhelmed with the AUP process and not able to devote time to any other work.

4.6 In our submission, a faster process does not necessarily equate to better planning. The conundrum we now face is that the completion of the AUP process within the required time frames has demonstrated that it can be done. We fear that the "success" in terms of timing of delivery of the AUP will be relied upon to justify the roll out of the IHP process nationwide, regardless of the quality and sustainability of the process. The number of High Court appeals on the AUP (in addition to almost 70 Environment Court appeals and 8 applications for judicial review) demonstrates that the IHP process has not succeeded in reducing appeals in the manner that was anticipated by the Government.

4.7 Other issues that require consideration include:

(a) The need for the IHP, in the case of a combined or Unitary Plan such as the AUP, to be able to consider and make decisions on the regional policy statement before proceeding with regional and district plan sections. This is a significant issue which the Auckland IHP had to address and provide a workable (but not optimal) "solution" for (by issuing interim guidance), to meet the required time frames.

(b) A clear and workable process for dealing with the full range of appeals from the IHP's recommendations needs to be put in place. For example, there is currently uncertainty (and differing opinions) within the resource management community around the AUP appeals as to:

(i) How the High Court appeals (and judicial review proceedings) will be progressed, including even the correct procedure for joining such matters.

(ii) Whether, if successful, matters appealed to the High Court will be referred back to the IHP or Council, and if so, the rights of original submitters in this process.

(iii) The correct procedure for addressing issues as to scope.

(iv) How the Environment Court and High Court can (and should) proceed where there are appeals to both Courts on related provisions from the PAUP.

4.8 In short, in our submission it is simply too early to enshrine the IHP process into the future planning framework or legislation, on the assumption that their trial with respect to the AUP and CRDP have been successful.

4.9 If a permanent IHP is introduced, we submit that the IHP should be chaired by an Environment Judge, retired Environment Judge or senior legal counsel, with senior resource management practitioners appointed as commissioners.

The expertise of the Auckland IHP was fundamental to the success of that process and to the quality of the decision making as a result.

4.10 In that regard, we agree with the Brown Report that:

> *"The role of the specialist Environment Court has been very powerful indeed, providing a judiciary that is appropriate qualified, appointed for life and well able to adjudicate some of the tough and complex matters that a less specialised judge or commissioner might struggle with."*

Role of the Environment Court

4.11 The Draft Report notes that the role of the Environment Court will be significantly reduced due to more narrow appeal rights and the introduction of an IHP. This will give rise to an increase in the availability of Environment Court judges to chair IHPs.

4.12 We do note, however, that if a new planning regime is introduced, this will result in an increase in declaratory proceedings in the Environment Court as to how the new legislation should be interpreted and applied.

4.13 The role of and burden upon the High Court in terms of interpreting resource management law is likely to significantly increase if points of law can only be determined by the High Court following an IHP process, as with the AUP process. In that regard, as noted there are 41 appeals to the High Court on questions of law as a result of the AUP process and an additional 8 applications for judicial review. One of the effects of this is that there are parallel appeals on the same issues in two different courts.

4.14 In our submission, there is no need for those questions of law to be addressed by the High Court and there is merit in retaining a role for the Environment Court in determining questions of law, given its specific expertise and knowledge of resource management law (as noted in the quote from the Brown Report at paragraph 4.10 above). If there is a desire to restrict the number of subsequent appeal rights available from IHP decisions, this could also be achieved by the Environment Court hearing points of law and any appeals from such decisions going straight to the Court of Appeal (i.e. bypassing the High Court), subject to leave.

4.15 The Draft Report also notes that one option is to locate the IHP within the Court system. In our submission, this approach warrants further exploration and is likely to give rise to advantages in terms of managing the IHP process. In that regard, Environment Court staff are well versed in managing large, complex cases with multiple parties and significant volumes of evidence.

Public participation / access to justice

4.16 As noted, the Draft Report includes several proposals that would reduce public participation by narrowing notification requirements and access to justice by restricting appeal rights, similar to those contained in the RLAB. Berry Simons has already commented on those proposals in detail, including in our article *"The Final Straw for the RMA? Some Shortcomings of the Resource Legislation Amendment Bill 2015"*.

4.17 We therefore do not repeat our views as to the importance of public participation and access to justice with the resource management area, or our concerns regarding the erosion of those, in detail in this submission. However, in summary:

(a) The RMA was based on the fundamental principle that there would be no standing requirement for submitters. To that extent, many of the proposals in the Draft Report would represent a fundamental shift in philosophy from that which has existed to date.

(b) A reduction in public participation can lead to a loss of public confidence in resource management processes (such as plan making and consenting) and a reduction in the quality of decision making.

(c) The National Monitoring System data for 2014/15 confirmed that 96% of applications processed to a decision in that time frame were non-notified (up from 94% in 2010/11 and 95% in 2012/13). It is therefore clear that the existing notification processes are not routinely causing undue delays such as to warrant any further substantive legislative reform.

(d) Notification in appropriate circumstances is fundamental to the ability of landowners to protect their property rights (such as their reasonable expectation of amenity including privacy). It also enables consent authorities to obtain better information about the potential effects of a proposal and, in many circumstances, to become aware of important effects which otherwise have been assessed incorrectly or underplayed by applicants and council officers.

(e) Access to justice is a cornerstone of our democratic society. Participating in the preparation of planning instruments and resource consent applications represents a fundamental means of protecting property rights as well as achieving the RMA's sustainable management objective. Any restriction on these rights must only occur in a transparent manner and only with sound justification.

4.18 We submit that the recommendations made in the final report must properly reflect the fundamental importance of public participation and access to justice to the RMA. These rights should only be curtailed where it can clearly be demonstrated that the loss of these important checks and balances is outweighed by (or at least proportional to) the benefits of any new processes in terms of quality and durable resource management outcomes.

5. KEY CONTACTS

5.1 All enquiries on this submission may be directed to:

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APPENDIX A

BERRYSIMONS
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THE FINAL STRAW FOR THE RMA?

SOME SHORTCOMINGS OF THE RESOURCE LEGISLATION REFORM BILL 2015

Simon Berry[1] and Helen Andrews[2]

1. INTRODUCTION

1.1 The Resource Legislation Reform Bill 2015 ("RLRB" or "the Bill") represents the second phase of the National-led Government's reform of the Resource Management Act 1991 ("RMA" of "The Act"), as signalled by the February 2013 discussion document "*Improving our Resource Management System*" ("Discussion Document"). It follows the first phase of RMA reforms which resulted in the Resource Management (Simplifying and Streamlining) Amendment Act 2009 ("2009 Amendment Act") and the Resource Management Amendment Act 2013 ("2013 Amendment Act").

1.2 The Discussion Document[3] indicates that the Government considered further reform was necessary for the reason that it:

> *"... continues to hear concerns that resource management processes are cumbersome, costly and time-consuming, and that the system is uncertain, difficult to predict and highly litigious. The system seems to be difficult for many to understand and use, and is discouraging investment and innovation. The outcomes delivered under the RMA are failing to meet New Zealanders' expectations."*

1.3 This is typical of language that has surrounded the RMA, which has been a political football since even before its enactment. It also reflects the misconception that it is the RMA rather than its implementation that is the problem.

1.4 Some aspects of the Bill are worthwhile and can be supported. However, many aspects of the Bill are ill-conceived and poorly drafted. The 2009 and 2013 Amendment Acts were a source of concern for their poor drafting, erosion of access to justice and unintended consequences. Even judged against those amendments, the RLRB represents a retrograde step, to such an extent that if enacted in its present form could prove to be the straw that breaks the RMA's back in terms of efficiency and ease of application.

1.5 The four key concerns with the Bill relate to:

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1 Partner, Berry Simons, Environmental Law.
2 Senior Associate, Berry Simons, Environmental Law.
3 Page 6.

(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 (for which the RMA will inevitably and simplistically be blamed).

(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.

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

1.7 The severe erosion of rights of public participation seems to spring from a mind-set reflected in the Regulatory Impact Statement[4] ("RIS") that such amendments are required because the Act's current scheme of broad public participation:

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

1.8 With all due respect, this is an extraordinary non sequitur that is inconsistent with the basic concept of public participation that has always been fundamental to RMA processes. Indeed, this thinking has spawned proposed reforms of a nature never seen before – amendments that represent a difference in kind rather than degree that would strike at the very heart of the RMA as we know it. Classic examples are the unusual concept of deemed permitted activities and the specific listing of parties who are the only ones who can be deemed to be affected by an activity by reference only to the status of that activity.

1.9 Despite these shortcomings, the Bill has received little substantive attention – probably because it was notified over Christmas and submissions were due at a time when the Resource Management community was overloaded by the Proposed Auckland Unitary Plan ("PAUP"). Most objective comment has been critical. It is therefore imperative that the worst features of the Bill are highlighted in sufficient time for these to be objectively considered by officials and the Select Committee.

1.10 To that end, this paper briefly addresses the Bill as a whole and then identifies some of the key concerns about the Bill as set out above. It is not intended to be an exhaustive analysis - the analysis in relation to the clauses addressed must necessarily be limited and there are worrisome provisions not addressed in this paper.

2. THE RESOURCE LEGISLATION REFORM BILL – OVERVIEW

2.1 The Bill was introduced to Parliament late November 2015 and had its first reading on 3 December 2015. The Explanatory Note states that the Bill's overarching purpose:

> *"... is to create a resource management system that achieves the sustainable management of natural and physical resources in an efficient and equitable way."*

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4 Paragraph 253.

2.2 The Bill seeks to achieve the following three objectives:

(a) Better alignment and integration across the resource management system (to avoid duplication, ensure internal consistency and that the tools under the RMA are fit for purpose);

(b) Proportional and adaptable resource management processes (with increased flexibility and adaptability, and allowing processes and costs to be scaled to reflect specific circumstances); and

(c) Robust and durable resource management decisions (based on high value participation and engagement and an upfront focus on planning decisions, rather than individual consents).

2.3 The Bill includes over 40 individual proposals (other than "minor fixes") which can be categorised into seven broad themes, namely:

(a) Greater national consistency and direction; to achieve this, the Bill proposes to:

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

(ii) Enable the development of a national planning template ("NPT"), which prescribes the structure and format for policy statements and plans, and substantive content on matters requiring national direction or consistency.

(b) Creating a responsive planning process; to achieve this, the Bill proposes to:

(i) Provide for plan changes to be processed limited notified in appropriate circumstances, with limited rights of appeal; and

(ii) Introduce two new "alternative" plan making tracks to the current Schedule 1 process: the collaborative planning process ("CPP") and the streamlined planning process ("SPP").

(c) Simplifying the resource consenting system; to achieve this, the Bill would:

(i) Introduce a ten-working-day time limit for determining "simple" or "fast-track" applications;

(ii) Allow councils to "deem" certain low impact activities as "deemed permitted activities";

(iii) Prescribe the parties eligible to be notified of different types of applications;

(iv) Provide greater ability for a consent authority to strike out submissions (including where these are not supported by evidence); and

(v) Require that resource consent conditions be directly connected to an adverse effect or applicable district or regional rule.

(d) Ensuring efficient and speedy resolution of appeals.

(e) Reducing overlaps and duplications between various statutes within the resource management system.

(f) Making several RMA process "improvements".

(g) Other minor technical "fixes".

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

3. FLAWED ASSUMPTIONS ON WHICH THE BILL IS BASED

3.1 The Bill contains a number of proposed "reforms" that are based on flawed assumptions as to issues which need to be addressed. The upshot is that the Bill contains provisions that are designed to solve problems that do not exist or, if they do, are arguably not of a scale as to warrant legislative intervention. These will require councils to gear up for change for little benefit and which could well have unintended negative consequences.

Flawed assumptions regarding the plan making process

3.2 The first example of a flawed assumption is the rationale for introducing the CPP and SPP as alternatives to the current First Schedule process, namely that[5]:

> *"...the current plan-making processes are often litigious and costly. The length of time taken to develop a new plan and resolve any appeals (approximately 6 years) means that plans lack agility and are not able to be responsive to urgent issues. A significant amount of time taken for plans to become operative has been spent resolving appeals in the Environment Court."*

3.3 However, contradicting that, the Regulatory Impact Statement ("RIS")[6] itself notes that over the last ten years more than three-quarters of all plans (77%) and the vast majority of plan changes (92%) have been successfully determined within two years of notification. This is consistent with the Environment Court's analysis in the Annual Review it undertook for the calendar year 2014.

3.4 This is significant because where the private sector proposes a change to a plan – 92% of the time they are dealt within under two years. In our experience, the most common cause of delay for private plan changes is a client wishing to pause to complete negotiations on one or more aspects of their intended development.

3.5 The timing for proposed plans is largely controlled by Councils and has as much to do with how fast the Council wishes to proceed, how much resourcing they apply to the project and what availability their staff and hearings commissioners have.

3.6 Where plans or plan changes have exceeded the two year time frame, that is generally because the issues were of such complexity and importance, and attracted the attention of so many interests, that time was needed to achieve a quality outcome. A classic example is the Waikato Water Allocation variation in which the Environment Court expertly juggled and adjudicated across a broad array of vested interests over a period of many months.

3.7 Either way, the time taken in the minority of cases need not be seen as a failure of the First Schedule process. In our view, these figures do not support a conclusion that all plan making processes consistently take too long or lack "agility" and are unable to be responsive in the majority of cases and when required.

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5 Explanatory Note to the Bill.
6 Paragraph 143.

3.8 Further, neither the RIS nor any other material produced in support of the Bill provides any data to support the assumption that a "significant" amount of the plan making process is spent resolving appeals in the Environment Court. This may have been a valid criticism some fifteen years ago when the "first generation" of plans were being processed, but the current reality, as summarised in the Environment Court's Annual Review for 2015[7], is as follows:

> *"Gone are the days when a Council would be granted a year or two by the Court to endeavour to negotiate solutions, often with no outcome to show for it, and only then to find that much mediation and / or hearing work remained necessary to resolve cases.*
>
> *In recent sets of such appeals, mediation has been undertaken commencing as soon as all parties have been identified under section 274, and bought to a conclusion about 10 or 11 months after the cases have been filed, with a high degree of success. Councils have been enabled to make large parts of the proposed instruments operative in short order if they wish, leaving the Court to move quickly to resolve remaining issues through hearings, facilitated conferences of experts, and pre-hearing and settlement conferences."*

3.9 As an example, pro-active case management and use of mediation resulted in the vast majority of the appeals on the Waikato Regional Policy Statement being resolved by consent order within just over a year.

3.10 The concept underpinning the CPP is that time spent litigating issues at hearings could potentially be reduced or avoided by encouraging more "up-front" engagement with the community and stakeholders in the preparation of proposed planning instruments. That concept is supported. However, such "front-loading" of plan making is already undertaken under First Schedule processes[8]. One wonders whether encouraging this practice requires the introduction of a whole new alternative planning process.

3.11 Further, we are now moving into the second generation of plans and plan reviews are commonly being undertaken on a "rolling review" or chapter-by-chapter basis. Consistent with the statistics cited in the RIS and by the Environment Court[9], both of these factors are resulting in faster planning processes and reduced need for appeals.

3.12 We therefore question the need for introducing two completely separate alternatives to the current First Schedule plan making process, especially as they are unlikely to achieve better planning outcomes or time and cost savings over making appropriate amendments to the First Schedule process.

The speed versus quality conundrum

3.13 Plan making is a complex exercise - sometimes time is needed to produce a sound result. A concern which arises in this context is the potential that the desire for speed in plan making may result in sub-standard outcomes both in terms of process and the plan provisions themselves. The desire for speed can overlook that existing provisions remain appropriate in the meantime while the new plan is put through its paces.

3.14 The PAUP is a good example. The speed with which it was prepared resulted in a very poor plan to kick the process off with. In hindsight, the process that has been followed might look acceptable on paper but is generally regarded as being too hurried, with too little time devoted to many highly complex and important issues (particularly in terms of the research and analysis underpinning the growth and infrastructure provision), and too much time spent sitting in pointless mediations. The process cost has been vast, as has the human cost. The Council routinely failed to

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7 Page 19.
8 Indeed, this is specifically anticipated by clause 3(2) of the First Schedule.
9 Environment Court Annual Report 2016.

meet deadlines, became adept at trotting out the party line, got some things wrong (e.g., land supply and the pre-1944 Overlay) and vacillated on fundamental issues – circulating evidence and then not appearing in support of it.

3.15 This is not a criticism of the Independent Hearing Panel ("IHP") which has done an exceptional job. But if Auckland ends up with a silk purse as a result of the PAUP process, it will be in spite of the process rather than because of it. It will not be a vindication of a 'streamlined' process. Similar comments have been made about the bespoke process to produce the new Christchurch Replacement District Plan.

3.16 The key point is that it is simply too early to enshrine such processes in legislation on the flawed assumption that they have been successful.

Flawed assumptions regarding the consenting process

3.17 The Bill is also based on flawed assumptions in relation to the consenting process. The relevant Cabinet Paper[10] states that:

> *"Consenting requirements for minor or less complex projects do not always reflect the scale of the activity. As a result, applicants wishing to undertake minor or less complex projects are often subject to unnecessarily costly and time-consuming processes."*

3.18 Clearly, applicants are sometimes put to more cost and expense than they should be. But such issues are most often a result of poorly worded plan provisions, a lack of Council resources, or relevant provisions being wrongly interpreted and applied by Council officers. Indeed, recent amendments to the RMA (particularly the 2009 and 2013 Amendment Acts) have themselves contributed to costs and delays by adding complexity and new provisions that need to be understood and applied. Legislating for faster consenting processes will not address these issues – indeed, for the reasons outlined below, it is more likely to exacerbate them.

3.19 The RMA already provides for:

(a) Decisions on non-notified applications to be made within a maximum 20 working days (and discounts if these time frames are not applied);

(b) Controlled or restricted discretionary activities which can generally be dealt with quickly;

(c) A presumption that some types of applications should be processed on a non-notified basis; and

(d) The ability for potentially affected parties to provide the written approvals so that effects on them can be disregarded.

3.20 As the Cabinet Paper records[11], the upshot of these provisions is that 95% of all consent applications for the 2012-13 were processed on a non-notified basis. This is in addition to the vast number of activities that can be carried out as permitted activities. In this context, does justification really exist to introduce a ten-day (rather than 20 day) fast track consent process? Are the complications associated with providing for "deemed permitted activities" and yet further changes to the notification provisions really needed?

3.21 We suspect that any likely benefits will be more illusory than real in terms of reducing costs and delays for consent applicants - in fact, the exact opposite is likely to be true

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10 *"Cabinet Paper for the Second Phase of Resource Management Reforms: Batch 1 of policy decisions"* Page 7.

11 Page 7.

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

4. PROPOSALS THAT WILL INCREASE COMPLEXITY, COSTS AND DELAYS

4.1 In its 25 year history, the RMA has been subject to several substantive amendments,[12] mostly aimed at improving procedural efficiency and addressing compliance costs. As a result, the statutory tests for notification of consent applications have been substantively changed four times; the RLRB will be the fifth. Importantly, it takes some time for plans to catch up with the new notification provisions – specifically enabling some types of applications to proceed on a non-notified basis. As a result, the full benefits from the 2009 and 2013 amendments have yet to be seen.

4.2 Each round of amendments brings with it the potential to increase rather than reduce costs and delays in RMA processes as it introduces complexity and new provisions and concepts that must be understood and applied by applicants, their advisors, and Council officers. It is hardly surprising that Council officers are more cautious (and therefore slower) to process applications under a revised statutory framework or when trying to apply new concepts – particularly when the relevant plan was written to reflect an entirely different notification regime.

4.3 This problem is exacerbated when the new amendments are complex, introduce new legal concepts, or are poorly drafted. There are many examples of all of these in the 2009 and 2013 Amendment Acts and this trend has been continued in the RLRB. Indeed, all three Amendment Acts contain changes needed to address unintended consequences from previous amendments, as the RIS recognises.

4.4 The predictable result is a concern that RMA processes are "uncertain, difficult to predict and highly litigious". The Government then reacts to these by further amending the Act and almost inevitably making matters worse. And so the cycle continues. The following sections demonstrate that the RLRB contains more of the same.

5. PROPOSED AMENDMENTS TO THE NOTIFICATION PROVISIONS

5.1 The Bill would substantially amend the already complex notification provisions in the RMA for the fifth time since 1991 by introducing a new process for determining whether a consent application should be publicly or limited notified, involving three steps:

(a) Public or limited notification being precluded in certain circumstances;

(b) The ability to disregard adverse effects that are "taken into account by the objectives and policies of that plan"; and

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

5.2 All three have flaws.

Changes to notification for controlled and boundary activities

5.3 The Bill proposes that:

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

(a) Public notification be precluded where an application is for controlled activities or "boundary activities", subdivision or residential activity (provided for as a restricted discretionary or discretionary activity); and

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

5.4 Both categories can be expanded by regulation (rather than amending legislation).

5.5 The elimination of limited notification to neighbours is a cause of concern in terms of fairness and access to justice. In order to ease consenting processes, district plans generally provide for a broad range of controlled activities where it is appropriate that an activity should proceed but where some consideration of the planning merits is needed. All current plans were written knowing that neighbours might be notified and there will be many examples where immediate neighbours, at least, should have a legitimate say in relation to such activities.

5.6 If nothing else, the most obvious outcome of this provision is likely to be a significant reduction in provision for controlled activities (in favour of restricted discretionary activities) when new plans or plan changes are notified - something of an "own goal" in a Bill seeking to streamline consenting processes. This is not a theoretical risk; Auckland Council was known to be strongly considering not providing for any controlled activities in the PAUP.

5.7 The change is unacceptable and should be removed.

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

5.8 When assessing whether the effects of a proposed activity will be "more than minor" (for public notification) or "minor or more than minor" (for limited notification), a consent authority will, if the Bill is enacted, be able to[13]:

> *"...disregard an adverse effect of the activity if the adverse effect, considered in the context of the relevant plan or proposed plan, is already taken into account by the objectives and policies of that plan."*
>
> (Emphasis ours.)

5.9 The open-ended nature of this provision is immediately apparent to resource management practitioners. To the extent that the objectives and policies of a plan exist to set the framework for the entire document, it is difficult to conceive of any potential adverse effect that falls within the scope of a consent authority's jurisdiction that is not somehow "taken into account" by the objectives and policies of its plan. To prevent an affected party from submitting in relation the very effects that the plan was set up to control is bizarre and can only introduce uncertainty, delay and process risk – contrary to the objective of the Bill itself.

5.10 In any event, how do objectives and policies "take into account" the adverse effects of activities? Does a policy which seeks to avoid an adverse effect still take it "into account"? Does a policy which seeks to mitigate an effect (such as shading) by providing a performance standard (such as maximum height) that will trigger the need for neighbour approvals if it is breached "take into account" the adverse effects of the activity? Which of a range of competing objectives and policies will take precedence? How is it to be applied by a processing officer or consultant? The courts will have to tell us the answers to these questions – the RMA will take the blame.

5.11 We agree with the LGNZ's submission in relation this provision:

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13 Clause 127 – proposed section 95D(ca).

"The new sub-clause leaves significant uncertainty for a local authority in terms of how objectives and policies (and particularly more general ones) should be applied...This new provision is likely to be very litigious as the interpretation will be very uncertain. As a result, it is likely that plans will need to be redrafted so objectives and policies are more prescriptive".

New and complex eligibility criteria

5.12 The Bill would introduce new highly complex "eligibility criteria"[14] and a new limited category of people who can be considered affected parties for the purposes of limited notification for all applications other than "regional consents"[15] and most non-complying activities.

5.13 A potentially affected party would need to establish that they are eligible to be notified of an application by reference to the type of activity for which consent is sought. For example, if the activity that is going to occur on designated land is not a non-complying activity, only the relevant requiring authority is eligible to be considered affected. This overlooks two basic facts:

(a) It will almost certainly be the requiring authority itself that is proposing the activity, e.g., discharges associated with the land use which is the subject of the designation; and

(b) The designation may well apply to a major piece of infrastructure, e.g., wastewater treatment plant, with potentially significant adverse effects that neighbours would be precluded from being notified of and therefore lodging submissions on.

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

(a) Who might need to have a say, e.g., the Medical Officer of Health – a first in the history of the RMA; and

(b) The likely generated effects of categories of activities based on the activity status of the activity in plans written before the provision was enacted - entirely unrelated to actual effects or any actual proposal.

5.15 If the potentially affected party establishes eligibility, they would still need to meet the threshold in proposed section 95E[16] to be entitled to limited notification.

Fundamental shift in philosophy as regards notification

5.16 The proposed notification provisions are fundamentally contrary to the basic tenet upon which the RMA was based, i.e., that there would be no standing requirement for submitters – to that extent, it would represent a fundamental shift in philosophy from that which has hitherto existed. The provisions are also highly complex and are almost certain to lead to unintended consequences and litigation.

5.17 We concur with the NZLS submission on the Bill[17]:

"Overall the new provisions relating to both public and limited notification introduce a greater level of complexity to the consent process. That is undesirable. There are potential costs in the lack of

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14 Clause 128 – proposed section 95DA.
15 Which are not defined or proposed to be defined but presumably related to activities that can only be granted by a regional council.
16 Clause 129.
17 At paragraph 189.

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

5.18 LGNZ echoes this concern[18]:

> *"LGNZ considers that new ss95A and 95B would establish an unnecessarily complicated process, which would be more limited than the existing RMA provisions...The existing limited notification processes seem to be working well as they are. New sections 95 to 95B are unnecessary and overly complex."*

Lack of justification for the change

5.19 What justification, if any, exists to introduce these novel and difficult concepts? The National Monitoring System data for 2014/15 confirmed that 96% of applications processed to a decision in that time frame were non-notified (up from 94% in 2010/11 and 95% in 2012/13). It is therefore clear that the existing notification processes are not routinely causing undue delays such as to warrant any further substantive revision – let alone amendments of the nature and complexity proposed by the Bill

5.20 These statistics confirm that there are a range of effective avenues available to applicants to avoid their applications being notified, including designing proposals so they are a controlled or restricted discretionary activity at worst; obtaining any necessary written approvals from potentially affected parties; and appropriately addressing potential adverse effects.

5.21 Notification in appropriate circumstances is fundamental to the ability of landowners to protect their property rights (such as their reasonable expectation of amenity including privacy). Contrary to the RIS[19], it also enables consent authorities to obtain better information about the potential effects of a proposal and, in many circumstances, to become aware of important effects which otherwise have been assessed incorrectly or underplayed by applicants and council officers.

5.22 All those in involved in the RMA should be able to efficiently and clearly determine when notification will be required and the basis on which this decision will be made. This requires simple, workable statutory criteria which are easy to understand and apply – not the complex set of prescriptive and ultimately unfair provisions that are proposed in the Bill.

6. INTRODUCTION OF NOVEL AND ILL-DEFINED CONCEPTS RELATING TO ACTIVITY STATUS AND RESOURCE CONSENTS

6.1 The Bill also proposes to introduce a number of novel, ill-defined and untested concepts in relation to activity status and resource consents. These will create uncertainty and can cause process delay and costs as a result of the need for a cautious approach by council processing officers and the inevitable need for the courts to clarify the ambit of the concepts.

6.2 The Bill[20] proposes to introduce "deemed permitted activities". These are activities that, in accordance with the relevant planning instruments, would require resource consent, but which can be declared by a consent authority to be a permitted activity (before or after a consent application is made) if the following conjunctive criteria are satisfied:[21]

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18 At page 28.
19 See paragraph 1.7 above.
20 Clause 122 - proposed section 87BA and 87BB.
21 Proposed section 87BB(1).

(a) The activity would be a permitted activity but for a "marginal or temporary non-compliance" with "requirements, conditions and permissions" specified in the RMA, regulations, a plan or a proposed plan; and

(b) Any adverse environmental effects of the activity are "no different in character, intensity or scale" than they would be in the absence of this non-compliance; and

(c) Any adverse effects of the activity on a person are less than minor; and

(d) The consent authority, in its discretion, decides to notify the person proposing to undertake the activity that the activity is a permitted activity.

6.3 This clause is a source of significant concern; a number of points need to be made.

"Marginal or temporary non-compliance"

6.4 The phrase "marginal or temporary non-compliance" is not used in the RMA and therefore has no established meaning in a planning context. The term "temporary" is used in section 107(2)(b) of the RMA relating to discharges of a "temporary nature". The meaning of "temporary" has been subject to some limited judicial consideration, but there is little in those cases[22] that assists other than the inevitable observation that such provisions need to be considered in the circumstances of the case.

6.5 The term "marginal" means "minor or not important; not central".[23] It is not used in the RMA, although the similar terms "minor" and "less than minor" are. The rules of statutory interpretation tell us that if a new term has been introduced it must mean something. It follows that "marginal non-compliance" needs to be interpreted as something different to "minor" non-compliance.

6.6 So how is "marginal" different to "minor"? Is it more than minor or less than minor? If it is less than minor, is it less than "less than minor"? One can immediately see where the debate (and inevitable litigation) is headed.

6.7 Given the clear potential for these provisions to override the rights of potentially affected neighbours, etc., it is only a matter of time before the courts are called upon to clarify the scope of this language. Until we have assistance, deciding what would constitute a "marginal or temporary non-compliance" with relevant regional or district plan rules for permitted activities would be a largely subjective exercise.

Adverse effects "no different"

6.8 There is an obvious similarity between this provision and section 10 relating to existing use rights which protects activities where "the effects of the uses are the same or similar in in character, intensity and scale" as that lawfully established. In the context of section 10, we have historical activities to compare existing activities with. No such luck for the processing officer in the context of this proposed provision.

6.9 How is a processing planner meant to establish that the effects of the proposed activity are "no different" to what they would have been but for the non-compliance? Presumably they must envisage what the effects of the activity would have been without the "marginal or temporary effect" and then compare it with the temporary or marginal effect overlaid on it. That is a very fine and difficult analysis. The case law

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22 *Paokahu Trust v. Gisborne DC* (A 162/03); *Marr v. Bay of Plenty RC* [2010] NZEnvC 347.
23 Oxford Dictionary.

on "existing environment"[24] will no doubt become highly relevant in the litigation that would follow the enactment of this provision.

6.10 There will be plenty to argue about. Again, there is a subtle change of wording from section 10 that we must assume was intentional. If effects are "no different" under section 87BB(1)(b) is that the same as "the same" effects under section 10? One presumes not. If not, how is "no different" different from "the same"? Or is it the same? Can section 10 cases help us?

Status of the notice

6.11 A number of legal issues arise in relation to the status of the notice that is issued if a low impact proposed activity is deemed to be a permitted activity, for example:

(a) What status does the notice have? Is it intended to be the equivalent of a certificate of compliance issued under section 139? Does a notice give rise existing use rights under section 10? One presumes so.

(b) Does the case law relating to the scope of activities apply to define and delimit the activities to which the notice is subject?

(c) Presumably conditions cannot be imposed on a notice for a deemed permitted activity – but what is the status of the performance standards (or other provisions of the plan) that the notice allows an applicant to contravene?

(d) What standards or controls is the deemed permitted activity holder required to comply with? Can a notice holder be subject to enforcement proceedings?

(e) What status would a notice have when assessing the effects of a subsequent application? Will (or should) activities allowed under a marginal or temporary notice be considered part of the permitted baseline?

6.12 The provision raises all of these questions but answers none – again, litigation is inevitable, either at the behest of an applicant who wishes to use the provision or a neighbour whose interests are affected by the issuance of one of these certificates.

6.13 The upshot is that this provision will:

(a) Cut across the integrity of planning instruments in a fundamental and constitutionally inappropriate way;

(b) Be the bane of processing officers as applicants clamour to demonstrate that they meet these criteria; and

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

6.14 Uncertainty, process costs and delay will result – applicants would be ill-advised to rely upon these provisions until they are thoroughly tested.

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

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24 For example, *Arrigato Investments Ltd v Auckland Regional Council* [2002] 1 NZLR 323 (CA), *Queenstown Lakes District Council v Hawthorn Estate Limited* [2006] NZRMA 424 (CA), and *Save Kapiti Inc v New Zealand Transport Agency* [2013] NZHC 2104.

"Directly affected parties" – need for clarity / definition

6.16 The Bill introduces limited notification as an available option for discrete plan changes, in circumstances where "directly affected" parties can be easily identified. As currently drafted, the new provision (new clause 5A to the First Schedule) begins:

> *"5A Option to give limited notification of proposed change*
>
> *(1) This clause applies to a proposed change to a policy statement or plan.*
>
> *(2) The local authority may give limited notification, but only if it is able to identify all the persons directly affected by the proposed change..."*
>
> (Emphasis ours.)

6.17 We support this proposal in principle to the extent that it may enhance "plan agility". However, one issue needs to be addressed. The term "affected person" is already used in the context of the notification provisions of the RMA, the Bill now uses the term "directly affected" without defining what that means or providing any tests. The High Court has held that the words "directly affected":[25]

> *"...are not words of any technical meaning. They are simple words with well understood meanings and connotation in everyday use. What I think is to be emphasised is that such words apply to the particular circumstances in each case."*

6.18 On the basis of this judicial guidance, local authorities will have reasonably wide discretion to determine the scope of "directly affected" parties in respect of each plan change having regard to the "particular circumstances in each case". That is something consent authorities are capable of doing as a result of their experience with notification of resource consent applications. However, there remains some scope for confusion and an amendment is warranted – perhaps to bring it in line with the definition in section 2AA(2) if desired, or to define it in a way that clearly sets it apart.

Lack of justification

6.19 What is the justification for this amendment? What are the drafters seeking to achieve? Surely, if the effects of the proposed activity are so benign that it is appropriate for it to be deemed to be a permitted activity, then it will fall within the 95% of applications that are processed on a non-notified basis?

6.20 The documents that an applicant will prepare to demonstrate compliance with the first three criteria (in order to persuade a council to exercise its discretion in their favour, under the fourth criteria), will need to address the same material as an assessment of environmental effects that needs to comply with section 88 of the RMA. What are we achieving here, other than introducing complexity to the process?

6.21 District and regional plans perform a fundamentally important function in achieving the purpose of the RMA. They are promulgated via a thorough process involving consultation, notification, the lodging of submissions and further submissions, hearings and a reasoned decision. Property owners and businesses are entitled to rely on the provisions of the plan. We consider that introducing a mechanism into the RMA that creates a legal fiction by enabling an activity to be declared to be a permitted activity despite the clear words of the plan is constitutionally inappropriate and unjustified.

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25 *Ngatiwai Trust Board* v. *New Zealand Historic Places Trust (Pouhere Taonga)* [1998] NZRMA 1, at page 13.

7. REDUCTION OF PUBLIC PARTICIPATION / ACCESS TO JUSTICE

7.1 It will now be apparent that the Bill contains a number of provisions that will reduce opportunities for public participation with limited (if any) justification or confirmation that the Bill will achieve any significant benefits. These include:

(a) A mandatory requirement for local authorities to strike out a submission for a number of reasons, including that it does not have a sufficient factual basis, is not supported by evidence or is unrelated to the effects that were the reason for notifying the application;

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

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

The founding principle

7.2 As noted at the outset, the RIS[26] justifies these amendments on the basis that public participation "...undermines the purpose of notification and seeking submissions, which is to give decision-makers useful, focused input". We fundamentally disagree and remind the reader that:[27]

> *"The founding principle of the RMA at the time of its enactment was that greater involvement by the public in resource management processes would result in more informed decision making and ultimately better environmental outcomes. As noted by the Supreme Court in Westfield (New Zealand) Ltd v North Shore City Council, it is the general policy of the Act that better substantive decision making results from public participation. The RMA has, as a consequence, afforded the public a wide scope for involvement in both the preparation of planning documents and the consideration of resource consent applications."*

7.3 Access to justice is a cornerstone of our democratic society. Participating in the preparation of planning instruments and resource consent applications represent a fundamental means of protecting property rights as well as achieving the RMA's sustainable management objective. Any restriction on these rights must only occur in a transparent manner and only with sound justification.

New power to strike out submissions

7.4 The Bill would provide a power for consent authorities to strike out submissions that are frivolous and vexatious, disclose no reasonable case or would represent an abuse of process[28] , etc., as the Environment Court[29] does. The courts have indicated that this power should be used sparingly and must to take into account the public participatory nature of the RMA.[30] As a result, the bar for striking out is set quite high. That power is acceptable given that consent authorities would be required to apply similarly stringent standards in exercising their new powers.

7.5 However, the Bill goes further than the Environment Court's current powers. An authority that is conducting a hearing is required to strike out submissions that:

(a) Do not have a sufficient factual basis;

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26 Paragraph 253.
27 *Environmental and Resource Management Law* (5th ed.), Nolan (editor), at paragraph 19.3 (with references omitted).
28 Clause 120 – proposed section 41D.
29 Section 279(4).
30 *Hauraki Maori Trust Board v Waikato RC* HC Auckland CIV-2003-485-999, 4 March 2004; *Perceptus Ltd v Waitakere City Council,* A40/08.

(b) Are not supported by evidence; or

(c) Are unrelated to the effects that "were the reason for notifying the application".

7.6 The direction striking out the submission can be made "before, at, or after the hearing" of the relevant application – clearly, if that direction is made in advance of the hearing, the authority is effectively determining whether or not a submission should be heard on the merits.

7.7 Hearing commissioners will come under intense pressure from applicants to exercise this power – if a submission is struck out, no appeal can be lodged. Applicants will request decision makers to make separate decisions on:

(a) The merits of the application; and

(b) The adequacy of the evidence in support of a submission (challenging its validity on whatever basis under proposed section 41D(2)(b) that can be made out).

7.8 There is clear potential for abuse and litigation challenging decisions to strike out submissions.

7.9 The concept is also practically flawed because the RMA does not impose specific obligations on submitters in terms of the information that needs to be provided. The regulations essentially require a submitter to state the nature of the concern and their reasons. Normally submitters will produce the evidence in support of their submission in the lead up to or at the hearing. If they are not calling expert evidence, they are not required to pre-circulate.

7.10 At what point does a consent authority decide that there is not sufficient evidence to support the submission when submitters are not even required to supply non-expert evidence? Or will expert evidence automatically trump locals' evidence from now on? Does the RMA need to be amended to require a minimum level of information from submitters? Do council officers need to be able to request further information from submitters?

7.11 Of course not. These basic underpinnings of the provision simply have not been thought through. The bottom line is that the entire concept is draconian, anti-democratic and impractical. The only sensible and fair option is to delete this provision.

7.12 In our view, if the Government wants public participation rights and access to justice significantly curtailed in the planning arena, it should do this transparently via substantive overhaul of the planning system itself – not death by a thousand cuts via the continual amendment to an Act which has public participation as a fundamental cornerstone. We strongly concur with the RMLA's submission on the Bill[31] that:

> *"...many of the processes [proposed under the Bill] remove or further diminish public participation and rights of appeal. It has not been demonstrated that the loss of these important checks and balances is outweighed by (or is proportional to) the benefits of the new processes in terms of robust and durable resource management conditions."*

Impact of reduced time frames

7.13 Access to justice is also affected when parties have rights to participate, but insufficient time and opportunity to exercise those. This could occur, for example, with

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31 Paragraph 9(b).

the SPP, where the time frame allowed for participation would be completely at the Minister's discretion. This has clearly been demonstrated by the processes established in special legislation for both the PAUP and proposed Christchurch Replacement District Plan. While in no way a criticism of how those processes have been run, the issue is neatly summarised in the NZLS's submission on the Bill:[32]

> *"Experience with both these processes has demonstrated that a significant number of affected parties and residents have been prevented from engaging with these planning instruments (or simply chosen not to), because they are not able to do so effectively in the prescribed time frames. Many who tried to participate have also had difficulties in obtaining necessary professional advice (legal, technical and planning) to support and guide their involvement. This is due to the overall time frames and number of clients requiring representation resulting in those advisors simply becoming completely overwhelmed with work."*

8. EXCESSIVE POWER WITH THE MINISTER FOR THE ENVIRONMENT

8.1 The Bill contains provisions that would enable the removal of decision-making making power from local communities and their transfer to the Minister for the Environment. Key provisions from the Bill which would remove control of planning matters from local communities to the Minister include the:

(a) Mandatory introduction of the NPT and extent of the Minister's discretion as to what that contains[33];

(b) Minister's proposed new regulation making powers to dictate the content of rules in regional and district plans[34]; and

(c) SPP process, which is effectively at the Minister's complete control and discretion, including the ability to completely reject the outcome of that process with no rights of appeal[35].

8.2 We are concerned about the continued aggregation of power to the Minister. Clearly, there are RMA issues in respect of which it is useful to have national direction and guidance. This can be already achieved via the introduction of NESs and NPSs. The Government also deems it useful for some projects to be the subject of the call-in procedure. But in light of the existing procedures that are available, we consider that these provisions in the RLRB go too far.

8.3 These amendments directly contradict the principle of local decision-making on which the RMA has always been based. The Minister's powers could be used to override rules that have (at least until now) been developed through robust public consultation and (when necessary) impartial determination by the Environment Court.

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

8.5 In our view, these proposed amendments would:

(a) Enable a single Minister to set public policy and determine how that should be implemented in the planning context, contrary to the doctrine of separation of powers on which our democratic system is based.

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32 At paragraph 93.
33 Clause 37 – proposed sections 58B to 58J.
34 Clause 105 – proposed section 360D.
35 Clause 52 – proposed section 80C.

(b) Have the effect of making planning provisions and processes subject to the whims of the Minister of the day.

(c) Undermine public confidence in and the validity of the planning system.

8.6 We agree with the NZLS's submission on the Bill:[36]

> *"Devolution of decision-making powers to local communities and providing for public participation were two of the fundamental principles of the RMA as originally enacted, for good reason. They underpin the central purpose of the Act – the sustainable management of natural and physical resources – which relies on community input to achieve quality planning and environmental outcomes."*

9. NO QUANTIFICATION OF COST OR IMPACT OF AMENDMENTS

9.1 We have tried to understand why, as with previous amendments, a number of the Bill's proposals "miss the mark" by such a wide degree. One explanation is that little substantive, robust analysis appears to have been undertaken to establish either the nature, cause or extent of current concerns with the RMA.

9.2 We do not suggest that there are no issues with the RMA or how it is currently administered – however, it is necessary to:

(a) Understand a problem (and whether one even exists) in order to determine how it might be fixed; and to

(b) Quantify the costs and potential impacts of doing so.

9.3 The "Agency Disclosure Statement" included with the RIS effectively acknowledges that this analysis has not been done:[37]

> *"Given the nature of issues covered in the reform program, accurate quantification of the size of the problems and impacts has not been feasible across all policy options. It is also difficult to identify the exact impact from many of the proposals in this paper as they will affect tangata whenua, local government, stakeholders and communities to a varied degree and with a mix of direct and indirect costs and benefits."*

9.4 We agree with LGNZ's submission on the Bill:[38]

> *"We also consider that the financial costs to local government and communities associated with implementing the proposals needs to be fully addressed, the Regulatory Impact Statement is largely silent on these. Unless all costs and benefits are accurately identified and quantified, the merits of a proposal cannot be addressed."*

9.5 With respect, it is not good enough to say that: "it's too hard to work out the cost or effect of what we propose" – the Ministry would frown on that quality of analysis from a consent authority. There is a great deal at stake here. Our resource management processes and their outcomes have important social, economic, cultural and environmental consequences that affect us all on a daily basis.

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36 At paragraph 98.
37 Page 1.
38 Page 4.

10. TIME TO PAUSE FOR THOUGHT

10.1 This paper has hopefully demonstrated the very significant process cost and time that the proposed amendments will have – not to mention the unintended consequences that previous hurried and poorly drafted amendments have had.

10.2 The RMA, a fundamentally sound statute that deservedly started life as an internationally ground-breaking piece of legislation, has been fundamentally weakened by continual (and particularly recent) amendments. It is nearing a tipping point at which it is becoming unworkable. And two of its fundamental precepts – public participation and local decision-making by co-operative mandate – would be severely compromised by the Bill. The RMA is being brought to its knees.

10.3 Our position is that when issues of this magnitude are at stake, there needs to be strong justification for the amendments by reference to the alleged problems and quantification of the "costs and benefits" of the choices made, including the option of "doing nothing". After all, this is the bare minimum that Parliament expects of planning authorities. The proponents of this legislation readily acknowledge that this has not been done.

10.4 Sound analysis and debate is required. As a minimum, those aspects of the Bill that we have highlighted in this paper need to be revisited, preferably by their removal from the Bill and complete reconsideration in light of these remarks. Obviously the Select Committee is the fundamentally important next first port of call in that regard. The hope is that party political considerations can be put aside in favour of quality outcomes.

Simon Berry / Helen Andrews

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