Full steam *ahead*

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The Government has put the pedal to the metal ahead of the looming 2017 general election and pushed forward with its reforms on a number of fronts.

The Resource Legislation Amendment Bill has finally worked its way through the system and passed into law, further amendments are proposed to the National Policy Statement for Freshwater Management (NPSFM), and a proposal to establish Urban Development Authorities is currently being consulted on.

While these changes go beyond mere tinkering, they are not the substantive reforms being called for in some quarters.

In this article we provide a brief overview of the Resource Legislation Amendment Act 2017 (RLA) and the proposed changes to the NPSFM. Due to space limitations, we will provide some commentary on the Urban Development Authorities proposal in future articles.

Resource Legislation Amendment Act 2017

The Resource Legislation Amendment Act 2017 (RLA) was passed into law on 18 April 2017, with the majority of the changes coming into effect a day later.[1]

The RLA amends the Resource Management Act 1991 (RMA) as well as five other acts[2], with the stated aim of creating "a resource management system that achieves the sustainable management of natural and physical resources in an efficient and equitable way."

The RLA contains around 40 individual changes aimed at delivering improvements to the resource management system. The changes include greater centralisation of resource management decision making and process changes intended to streamline decision making. Some of the more significant changes to the RMA and their implications are discussed below.

Procedural principles

New procedural principles are included in the RMA, requiring all persons exercising powers to take all practicable steps to:

1. Use timely, efficient, consistent, and cost-effective processes that are proportionate to the functions or powers being performed or exercised
2. Ensure that policy statements and plans include only those matters relevant to the purpose of the RMA and are worded in a way that is clear and concise, and
3. Promote collaboration between or among local authorities on their common resource management issues.

These procedural principles augment existing obligations to avoid unreasonable delay. Recourse to these principles will be a useful tool for participants navigating RMA processes.

Iwi Participation Agreements – Mana Whakahono a Rohe

The RLA's provision for iwi participation agreements/Mana Whakahono a Rohe (agreements) has attracted considerable controversy. These agreements are intended to provide a formal mechanism through which iwi authorities may participate in resource management processes, as well as assist local authorities to comply with their RMA duties, particularly sections 6(e), 7(a), and 8.

The process for reaching an agreement can be initiated by either iwi or local authorities. An agreement is required to address:

1. How iwi will participate in plan making processes
2. How iwi and councils will collaborate with monitoring under the RMA
3. A process for identifying and managing conflicts of interest, and
4. A process for resolution of any disputes regarding the agreement.

Agreements may also address:

1. How a local authority is to consult or notify an iwi authority on resource consent matters, where the RMA provides for consultation or notification
2. The circumstances in which an iwi authority may be given limited notification as an affected party, and
3. Any arrangement relating to other functions, duties, or powers under the RMA.

The RLA also includes guiding principles for the initiation, development, and implementation of agreements. These include working in good faith, transparent communications, a commitment to meeting statutory timetables, minimising cost delays, and recognising Treaty settlement legislation.

Once an agreement has been reached it cannot be altered or terminated without the consent of all parties.

National planning standards

The Minister must prepare national planning standards within two years of the RLA coming into force. The national planning standards must address:

1. A structure and form for policy statements and plans
2. Definitions, and
3. Requirements for the electronic functionality and accessibility of policy statements and plans.

The Minister may also elect to specify objectives, policies and methods (including rules) that must be included in plans. The public will be provided with an opportunity to make submissions on the standards before they come into effect.

Changes to resource consent processes

The RLA introduces a number of new features to resource consent processes:

1. Boundary activities. These are activities which breach boundary rules in district plans between privately owned blocks of land. If the relevant neighbour consents to the activity, then the activity is permitted.
2. Deemed permitted activities. These are activities that would be permitted but for a marginal or temporary non-compliance with rules. Provided that the environmental effects of the non-compliance are no different than they would be without the non-compliance, and the effects to any person are less than minor, the consent authority has a discretion to deem the activity permitted.
3. Fast track applications. These are applications for a controlled activity land use consent (other than subdivision of land) or other applications prescribed in regulations. Unless the application is notified, decisions must be made within 10 working days.
4. Express consideration of environmental offsets. Decision makers must have regard to any environmental benefit proposed to compensate for any adverse effects that may arise from the activity.
5. Further requirements for consent conditions. Conditions may only be imposed on consents where the applicant agrees to the condition or the condition is "directly connected" to an adverse effect on the environment, an applicable rule or national environmental standard. This sets a higher standard for imposition of conditions than the "logically connected" threshold set by the Supreme Court in the Estate Homes[3] case.

1. Changes to consenting procedures will come into effect from 1 October 2017.
2. The Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012; The Environmental Protection Authority Act 2011; The Conservation Act 1987; The Reserves Act 1977; and The Public Works Act 1981.

6. Limited appeal rights. Rights of appeal to the Environment Court against resource consent decisions are removed for all boundary, subdivision and residential activity – except if the activities are non-complying.

In addition, the notification provisions have been re-written as a step-by-step code.

Collaborative and streamlined planning process

The RLA provides for two new plan making processes: "collaborative" and "streamlined".

The collaborative process is available to councils if certain criteria are met. The process provides for the establishment of a group whose membership is intended to reflect a balanced range of the interests. The group's purpose is to seek to achieve consensus, after which the council must draft a proposal that gives effect to the consensus position – although the council may also include provisions on matters where consensus was not reached. The council then publicly notifies the proposal for submissions. A review panel is established which provides recommendations on the proposal and matters raised by the submissions. The council must then accept or reject the recommendations of the review panel. The extent to which recommendations are accepted affects the availability of rights of appeal to the Environment Court.

The streamlined process is available on application of a local authority to the Minister where certain criteria are met showing that the expeditious preparation of a planning instrument is required. Where the Minister considers the streamlined process is appropriate the Minister must issue a direction specifying the details of a bespoke streamlined process. The Minister's direction must be presented to the House of Representatives and can be disallowed (revoked) if the House resolves to do so. The proposed planning instrument is provided to the Minister within the timeframe specified by the direction. The Minister may approve the instrument, send it back to the council for further consideration, direct changes to be made before implementation, or decline to approve the instrument. There are no rights of appeal against any decision or action of the responsible Minister, council, or any other person, other than judicial review.

Strike out of submissions

The RLA includes a power for local authorities to strike out submissions or parts of submissions where the submission is frivolous or vexatious, discloses no reasonable or relevant case, or is otherwise an abuse of process. This is similar to the power a court has in relation to proceedings brought before it.

Provisions to manage natural hazard risks

The RMA has been amended to require decision makers to recognise and provide for the "management of significant risks from natural hazards" as a matter of national importance under section 6, and to enable the refusal of subdivision consent under section 106 where there is a "significant risk from natural hazards". Determining the risk from natural hazards requires a combined assessment of the likelihood of the hazard, the damage that would result to the relevant land, and whether the use of land sought would exacerbate such damage.

Requirements to ensure land is available for housing and business

The functions of local authorities are amended to include "the establishment, implementation, and review of objectives, policies, and methods to ensure that there is sufficient development capacity in respect of housing and business land to meet the expected demands of the [district/region]". This amendment integrates with the National Policy Statement on Urban Development Capacity 2016, which provides specificity as to what "sufficient capacity" entails in particular regions and districts.

3. *Waitakere City Council v Estate Homes Limited [2006] NZSC 112 at paragraph [66].*

Ministerial powers

The RLA includes new powers for the Minister to make regulations:

1. Excluding stock from water bodies, estuaries, and coastal lakes and lagoons. Infringement fines of up to $2000 per offence are provided.
2. Prescribing situations where limited or public notification of resource consent applications is precluded.
3. Prohibiting or removing specified rules or types of rules that would duplicate, overlap with, or deal with the same subject matter that is included in other legislation, eg, matters regulated by the Hazardous Substances and New Organisms Act 1996 or the Fisheries Act 1996. This power does not apply to rules that regulate the growing of crops that are genetically modified organisms, so regulating such plants remains open to local authorities.

National Policy Statement for Freshwater Management

In February 2017, the Government released a Clean Water consultation document. The document targets having 90 percent of rivers and lakes swimmable by 2040, includes new maps and information on current water quality for swimming, invites applications to the Freshwater Improvement Fund, proposes a stepped regime for excluding stock from waterways, and proposes a number of amendments to the NPSFM.

The amendments proposed to the NPSFM are aimed at meeting the swimmable targets as well as building on proposals outlined in 2016 in the Next Steps for Freshwater document.

The proposed amendments include:

- Requiring councils to identify waterbodies suitable for swimming, those that will be once improved, plus timeframes for improvement
- Requiring councils to monitor macroinvertebrates in 'appropriate' (ie, wadeable) rivers and streams
- Limiting the concept of "maintain or improve" to within a freshwater management unit (ie, catchment/part catchment)
- Requiring councils to establish in-stream objectives for dissolved inorganic nitrogen (DIN) and dissolved reactive phosphorus (DRP)
- Requiring councils to consider the community's economic wellbeing when making decisions about water quantity, deciding what level or pace of water quality improvements will be targeted and when establishing freshwater objectives
- Amending policy CA3 to clarify that councils can only set freshwater objectives below national bottom lines:
  - For attributes that are currently below national bottom lines and only in the physical areas where the infrastructure contributes to the degraded water quality, and
  - If it is reasonably necessary for the continued operation of the infrastructure
- Removing the footnote in the current NPSFM in relation to coastal lakes and lagoons and providing direction about the monitoring requirements for such waterbodies
- Further clarification of what Te Mana o Te Wai means and how it will be implemented, as well as a new objective and policy requiring councils to recognise Te Mana o Te Wai when giving effect to the NPSFM.

Submissions on the Clean Water consultation document closed on 28 April 2017. No indication has as yet been given as to when the amendments may come into force, however, given it is an election year, the Government may wish to push this through prior to the election.

It is also noted that this is not the last step in the freshwater reform programme, with further steps relating to good management practices, allocation, and the land and water national science challenge expected to be progressed later this year. **WNZ**