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Proposed Amendments to the RMA

1 Introduction.

1.1 General format.

This is a draft of the amendments to the Act which the CRMS believes would improve the Act and its implementation, and which would help make the RMA more ‘bullet proof’ from attack by the central planners.

The general format tracks consequent changes to any proposed amendment within any amended section but does NOT track consequent amendments right through the Act. Otherwise the document would be hundreds of pages long. (It’s long enough as it is.)

Many of the proposed amendments are not explained in detail because most readers of this document are probably aware of the arguments. Again, adding the explanations would greatly increase the length of the document.

However, please ask if clarification on any matter is required.

Explanatory notes are added where questions have already been raised.

1.2 Reading the document.

Most of the original sections, without change, are not included – again for brevity. Also in most cases the surrounding sections are not included.

To follow the context and to track which sections and parts are NOT amended please go to:

<http://www.legislation.govt.nz/act/public/1991/0069/latest/DLM230265.html>

This is an excellent resource (and is available for all Acts of Parliament) because a reader can access each section one page at a time, and within that page there are links to other relevant Acts and sections which can be activated from any word document open on the screen. For example clicking on *Section 8 Treaty of Waitangi* will open the page with:

Treaty of Waitangi

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical

resources, shall take into account the principles of the [Treaty of Waitangi](#) (Te Tiriti o Waitangi).

Clicking on the “Treaty of Waitangi” link will open the full Treaty.

1.3 Limitations.

Some proposals are difficult to address through changes to the legislation. For example licensing contractors is probably available under the existing legislation and simply needs the local authority to include it as a “method” under the policy statement or manual, possibly encouraged by direction from a National Policy Statement.

Front-end fees and levies are legitimised mainly through the LGA – so that issue must be addressed separately.

Several issues, among those listed from 1.4 to 1.22 are associated with the RMA but either require amendments to the LGA or other legislation, or may be more efficiently address by National Policy Statements rather than amendments to the Act. Where such doubt exists the Centre has not proposed an amendment to the Act although further analysis may demonstrate that such amendments are necessary.

1.4 Amendments.

Proposed changes follow.

- Deletions are ~~strike-outs~~.
- Additions are underlined.
- Defined terms are **emboldened**.

Note: The explanatory notes are emboldened but are in a different typeface to avoid confusion.

The deletions flag consequent significant deletions from the body of the Act. For example local authorities have no role in energy policy and hence the deletion of the definition of ‘renewable energy’ flags the removal of “renewable energy” from the body of the Act as a matter to be dealt with under the RMA. (Or the alternative section **70B(d)**)

Also the first deletion applies to all subsequent references. Hence the deletion of “Minister of Conservation” as a consent authority flags the removal of the Department of Conservation from having any special role in the administration of the RMA.

The replacement of the word “plan” with the word “manual” applies to all subsequent appearances of the term “plan”

PART 1 INTERPRETATION AND APPLICATION.

To see full list go to:

<http://www.legislation.govt.nz/act/public/1991/0069/latest/DLM230265.html>

Then click on: **2 Interpretation and keep it in front of you if you have a wide screen.**

2. Interpretation.

~~Amenity Values~~ Amenities means those natural or physical qualities and characteristics of an area that contribute to people’s appreciation of its pleasantness, ~~aesthetic coherence~~ aesthetic qualities, and ~~cultural and~~ recreational attributes.

(Do the valuers have a definition used in assessing property values? Is there a definition of amenity values in any legislation such as the QV legislation?)

~~Climate change~~

~~Consent Authority~~ means ~~the Minister of Conservation~~, a regional council, a territorial authority ... etc.

[Exp Note: As a result of the proposed amendments the Minister of Conservation will no longer be a consent authority. They have enough to do with their own land.]

~~District Plan~~ Manual (of environmental standards) means an operative ~~plan~~ manual approved by a territorial authority under Schedule 1: and includes all operative changes to such a ~~plan~~ manual (whether arising from a review or otherwise).

[Exp Note: The RMA was meant to prevent central planning but then replaced “district schemes” with “district plans”. This name has been used to legitimize “planning” in the courts. A manual of environmental standards is much closer to what the RMA had in mind. Some might not like the MES as an acronym, but in many cases it would be appropriate.]

Environment includes –

- (a) ~~Ecosystems~~ Habitats of flora and fauna and their constituent parts,

- (b) people and ~~communities~~ settlements and
- (c) All natural and physical resources; and
- (d) Amenities. ~~Amenity values.~~
- (e) ~~The social, economic, aesthetic and cultural conditions which affect the matters stated in paragraphs a to d of this definition or which are affected by those matters:~~

[Exp. Note: Clause (e) is the “killer clause” which has allowed Westfield and others to justify trade competition to enter the courts.]

Family member shall include the wife, husband, son, daughter, mother, father, brother, brother-in-law, sister, sister-in-law, son-in-law, daughter-in-law, mother-in-law, father-in-law, aunt, uncle, niece, nephew, stepparent, stepchild, grandparent, or grandchild of the owner of the property, an estate of any of the foregoing family members, or a legal entity owned by any one or combination of these family members or the owner of the property. (See new section 87 re compensation.)

[Exp. Note: this relates to the new compensation provisions.]

~~Greenhouse gas~~

~~Intrinsic values~~

~~Plan Manual~~ means a district or regional manual (of environmental standards).

~~Regional Coastal Plan~~

~~Regional Plan manual~~ means ...etc.

~~Renewable energy (?)~~

Structure or framework plan – a structure or framework plan may be used to indicate the location of proposed public works and the use of public land, but, except with the express consent of the landowners, may not be used to direct and control the detailed subdivision use and development of land within the area defined by the structure or framework plan, without offering the landowners the option of purchase of their land by council with fair compensation.

[Exp. Note: This is intended to be the definition of a Structure Plan or Framework plan but maybe this is not good drafting and the definition needs to be split from the function. Smart Growth councils are now writing structure plans as though the

Councils actually own the land. The Omokoroa plan is a good example which sets out every lot on the whole peninsula and dictates its use.]

~~Tangata Whenua~~

~~Treaty of Waitangi. (Maybe OK in terms of proposed amendment.~~

Zone – a zone may be used to define the spatial extent of a rule or environmental standard but its primary purpose is not to direct and control the use of land by activity.

[Exp. Note: This attempts to re-establish the original intention of the RMA. Regulation 38 used to define a zone as ‘the spatial extent of an environmental standard’ but was deleted somewhere along the way’. The RMA never mentions the word zone – and zones are now court-made law.]

3 Meaning of “effect”.

In this Act, unless the context otherwise requires, the term **effect** includes—

- (a) Any positive or adverse effect; and
- (b) Any temporary or permanent effect; and
- (c) Any past, present, or future effect; and
- (d) Any cumulative effect on land, water or air, which arises over time or in combination with other effects – regardless of the scale, intensity, duration, or frequency of the effect, and also includes—

[Exp. Note: this addition prevents anxious “hand-waving” about future changes to built environments which could have been used to prevent Auckland or London turning into a city.]

- (e) Any potential effect of high probability; and
- (f) Any potential effect of low probability which has a high potential impact; and
- (g) Any long term effect of activities on the biosphere as a whole, where such activities and their consequent effects have been accepted by Government at a national level and where appropriate national policies have been adapted and promulgated.

[Exp. Note: This clause (g) would allow the removal of all references to climate change, greenhouse gases, and related references to renewable energy. Most importantly this enables a rapid response to any changes in such government policy]

PART II – PURPOSE AND PRINCIPLES

5. Purpose

The purpose of this Act is to promote economic growth and development by enabling people, families and groups with shared or common interests to manage the use, development and protection of natural and physical resources in a way, or at a rate, so as:

- (a) To provide for their own social, economic and cultural wellbeing, and
- (b) To provide for their retirement, and
- (c) To provide for their own health and safety, and
- (d) To initiate, respond to, and adapt to change, and
- (e) To promote personal mobility, and
- (f) To promote their access to energy.

while –

- (a) Sustaining the potential of natural and physical resources (excluding minerals and petroleum) to meet the reasonably foreseeable needs of current and future generations; and
- (b) Safeguarding the life-supporting capacity of air, water, and soil ~~and ecosystems~~; and
- (c) Avoiding, remedying or mitigating any adverse effects on the environment which might arise as a result of any proposed use or development of natural and physical resources.

[Exp Note: Most should need no explanation but the addition to (c) is to prevent councils simply requiring these actions when writing district plans rather than when considering applications and without compensation. This is an attempt to restore some balance and to emphasise the enabling intention of the Act.]

6 Matters of national importance.

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the effects of the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:

- (a) The preservation of the ~~natural character~~ **amenities** of the **coastal marine area** ~~coastal environment (including the coastal marine area)~~, wetlands, and lakes and rivers, and their margins, and their protection from inappropriate use, and development, while enabling appropriate use and development; and
- (b) The protection of outstanding natural features ~~and landscapes~~ from inappropriate subdivision, use, and development.
- (c) The protection of significant areas of indigenous vegetation and significant or scarce habitats of indigenous fauna, and the reforestation of land where appropriate:

[Expl. Note: Many developers volunteer to reforest (with heritage forests etc) eroding land in return for some rural residential hamlets etc but the courts consistently decide that “rural character” trumps reforestation. And there is currently no reference to reforestation as a matter of national importance.]

- (d) The maintenance and enhancement of access to and along the coastal marine area, lakes and rivers from both public and private lands.
- (e) ~~The~~ Any special relationship of Maori the peoples of New Zealand and their culture and traditions with their ancestral and family lands, water, sites, **burial grounds**, sacred places and other significant places.
- (f) The protection of **historic heritage** from inappropriate ~~subdivision~~ use and development.
- ~~(g) — The protection of recognized customary activities. [Recent amendment]~~
- (g) The efficient use and development of natural and physical resources, and in particular —
 - (i) the use of market mechanisms to promote their efficient allocation.
 - (ii) the need to promote this efficient use by reducing transaction costs to a reasonable minimum.

- (iii) by councils collecting data bases relating to previous applications so that applicants do not have to provide information already provided by previous applicants.
- (iv) The need for communities to have access to locally sourced mineral aggregates for construction purposes.

(h) The payment of compensation to those whose lands are affected by development controls imposed to protect environmental qualities of national and regional importance.

[Exp. Note: These are self-explanatory I believe. The reference to reducing transaction costs was a recommendation of Judge Jackson in one of his papers on economic efficiency.]

7. Other matters.

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—

- (a) **Kaitiakitanga:**
 - (aa) The ethic of **stewardship**:

[Exp Note: (aa) as in recent amendment to balance (a)]

~~(b)—The efficient use and development of natural and physical resources:~~

[Exp. Note: Moved to s6.]

~~(ba)—The efficiency of the end use of energy:-~~

[Exp Note: Undefinable.]

(b) The maintenance and enhancement of amenities. ~~values-~~

[Exp Note: This had led to anthropomorthic “Values” being pepper-potted everywhere.]

(c) ~~Intrinsic values of ecosystems:-~~ The maintenance and enhancement of habitats of significant flora and fauna.

[Exp. Note: Ecosystems are undefinable and are a human construct. Also, they stand on politically dangerous ground. Go to my paper on Muriel Newman’s website:

<http://www.nzcpr.com/guest84.htm>]

(d) The maintenance and enhancement of the quality of the environment.

~~(d) Any finite characteristics of natural and physical resources:~~

[Exp Note: All 'natural resources' are infinite. Read Julian Simon.]

~~(e) Ongoing access to mineral resources, including aggregates. (This is better)~~

~~(e) The protection of fish and game habitats. The protection of the habitat of trout and salmon.~~

~~(g) the effects of climate change.~~

~~(h) the benefits to be derived from the use and development of renewable energy.~~

[Exp Note: There are not necessarily any, and if they are they should be spelled out.]

8. Treaty of Waitangi.

(1) In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development and protection of natural physical resources, shall take into account the articles principles of the Treaty of Waitangi, including the fiduciary duty. (Te Tiriti o Waitangi).

(2) Treaty settlements or memoranda of understanding between Councils and Maori interests may not over-ride or conflict with the processes and procedures laid down by this Act unless specifically sanctioned by an Act of Parliament.

PART III

DUTIES AND RESTRICTIONS UNDER THIS ACT.

9. Restrictions on use of land

A person may use land ~~No person may use any land in any manner provided that the use does not contravene a rule in a district plan manual or proposed district plan unless or the activity is—~~

(a) Expressly allowed by a resource consent granted by the territorial authority responsible for the ~~plan~~ manual; or

(b) An existing use allowed by section [10](#) or section [10A](#).

[Exp. Note: this is a more active expression of the original sentiment.]

(2) No person may contravene section [176](#) or section [178](#) or section [193](#) or section [194](#) (which relate to designations and heritage orders) unless the prior written consent of the requiring authority concerned is obtained.

(3) A person may use land ~~No person may use any land in a manner that in any manner provided the use does not~~ contravene a rule in a regional ~~plan manual~~ plan manual ~~or a proposed regional plan manual~~ unless or that activity is—

(a) Expressly allowed by a resource consent granted by the regional council responsible for the ~~plan manual~~; or

(b) Allowed by section [20A](#) (certain existing lawful uses allowed).

In this section, the word **use** in relation to any land means—

(a) ...

(5) In subsection [\(1\)](#), **land** includes the surface of water in any lake or river but does not include a farm drain or artificial farm pond or dam.

[Exp Note: Farm drains and dams are NOT watercourses or part of the conservation estate.]

10 Certain existing uses in relation to land protected.

(1) A new rule in a proposed District environmental standards manual has no effect until a decision has been made and no appeal has been lodged within the time-frame, unless the local authority has applied to Parliament's Regulatory Review Committee for the rule to take more immediate effect because of an urgent need to remedy an existing rule.

[Exp. Note: At present the case law says a proposed plan has virtually no weight at the date of publication but gains weight as it goes through the process. However, many councils tell applicants that the proposed plan is the new plan and remove the operative plan from the shelves. Hence there is no incentive to make the proposed plan operative because they treat it as though it is.]

(1A) Land may be used in a manner that contravenes a rule in a district ~~plan~~ manual or proposed district manual ~~plan~~ (?) if—

(a) Either—

(i) The use was lawfully established before the rule became operative ~~or the proposed plan was notified~~; and

(ii) The effects of the use are the same or similar in character, intensity, and scale to those which existed before the rule became operative ~~or the proposed plan was notified:~~

(b) Or—

(i) The use was lawfully established by way of a designation; and

(ii) The effects of the use are the same or similar in character, intensity, and scale to those which existed before the designation was removed.

13 Restriction on certain uses of beds of lakes and rivers.

[Note: The Centre needs guidance here from MAF, Federated Farmers etc.]

17. Duty to avoid, remedy, or mitigate adverse effects.

(5) In implementing this section of the Act, decision-makers shall take into whether the adverse effects are impacting upon an occupier of land who has knowingly "moved to the nuisance".

[Exp. Note: this addresses the case of Johnson the Cambridge Pig farmer. The council allowed residents to surround his pig farm and then closed him down because the residents did not like the smell. It seems the Regional Council was full of anti-factory-farmers and vegetarians.]

~~17A Recognised Customary activity may be exercised in accordance with any controls.~~

(NOTE: Possibly best remedied by restoring Maori rights to claim customary property rights to foreshore and seabed. On the other hand the recent settlement may suggest the current Act is working.)

20 Certain duties in proposed plan-manuals not to have effect.

(1) A new rule in a proposed Regional Environmental Standards Manual has no effect until a decision has been made and no appeal has been lodged within the time-frame, unless the local authority has applied to Parliament's Regulatory Review Committee for the rule to take immediate or earlier effect because of an urgent need to remedy an existing policy method or rule.

(2) If, as a result of a rule in a proposed regional environmental standards manual ~~plan~~ being notified, and becoming effective as a result of 20(1) above an activity requires a resource consent, the activity may continue until the rule becomes operative if —

- (a) before the rule was notified, the activity—
 - (i) was a permitted activity or otherwise could have been lawfully carried on without a resource consent; and
 - (ii) was lawfully established; and
- (b) the effects of the activity are the same or similar in character, intensity, and scale to the effects that existed before the rule was notified; and
- (c) the activity has not been discontinued for a continuous period of more than 6 months (or a longer period fixed by a rule in the proposed regional ~~plan~~ manual in any particular case or class of case by the regional council that is responsible for the proposed manual) since the rule was notified.

Exp Note: This repeats the proposed changes for Regional Manuals as already set out for Proposed District ES Manuals.]

PART IV

FUNCTIONS, POWERS AND DUTIES OF CENTRAL AND LOCAL GOVERNMENT.

26 Minister may make grants and loans

(1) The Minister for the Environment may make grants and loans on such conditions as he or she thinks fit to any person to assist in achieving the purpose of this Act.

(1b) Except that any grants made to any Environmental Legal Assistance Fund shall be administered by the Ministry of Justice.

[Exp. Note: see my report on the Environmental Legal Assistance Fund and the perceived conflict of interest and bias. Go to: <http://www.rmastudies.org.nz/rma.htm>]

~~28 Functions of Minister of Conservation.~~

30 Functions of regional councils under this Act.

(1) Every regional council shall have the following functions for the purpose of giving effect to this Act in its region:

- (a) The establishment, implementation, and review of objectives, policies and methods to achieve ~~integrated management~~ the management of the effects of the use

and development or protection of the natural and physical resources of the region, with particular regard to the effects on the soil, water and air

~~(aa) the protection of natural and cultural heritage.~~

(b) The preparation of objectives and policies in relation to any actual or potential effects of the use and development or protection of land, which are of regional significance: (Delete or Review)

(c) The ~~control~~ management of the effects of the use of land having regard to:

(i) the effects on soil conservation.

(ii) the maintenance and enhancement of the quality of water in water bodies and coastal water;

(iii) the maintenance of the quantity of water in water bodies and coastal water having regard to the need to store fresh water for the purpose of supplying drinking and irrigation water.

(iiia) the maintenance and enhancement of ~~ecosystems in~~ habitats of flora and fauna in water bodies and coastal water;

(iv) the avoidance or mitigation of natural hazards having regard to the use of insurance, indemnification, limited liability, and other risk management techniques.

(v) the prevention or mitigation and remediation, of any adverse effects of the storage, use, disposal or transportation of hazardous substances.

... ..

~~(gb) the strategic integration of infrastructure with land use through objectives, policies, and methods —~~

(5) A regional council may not intervene in the management of the effects of the use, development and subdivision of land by territorial local authorities except as they those activities impact directly on the soil, water and air.

(6) In particular, regional councils may not ration the supply of land by imposing direct controls on the use and development of land within districts by means of metropolitan urban limits, urban growth boundaries, infrastructure limit boundaries or other rules or boundaries which artificially restrict the supply of land available for use, development and subdivision in the region by imposing general and wide-ranging

constraints rather than being specifically and directly related to effects on soil, water, and air, and while recognising that:

(a) land is not in short supply in New Zealand and hence does not need to be rationed; and

(b) land is only productive as a result of human activity; and

(c) this Act focuses on soil as a resource, not on land as such or on any particular use of land.

[Exp. Note: Most of these are self-explanatory, and as a group are designed to refocus Regional Councils on soil water and air, and keep them out of land use planning and Smart Growth.]

31 Functions of territorial authorities under this Act

(1) Every territorial authority shall have the following functions for the purpose of giving effect to this Act in its district:

(a) The establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of the use, and development of land, ~~or protection of land~~ and the associated natural and physical resources of the district:

(b) the ~~control~~ management of any actual or potential effects of the use and development of land, ~~or protection of land~~, including for the purpose of—

(i) the avoidance or mitigation of natural hazards; and

(ii) the prevention or mitigation of any adverse effects of the storage, use, disposal, or transportation of hazardous substances; and

(iia) the prevention, mitigation or remediation of any adverse effects of the development, subdivision, or use of contaminated land:

(iii) the maintenance of indigenous biological diversity:

[Exp. Note: what is meant by protection of land? The decision makers are meant to focus on soil. “Land” soon becomes “farmland” and we are soon back to the T&CPA.]

(c) *[Repealed]*

(d) The ~~control~~ management of the emission of noise and the mitigation of the effects of noise:

(e) The ~~control~~ management of any actual or potential effects of activities in relation to the surface of water in rivers and lakes:

(f) Any other functions specified in this Act.

(g) Territorial authorities are not to control, manage or ration the supply of land available for activities except as necessary to manage the effects of activities on the land directly affected.

[Exp Note: These changes focus on management rather than control and (g) further restricts Growth Management activities, methods and rules.]

32: Consideration of alternatives, benefits, and costs

(3) An evaluation must examine –

(a) the extent to which each objective is necessary and the most appropriate in achieving the purpose of this Act; and

(b) whether, having regard to their efficiency and effectiveness, the policies, rules or other methods are necessary and the most appropriate for achieving the objectives.

3A The cost and benefit analysis referred to in 3(d) shall be a guide to any compensation payments required to implement such takings.

(4) For the purposes of the examinations referred to in subsection (3) and (3A) an evaluation must take into account –

(a) The benefits and costs, having regard to the time value of money, of policies rules and other methods; and

(b) The risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods, having regard to the time value of money; and

(c) The cost and benefit analysis must include monetary costs and benefits wherever possible, and isolate and identify those costs and benefits which are deemed unquantifiable; and

(d) Where the objective, policy method or rule impacts on a property so as to constitute a “taking” for the public good the cost and benefit analysis must be specific to each and every property and must be developed in consultation with the owners of that property.

(6A) The evaluation must be a single coherent and identifiable document and not a collection of reports and discussion papers which have to be assembled when required.

(7) The evaluation is required only for interventions which reduce or significantly interfere with rights in property and is not required for changes to manuals which increase freedom of action and which lift existing restraints.

(8) The benefit cost analysis must involve a person or persons with some specialist skill in such analysis, and in particular some specialist knowledge and skill in economic analysis.

[Exp. Note: These changes are generally self-explanatory, although many economists may be surprised to learn that the MfE says the benefit cost analysis must NOT take into account the time value of money. The new section 7 attempts to codify the Mike Garland principle that “The ayes have it.”]

32A Failure to carry out evaluation.

(3) Failure to comply with the requirement to consult with landowners while carrying out the requirement of section 32(d) shall render any policies methods and rules applying to those landowners’ properties of no force or effect.

36 Administrative Charges.

(4) When fixing charges referred to in this section, a local authority shall have regard to the following criteria:

(b) A particular person should only be required to pay a charge, after taking into account that

- (i) an individual does not benefit from receiving a consent that they were legally entitled to receive and
 - (ii) their application for a consent be deemed to cause the local authority to incur costs since the actual cause is the legislation that requires them to apply for a consent.
- (c) A particular person should only be required to pay a charge
- (i) if the application is declined.
 - (ii) to the extent that the benefit of the local authority's actions to which the charge relates is obtained by those persons as distinct from the community or local authority as a whole; or
 - (iii) Where the need for the local authority's actions to which the charge relates is specifically occasioned by the actions of those persons, independent of any application for consent;

[Exp Notes: The first point is necessary in order to rebut the notion currently implicit in b(i) that a benefit is an avoided illegal harm. (The argument that a landowner should pay a council for a consent that the council is legally obliged to supply is the same as the argument that you should pay me every time I do not punch you on the nose. Denying the consent would be as illegal as my punching you on the nose.)

People have already paid for their legal rights when they bought their property, or turned down the chance to sell it at the market price. The market value of land reflects the value the community puts on the land. So since the market will expect a consent to be granted for a legal activity, the owner receives no benefit from obtaining that consent. More precisely, the community's value will largely reflect the value of the land with the formal consent less the community's assessment of the costs of obtaining that consent. So any increment on the land value after obtaining the consent reflects the community's assessment of the costs to any applicant of obtaining that consent.

The second point is necessary because otherwise local authorities would ignore b(i) as amended and rely instead on b(ii). However, it is obvious that most landowners would not apply for a resource consent if they did not have to. The cause of their

action is government legislation. How many landowners were applying for resource consents before this legislation was passed? The ostensible purpose of the legislation is not to benefit landowners; instead it is to constrain land use changes by landowners in order to achieve 'environmental benefits' for the community.

This is quite different from a building permit which is to protect the safety of the applicant and future applicants and protect the applicants investment.)

36B Power to make joint management agreement. (See proposed new section 78(B))

[Exp Note: for the current definition of a joint management agreement see definition in Part I of the Act. This definition may cover the proposed consolidated planning framework. I shall seek ongoing input from the Northland councils.]

(1) A local authority that wants to make a joint management agreement, including the preparation of a single regional consolidated resource management framework, and environmental standards manual, must—

- (a) notify the Minister that it wants to do so; and
- (b) satisfy itself—
 - (i) that each public authority, territorial local authority, iwi authority, and group that represents hapu for the purposes of this Act that, and is, in each case, a party to the joint management agreement—
 - (A) represents the relevant community of interest; and
 - (B) has the technical or special capability or expertise to perform or exercise the function, power, or duty jointly with the local authority; and
 - (ii) that a joint management agreement is an efficient method of performing or exercising the function, power, or duty; and
- (c) include in the joint management agreement details of—
 - (i) the resources that will be required for the administration of the agreement; and
 - (ii) how the administrative costs of the joint management agreement will be met.

- (2) A local authority that complies with subsection (1) may make a joint management agreement.

Powers and duties in relation to hearings.

39B Persons who may be given hearing authority:

- (1) This section applies when a local authority wants to apply any of sections 33, 34, and section 34A to give authority to 1 person or a group of persons to conduct a hearing on—
 - (a) an application for a resource consent notified under section 93; or
 - (b) a notice of requirement given under section 168 or section 189; or
 - (c) a request under clause 21(1) of Schedule 1 for a change to be made to a plan.
- (2) If the local authority wants to give authority to 1 person, it may do so only if the person is accredited.
- (3) If the local authority wants to give authority to a group of persons that has a chairperson, it may do so only if the chairperson is accredited.
- (4) If the local authority wants to give authority to a group of persons, whether or not the group has a chairperson, it may do so only if over half of all the persons are accredited.
- (5) The applicant has the right to decide whether the hearing authority shall be made up of authorised councillors, or commissioners, or a combination of both.

[Exp. Note: This gives the applicant the choice of hearing members.]

42 Protection of sensitive information

- (1) A local authority may, on its own motion or on the application of any party to any proceedings or class of proceedings, make an order described in subsection (2) where it is satisfied that the order is necessary—
 - (a) To avoid serious offence to tikanga Maori or to avoid the disclosure of the location of waahi tapu; or

[Note: what do we do about this? It does not apply to the Environment Court.]

PART V

STANDARDS, POLICY STATEMENTS, AND ~~PLAN-MANUALS~~

National Environmental Standards

43 Regulations prescribing national environmental standards.

43A National environmental standards must be endorsed by Parliament's Regulatory Review Committee.

(1) Before being prescribed or implemented or included in any ~~plan-manual~~ or proposed ~~plan~~ manual any national environmental standard shall be referred to the Regulatory Review Committee to be assessed against the following criteria:

- (i) the intelligibility of the standard;
- (ii) the legality of the standard in terms of the Act. (vires the RMA);
- (iii) the net public benefit gained from implementing the standard;
- (iv) whether the standard is in accordance with the general objects and intentions of the RMA;
- (v) whether the standard trespasses unduly on personal rights and liberties;
- (vi) whether the standard appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made;
- (vii) whether the science on which the standard is based has been subject to extensive peer review by independent experts and in particular, if the standard has been derived from the application of computer models whether the outcomes have been tested against measured outcomes in the field.

[Exp Note: This means that RMA regulations must be tested before being inflicted on the public. The present RRC is not properly equipped to do this job but the current review provides an opportunity to make the necessary changes. See Appendix C.]

45 National standards subject to review at any time.

(1) Anyone, at any time can apply to the Environment Court or to the Environmental Protection Agency seeking the Court of Agency to direct the Regulatory Review

Committee to reassess the science, technology and knowhow supporting the standard to ensure the standard reflects the current state of knowledge in the field.

(2) The standing of any ~~plan~~-manual or proposed ~~plan~~ manual shall be of no relevance to the Court or Agency when making this decision.

(3) The extent or degree of consultation shall also be of no relevance to the Court or Agency when making this decision.

[Exp Note: We cannot wait to go through a several year process to introduce new science, new technology, or new knowledge.]

Regional Plans-Manuals

~~New Zealand Coastal Policy Statements and Regional Coastal Policy Plans~~ Manuals.

~~64—Preparation of Regional Coastal Plans~~

[Exp Note: The coastal policy statements can guide the regional plan but we have far too many plans and there is no need for this separate document.]

66 Matters to be considered by regional council

(3) In preparing or changing any regional ~~plan~~ manual a regional council must not have regard ~~to trade competition~~ to any effects on social, economic, aesthetic, and cultural conditions which may arise as a result of trade or business competition, including competition based on price, innovation, location, scale, or term, or as a result of any re-distribution of expenditure or investment arising from any business or trading activity.

OR

(a) have regard to trade, occupation or business competition, including competition based on price, innovation, location, scale, or term and to any ancillary effects (including social, economic, aesthetic, and cultural effects on any person or persons) that might arise from trade competition.

67 Contents of regional ~~Plans~~ manuals.

(2) A regional ~~plan~~ manual may state –

(b) the methods, other than rules, for implementing the policies for the region; and in particular the use of tradeable rights as a means of allocating natural and physical resources such as water.

70B Application to climate change of rules relating to discharge of greenhouse gases:

(c) and shall recognise at all times that carbon dioxide is neither a contaminant nor a pollutant.

(d) and shall recognise that “renewable energy sources” may or may not emit more or less greenhouse gases than fossil fuels and other non-renewable energy sources.

[Exp Note: Just introducing some good science.]

District Plans-Manuals

73 Preparation and Change of District Plans Manuals.

(1) There shall at all times be one district ~~plan~~-manual for each district prepared by the territorial authority in the manner set out in the First Schedule.

(2) There shall at any time be no more than one proposed ~~plan~~-manual affecting any single property within each district, or territorial section of a district, prepared by the territorial authority in the manner set out in the First Schedule.

(3) Section 73(2) does not restrain the number of proposed private ~~plan~~-manual changes which can be received or accepted by a territorial authority and does not apply to a variation proposed by council to implement a necessary public work in the manner set out in the First Schedule.

(3) A district ~~plan~~-manual can only be changed by a privately requested ~~plan~~-manual change if the district ~~plan~~-manual, or the relevant part or section of the district ~~plan~~-manual is operative.

(4) A proposed district ~~plan~~-manual must be made operative, or abandoned, within two years of being published as a proposed ~~plan~~-manual.

74 Matters to be considered by a territorial authority.

(3) In preparing or changing a district ~~plan~~-manual a territorial authority must not have regard to trade competition, to any effects on social, economic, aesthetic, and cultural conditions which may arise as a result of trade or business competition, including competition based on price, innovation, location, scale, or term, or as a result of any re-distribution of expenditure or investment arising from any business or trading activity.

78 Contents of district Plan-manuals

(3) A district ~~plan~~manual must give effect to:

- (a) any national policy statement, and.
- ~~(b) any New Zealand Coastal Policy statement.~~
- (c) ~~any Regional Policy Statement.~~

(3A) A district manual must not be inconsistent with any Regional Policy Statement.

78(B) Consolidated planning framework.

[Exp. Note: as proposed by Northland Regional Council.]

(1) All the local authorities in a designated region (including the regional council) may put in place a consolidated planning framework that meets the requirements of the Region's

- regional policy statement
- The regional plans
- The district plans.

[Expl Notes:

(a) the suites of operative plans in a region represent a major investment in both economic and social capital. Any move to put in a place a CPF would have to be underpinned by a mechanism that protects that investment. To this end a new section 78(B)2 should be added which allows for all the synergies to be identified. The first schedule would only be used for the major variations which are identified.

(b) The actual form of the CPF would be determined by councils. There would be elements of the framework which would remain the domain of individual councils .e.g. structure plans etc.]

79 Review of policy statements and ~~plans~~ manuals.

(1) Every regional council shall commence a ~~full~~ review of its regional policy statement, and each of its regional manuals, not later than 10 years after the statement or manual became operative.

(2) Every territorial authority shall commence a ~~full~~ review of its district plan not later than 10 years after the plan became operative.

(3) If, after reviewing a policy statement or plan under this section, a regional council or territorial authority considers—

(a) ~~That the statement or plan requires change or replacement, it shall change or replace the statement or plan in the manner set out in Schedule 1 and this Part.~~ That the statement or manual can remain without change or replacement, it shall publicly notify that statement or manual as if it were a proposed policy statement or plan in the manner set out in the First Schedule.

(b) ~~That the statement or plan can remain without change or replacement, it shall publicly notify that statement or plan as if it were a proposed policy statement or plan in the manner set out in Schedule 1 and this Part.~~ That the statement or plan requires change or replacement, it shall change or replace the statement or plan in the manner set out in Schedule 1 and this Part.

[Exp. Note; these are simply reversed, in order to encourage councils to roll over their manuals.]

(4) When a regional council or territorial authority is reviewing a policy statement or ~~plan manual~~, it ~~shall~~ may review all sections of, and all changes to, the policy statement or plan regardless of when those sections or changes became operative.

(5) A policy statement or plan shall not cease to be operative by virtue of being due for review or while it is being reviewed.

(6) The obligations of each regional council and territorial authority under this section are in addition to its duty to monitor under section 35.

85. Compensation not payable in respect of certain controls on the effects of the use and development of land.

(1) An interest in land shall be deemed not to be taken or injuriously affected by reason of ~~any~~ any provision in a ~~plan manual~~ unless otherwise provided for in this Act, and in particular as provided for in section 87 and Part VIII.

(2) Notwithstanding subsection (1), any person having an interest in land to which any provision or proposed provision of a ~~plan manual~~ or proposed ~~plan manual~~ applies, and who

considers that the provision or proposed provision would render that interest in land incapable of reasonable use, may challenge that provision or proposed provision on those grounds—

(a) In a submission made under Part [1](#) of the First Schedule in respect of a proposed ~~plan manual~~ or change to a ~~plan manual~~; or

(b) In an application to change a ~~plan manual~~ made under clause [21](#) of the First Schedule.

(3) Where, having regard to Part [3](#) (including the effect of section [9\(1\)](#)) and the effect of subsection [\(1\)](#), the Environment Court determines that a provision or proposed provision of a ~~plan manual~~ or a proposed ~~plan manual~~ renders any land incapable of reasonable use, ~~and or~~ places an unfair and unreasonable burden on any person having an interest in the land, the Court, on application by any such person to change a ~~plan manual~~ made under clause [21](#) of Schedule 1, may—

(a) In the case of a ~~plan manual~~ or proposed ~~plan manual~~ (other than a regional coastal ~~plan~~), direct the local authority to modify, delete, or replace the provision; ~~and~~

~~(b) In the case of a regional coastal plan, report its findings to the applicant, the regional council concerned, and the Minister of Conservation, which report may include a direction to the regional council to modify, delete, or replace the provision.~~

(5) In subsections (2) and (3) a “provision of a ~~plan manual~~ or proposed ~~plan manual~~ ~~does not include~~ includes a designation or heritage order or a requirement for a designation or heritage order.

86A Compensation payable when land or rights in land are taken for public benefit.

(1) An interest in land shall be deemed to be taken or injuriously affected by reason of a ~~any~~ provision in a ~~plan manual~~ or proposed ~~plan manual~~ which takes or injuriously effects land when such a taking or injurious affect is imposed by a ~~plan manual~~ or proposed ~~plan manual~~ to provide a public benefit independent of any application for a proposed use or development of the land and has the effect of reducing the fair market value of the property, or any interest therein. In this situation the owner of the property shall be paid just and appropriate compensation.

(2) Just and appropriate compensation shall be equal to the reduction in the fair market value of the affected property interest resulting from enactment or enforcement of the provision of

the plan manual or proposed plan manual as of the date the owner makes written demand for compensation under this act.

(3) Subsection (1) shall not apply to land use regulations:

(a) restricting or prohibiting activities commonly and historically recognized as public nuisances under common law. This subsection shall be construed narrowly in favor of a finding of compensation under this act;

(b) restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes, health and sanitation regulations, solid or hazardous waste regulations, and pollution control regulations;

(c) to the extent the land use regulation is required to comply with New Zealand law; or

(d) enacted prior to the date of acquisition of the property by the owner or a family member of the owner who owned the subject property prior to acquisition or inheritance by the owner, whichever occurred first.

(4) Just and appropriate compensation under subsection (1) of this act shall be due to the owner of the property if the land use regulation continues to be enforced against the property 180 days after the owner of the property makes written demand for compensation under this section to the public entity enacting or enforcing the land use regulation.

(5) For claims arising from land use regulations enacted prior to the effective date of this act, written demand for compensation under subsection (4) shall be made within two years of the effective date of this act, or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner of the property, whichever is later. For claims arising from land use regulations enacted after the effective date of this act, written demand for compensation under subsection (4) shall be made within two years of the enactment of the land use regulation, or the date the owner of the property submits a land use application in which the land use regulation is an approval criteria, whichever is later.

(6) If a land use regulation continues to apply to the subject property more than 180 days after the present owner of the property has made written demand for compensation under this act, the present owner of the property, or any interest therein, shall have a cause of action for compensation under this act in the circuit court in which the real property is located, and the present owner of the real property shall be entitled to reasonable attorney fees, expenses, costs, and other disbursements reasonably incurred to collect the compensation.

(7) A territorial authority may adopt or apply procedures for the processing of claims under this act, but in no event shall these procedures act as a prerequisite to the filing of a compensation claim under subsection (6) of this act, nor shall the failure of an owner of property to file an application for a land use permit with the local government serve as grounds for dismissal, abatement, or delay of a compensation claim under subsection (6) of this act.

(8) Notwithstanding any other state statute or the availability of funds under subsection (10) of this act, in lieu of payment of just and appropriate compensation under this act, the governing body responsible for enacting the land use regulation or ~~plan~~ manual provision may modify, remove, or chose not to apply the land use regulation or land use regulations or ~~plan~~ manual provisions to allow the owner to use the property for a use permitted at the time the owner acquired the property.

(10) Claims made under this section shall be paid from funds, if any, specifically allocated by the territorial authority for payment of claims under this act. Notwithstanding the availability of funds under this subsection, a territorial authority shall have discretion to use available funds to pay claims or to modify, remove, or not apply a land use regulation or land use regulations or manual provisions pursuant to subsection (6) of this Act. If a claim has not been paid within two years from the date on which it accrues, the owner shall be allowed to use the property as permitted at the time the owner acquired the property.

(11) The remedy created by this Act is in addition to any other remedy under New Zealand statute and is not intended to modify or replace any other remedy.

[Expl. Note: This section should be self-explanatory. The amendment is based on the legislation endorsed by a Citizens' referendum in Oregon.]

PART VI

RESOURCE CONSENTS

92 Further information, or agreement, may be requested.

A consent authority may, at any reasonable time before the hearing of an application for a resource consent or before the decision to grant or refuse the application (if there is no hearing), by written notice, request the applicant for the consent to provide further information relating to the application, and which assists the consent authority in considering the application and forming opinions under Sections 94 and 104.

[Exp. Note – there should be no requests for information relating to matters inside an “applicant’s black box” of equipment and machinery. A resource consent is not an excuse for an analysis of a technology other than the adverse effects on the environment of that technology.]

93 When public notification of consent applications is required

- (1) A consent authority must notify an application for a resource consent unless—
- (a) the application is for a controlled activity; or
 - (b) the consent authority is satisfied that the adverse effects of the activity on the environment will be minor; and
 - (c) the policy statement or manual includes policies or rules which allow non-notification for each class of consent within the policy statement or manual.

[Exp. Note: Many plans are silent on what should be notified and leave it to the applicant to make their own legal judgment by reading the Act and the whole plan.

The other approach is to reverse the presumption. I.e. applications need not be notified unless Same for 94. After consultation is supposed to have taken place during preparation of manuals. Why do we have to go through it all over again.]

94 When public notification of consent applications is not required

- (1) If notification is not required under section [93\(1\)](#), the consent authority must serve notice of the application on all persons who, in the opinion of the consent authority, may be adversely affected by the activity, even if some of those persons have given their written approval to the activity.
- (2) However, a consent authority is not required to serve notice of the application under subsection [\(1\)](#) if
- (a) all persons who, in the opinion of the consent authority, may be adversely affected by the activity, have given their written approval to the activity.

- (b) the persons who have not given their written approval to the activity –
 - (i) are not significantly or directly affected by the activity; or
 - (ii) are refusing to give approval to an activity which is not significantly different to the level of activity to their own current activity or activities; or
 - (iii) have refused to identify the reason for their withholding approval and to indicate means of avoiding, remedying, or mitigating those adverse effects.
 - (iv) have no standing under section 96.

[Exp. Note: This is an attempt to reduce the opportunity for a single “difficult” person to withhold approval without good reason and so forcing notification or greenmail. (ii) is an extension of the permitted baseline.]

[94A Forming opinion as to whether adverse effects are minor or more than minor

When forming an opinion, for the purpose of section 93, as to whether the adverse effects of an activity on the environment will be minor or more than minor, a consent authority—

- (a) must ~~may~~ disregard an adverse effect of the activity on the environment if the ~~plan~~ manual permits an activity with that effect, unless;
 - (i) the ~~plan~~ manual does not provide for a permitted activity or activities from which a reasonable comparison of adverse effect can reasonably be drawn;
 - (ii) the information supporting the application and describing any hypothetical and non-fanciful development under a relevant permitted activity, is not sufficient to allow for an adequate comparison of adverse effects;
 - (iii) the permitted activity with which the proposal might be compared as to adverse effect is so different in kind or in purpose within the ~~plan~~ manual’s framework that the permitted baseline ought not to be invoked;
- (b) for a restricted discretionary activity, must disregard an adverse effect of the activity on the environment that does not relate to a matter specified in the ~~plan manual~~ or proposed plan as a matter for which discretion is restricted for the activity; and
- (c) must disregard any effect on a person who has given written approval to the application; and
- (d) must not have regard to any effects on social, economic, aesthetic, and cultural conditions which may arise as a result of trade or business competition, including competition

based on price, innovation, location, scale, or term, or as a result of any re-distribution of expenditure or investment arising from any business or trading activity.

{Exp. Note: We were led to believe that “May” really meant “Must” but in the case I brought Judge Newhook finally concluded that the test was optional and hence a council could do the test and then simply ignore the findings if they did not suit. This amendment includes some tests which have been presented as reasons for saying May rather than Must. But surely optional law is bad law. This amendment says “Must – unless ...”}

94B Forming opinion as to who may be adversely affected

- (1) Subsections [\(2\) to \(4\)](#) apply when a consent authority is forming an opinion, for the purpose of section [94\(1\)](#), as to who may be adversely affected by the activity.
- (2) The consent authority must have regard to every relevant statutory acknowledgement, within the meaning of an Act specified in Schedule [11](#), made in accordance with the provisions of that Act.
- (3) A person—
 - (a) ~~must~~ may be treated as not being adversely affected if, in relation to the adverse effects of the activity on the person, the ~~plan~~ manual permits an activity with that effect; or
 - (b) in relation to a controlled or restricted discretionary activity, must not be treated as being adversely affected if the adverse effects of the activity on the environment do not relate to a matter specified in the ~~plan manual~~ or ~~proposed plan~~ as a matter for which—
 - (i) control is reserved for the activity; or
 - (ii) discretion is restricted for the activity; or
 - (c) must not be treated as being adversely affected if it is unreasonable in the circumstances to seek the written approval of that person, or
 - (d) must not be treated as being adversely affected if the proposed activity generates no more adverse effects than the activities currently on that person’s own land.
- (4) In forming the opinion as to who may be adversely affected by an activity the consent authority must not have regard to any effects on social, economic, aesthetic, and cultural

conditions which may arise as a result of trade or business competition, including competition based on price, innovation, location, scale, or term, or as a result of any re-distribution of expenditure or investment arising from any business or trading activity.

(4) ~~However, the holder of a customary rights order must be treated as being adversely affected if, in the opinion of the consent authority, the grant of a resource consent may adversely affect a recognised customary activity carried out in accordance with section [17A\(2\)](#).~~

[Exp Note: These amendments are consequent to earlier ones.]

95 Time limit for notification

(a) If an application for a resource consent is required to be publicly notified or notice of the application is required to be served on any person, that notice must be given or served within 10 working days of the date the application is first lodged.

(b) If the consent authority is late in serving such notice then the consent authority must pay all the costs associated with the notification, including the costs of any hearing arising out of notification.

Submissions on Applications

96 Making of submissions

(1) The following persons may make submissions to a consent authority about an application for a resource consent:

(a) if the application is publicly notified in accordance with section [93](#) or section [94C](#), any person who is:

(i) adversely affected by the proposal, or

(ii) has an interest in the proposal greater than the public generally.

(b) if notice of the application is served under section [94\(1\)](#), any person served with the notice of the application.

[Exp. Note: This reintroduces Standing – I hope.]

(2) A submission must be in the prescribed form and served on the local authority, either by hand, by mail or by email, and be accompanied by the appropriate fee.

(3) A submission may state whether it is in support of, or in opposition to, the application or is neutral.

(4) A person who makes a submission shall serve a copy of it on the applicant as soon as reasonably practicable after serving the submission on the consent authority.

104 Consideration of applications

(1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to—

- (a) any actual and potential effects on the environment of allowing the activity; and
- (b) any relevant provisions of—
 - (i) a national policy statement;
 - ~~(ii) a New Zealand coastal policy statement;~~
 - (ii) a regional policy statement or proposed policy statement
 - (iii) any part of a proposed regional policy statement given weight by a decision of the Regulatory Review Committee of Parliament;
 - ~~(iv) a plan manual or proposed plan~~
 - (v) any part of a proposed manual given weight by the Regulatory Review Committee of Parliament under section; and
- (c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

[Exp Note: This allows for urgent changes to be given some weight immediately, after following the RRC process.]

(2) When forming an opinion for the purposes of subsection (1)(a), a consent authority shall disregard an adverse effect of the activity on the environment if the ~~plan manual~~ permits an activity with that effect unless:

- (i) the manual does not provide for a permitted activity or activities from which a reasonable comparison of adverse effect can reasonably be drawn.
- (ii) the information supporting the application and describing any hypothetical and ~~non-fanciful~~ (?) development under a relevant permitted activity, is not sufficient to allow for an adequate comparison of adverse effects.

(iii) the permitted activity with which the proposal might be compared as to adverse effects is so different in kind or in purpose within the manual's framework that the permitted baseline ought not to be invoked.

(2A) When considering an application affected by section [124](#), the consent authority must have regard to the value of the investment of the existing consent holder.

(3) A consent authority must not—

(a) have regard to ~~trade competition~~ any effects on social, economic, aesthetic, and cultural conditions which may arise as a result of trade or business competition, including competition based on price, innovation, location, scale, or term, or as a result of any re-distribution of expenditure or investment arising from any business or trading activity, when considering an application:

(b) when considering an application, have regard to any effect on a person who has given written approval to the application:

(c) grant a resource consent contrary to—

(i) section [107](#) or section [107A](#) or section [217](#):

(ii) an Order in Council in force under section [152](#):

(iii) any regulations:

~~(iv) a Gazette notice referred to in section [26\(1\)](#), [\(2\)](#), and [\(5\)](#) of the [Foreshore and Seabed Act 2004](#):~~

(d) grant a resource consent if the application should have been publicly notified and was not.

(4) Subsection [\(3\)\(b\)](#) does not apply if a person has given written approval in accordance with that paragraph but, before the date of the hearing (if a hearing is held) or otherwise before the determination of the application, that person gives notice in writing to the consent authority that the approval is withdrawn.

(5) A consent authority may grant a resource consent on the basis that the activity is a controlled activity, a restricted discretionary activity, a discretionary activity, or a non-complying activity, regardless of what type of activity the application was expressed to be for.

(1) When considering an application for a discharge permit or coastal permit to do something that would otherwise contravene section 15 or section 15B relating to the discharge into air of greenhouse gases, a consent authority must not have regard to the effects of such a discharge on climate change, except to the extent that the use and development of **renewable energy** enables a reduction in the discharge into air of greenhouse gases, either—

- (a) in absolute terms; or
- (b) relative to the use and development of non-renewable energy by the applicant.

(2) If the application does not involve renewable energy a consent authority must not consider the effects of greenhouse gases on climate change.

(3) Decision makers shall recognise that **renewable energy sources** may or may not emit more or less greenhouse gases than fossil fuels and other non-renewable energy sources, and that each application shall be assessed on its overall merits.

[Exp. Note: I hope that (b) resolves the anomaly where the High Court appears to have decided that the Act does not mean what we thought it meant, and that 3 addresses the fact that Ngawha generates more CO2 per kwh than a combined-cycle gas generator.]

107A Restrictions on grant of resource consents

~~(1) A consent authority must not grant an application for a resource consent to do something that will, or is likely to, have a significant adverse effect on a recognised customary activity carried out in accordance with section 17A(2), unless written approval is given for the proposed activity by the holder of the relevant customary rights order.~~

~~(2) In determining whether a proposed activity will, or is likely to, have a significant adverse effect on a recognised customary activity, a consent authority must consider the following matters:~~

108 Conditions of resource consents

(1) Except as expressly provided in this section and subject to any regulations, a resource consent may be granted on any condition that the consent authority considers appropriate, including any condition of a kind referred to in subsection (2).

(2) A resource consent may include any one or more of the following conditions:

..... (subclauses)

(10) A consent authority must not include a condition in a resource consent requiring a financial contribution unless—

(a) The condition is imposed in accordance with the purposes specified in the ~~plan manual or proposed plan~~ (including the purpose of ensuring positive effects on the environment to offset any adverse effect); and

(b) The level of contribution is determined in the manner described in the ~~plan manual. or proposed plan.~~

(11) A consent authority must not include a condition in a resource consent which is not clearly and evidentially derived from a provision in the manual or in the Act.

120 Right to appeal

(1) Any one or more of the following persons may appeal to the Environment Court in accordance with section [121](#) against the whole or any part of a decision of a consent authority, ~~except a decision of the Minister of Conservation under section [119](#)~~, on an application for a resource consent, or an application for a change of consent conditions, or on a review of consent conditions:

(a) The applicant or consent holder;

(b) Any person who made a submission on the application or review of consent conditions.

(2) This section is in addition to the rights provided for in sections [357A](#), [357C](#), and [357D](#) (which provide for objections to the consent authority).

121 Procedure for appeal

(1) Notice of an appeal under section [120](#) shall be in the prescribed form and shall—

(a) State the reasons for the appeal and the relief sought; and

(b) State any matters required by regulations; and

(c) Be lodged with the Environment Court and served on the consent authority whose decision is appealed within 15 working days of notice of the decision being received in accordance with this Act.

(2) The appellant shall ensure that a copy of the notice of appeal is served on every person referred to in section [120](#) (other than the appellant) within 5 working days of the notice being lodged with the Environment Court, or be posted on an **internet site** in which case every person referred to in section 120 (other than the appellant) need be served only with a notice of the web site address, with advice that a hard copy will be provided on request.

~~(3) Where a notice for an inquiry is lodged with the Environment Court in relation to a recommendation of a hearing committee on a restricted coastal activity under section [118](#), the appellant shall ensure that a copy of that notice is served on the Minister of Conservation on the day the notice is lodged.~~

[Exp. Note: The addition to (2) is part of a group designed to reduce paperwork by making more use of internet and email processes.]

Decisions on proposals of national significance

[Exp. Note: This is outside the scope of this report. See Maurice Williamson.]

PART 10

SUBDIVISIONS AND RECLAMATION

220 Condition of subdivision consents

(1) Without limiting section [108](#) or any provision in this Part, the conditions on which a subdivision consent may be granted may include any one or more of the following:

...

(d) A condition that provision be made to the satisfaction of the territorial authority for the protection of the land or any part thereof, or of any land not forming part of the subdivision, against erosion, subsidence, slippage, or inundation from any source (being, in the case of land not forming part of the subdivision, subsidence, slippage, erosion, or inundation arising or likely to arise as a result of the subdividing of the land the subject of the subdivision consent), or require the applicant to indemnify Council against any claims against Council which may be made as a result of erosion, subsidence, slippage, or inundation of the applicant's land arising from the subdivision:

(4) A consent authority must not include a condition in a resource consent which is not clearly and evidentially derived from a provision in the manual or in the Act.

[Exp Note: Some councils refuse to allow people to “contract out” of liability claims. Para (4) attempts to address the problem of invented conditions based on whim. This would be classic RMA Ombudsman territory, because these are frequently imposed before a hearing – by threat.]

PART XI

ENVIRONMENT COURT.

294A – Security for costs

(1) The Environment Court ~~does not have the power to~~ may order a party to give security for costs.

~~(2) Subsection (1) overrides any other enactment relating to security for costs.~~

Fees.

[Exp. Note: these are intended to introduce a “scale of charges” and are introduced here rather than in the schedule where they belong, for convenience.]

- (i) The fee for reference to the court by a landowner or applicant is \$55.
- (ii) The fee for a reference by another local authority or other government department is \$1,000. (This might discourage over enthusiastic Regional Councils from challenging so many Council consents).
- (iv) The fee for an objector’s appeal, or a 274 party, to a consent is \$2,000.

[These will be highly contentious but the idea of different charges is worth considering.]

PART XII

DECLARATIONS, ENFORCEMENT AND ANCILLARY POWERS

332 Power of entry for inspection

(1) Any enforcement officer, ~~specifically authorised in writing by any local authority or consent authority to do so, who holds both a general warrant of appointment and a specific written authorisation in writing~~ by any local authority or consent authority to do so, may at all reasonable times go on, into, under, or over any place or structure, except a dwellinghouse, for the purpose of inspection to determine whether or not—

- (a) This Act, any regulations, a rule of a ~~plan~~ manual, a resource consent, section 10 (certain existing uses protected), or section 10A (certain existing activities allowed), or section 20A (certain lawful existing activities allowed) is being complied with; or
 - (b) An enforcement order, interim enforcement order, abatement notice, or water shortage direction is being complied with; or
 - (c) Any person is contravening a rule in a proposed ~~plan~~ manual in a manner prohibited by any of sections 9, 12(3), 14(2), or 15(2); or
 - ~~(d) any control imposed under Schedule 12 on a recognised customary activity is being complied with.~~
- (2) For the purposes of subsection (1), an enforcement officer may take samples of water, air, soil, or organic matter.
- (2A) Where a sample is taken under subsection (2), an enforcement officer may also take a sample of any substance that the enforcement officer has reasonable cause to suspect is a contaminant of any water, air, soil, or organic matter.
- (3) Every enforcement officer who exercises any power of entry under this section shall produce for inspection his or her warrant of appointment and his or her specific written authorisation upon initial entry and in response to any later reasonable request.
- (4) If the owner or occupier of a place subject to inspection is not present at the time of the inspection, the enforcement officer ~~shall~~ must leave in a prominent position at the place or attached to the structure, a written notice showing the date and time of the inspection and the name of the officer carrying out the inspection.
- (5) An enforcement officer may not enter, unless the permission of the landowner is obtained, any land which any other Act states may not be entered without that permission.
- (6) Any enforcement officer exercising any power under this section may use such assistance as is reasonably necessary.
- (7) Each specific authorisation required under this section must be signed by the CEO of Council and a councillor, or, in the event of the absence of the CEO, the Deputy CEO and a Councillor, or two councillors. In the event that neither the CEO or Deputy or any Councillors are available then the authority must be obtained from a Judge of the District Court, or any duly authorised Justice or Registrar following the procedures described in part 334 of the Act.

(8) Officers intending to enter any place or vehicle to collect evidence relating to a crime or offence against this Act which is punishable by imprisonment must secure a warrant signed by a District Court Judge or any duly authorised Justice or Registrar.

(9) It is the duty of staff, before entering private property, whether they are there for the purposes of inspection (s332) or for the purposes of survey (s333), or for or for the purposes of search and collection of evidence, (sections 334, 335) to make themselves fully informed of their duties and obligations under the Act and of the rights of the landowner.

[Exp. Note: This addresses a major abuse of powers of entry. Many officers deliberately avoid making appointments so they do not have to deal with the landowner.]

333 Power of entry for survey

(1) For any purpose connected with the preparation, change, or review of a policy statement or manual, any warranted enforcement officer ~~specifically~~ authorised in writing by any local authority or consent authority to do so, may do all or any of the following:

- (a) Carry out surveys, investigations, tests, or measurements;
- (b) Take samples of any water, air, soil, or vegetation;
- (c) Enter or re-enter land (except a dwellinghouse) —
at any reasonable time, with or without such assistance, vehicles, appliances, machinery, and equipment as is reasonably necessary for that purpose.

(1A) Subsection (1) applies for the purpose of assessing the effects on the environment of a recognised customary activity.

(2) Reasonable written notice shall be given to the occupier of land to be entered under subsection (1) —

- (a) That entry on to the land is authorised under this section:
- (b) Of the purpose for which entry is required:
- (c) How and when entry is to be made.

(3) Every enforcement officer who exercises any power of entry under this section shall produce for inspection his or her warrant of appointment and written authorisation upon initial entry and in response to any later reasonable request.

(7) Each specific authorisation required under this section must be signed by the chief executive of Council and a councillor, or, in the event of the absence of the chief executive, the deputy chief executive and a councillor, or two councillors.

333A Information collected for one purpose not to be used for another.

Any officer of the Crown or of a local Authority who enters private property for whatever reason must not use information collected during that entry for any other reason, other than to apply for a further warrant and authorisation as necessary.

[Exp Note: this simply clarifies a point of law]

FIRST SCHEDULE.

***PREPARATION, CHANGE, AND REVIEW OF POLICY STATEMENTS
AND PLANS-MANUALS***

2 Preparation of proposed policy statement or plan

(1) The preparation of a policy statement or ~~plan~~ manual shall be commenced by the preparation by the local authority concerned of a proposed policy statement or ~~plan~~ manual.

~~(2) A proposed regional coastal plan must be prepared by the regional council concerned in consultation with—~~

~~(a) the Minister of Conservation; and~~

~~(b) iwi authorities of the region; and~~

~~(c) the board of any foreshore and seabed reserve in the region.~~

3 Consultation

(1) During the preparation of a proposed policy statement or ~~plan~~ manual, the local authority concerned shall consult—

(a) The Minister for the Environment; and

(b) Those other Ministers of the Crown who may be affected by the policy statement or plan; and

(c) Local authorities who may be so affected; and

- (d) The tangata whenua of the area who may be so affected, through iwi authorities; and
 - (e) the board of any foreshore and seabed reserve in the area. (?)
 - (f) any landowner or landowners whose land may be subject a heritage order or designation or other “taking”.
- (2) A local authority may consult anyone else during the preparation of a proposed policy statement or ~~plan~~ manual.
- (3) Without limiting subclauses [\(1\)](#) and [\(2\)](#), a regional council which is preparing a regional ~~coastal plan~~ manual shall consult—
- (a) The Minister of Conservation generally as to the content of the plan; ~~and with particular respect to those activities to be described as restricted coastal activities in the proposed plan~~; and
 - (b) The Minister of Transport in relation to matters to do with navigation and the Minister's functions under Parts [XVIII to XXVII](#) of the [Maritime Transport Act 1994](#); and
 - (c) The Minister of Fisheries in relation to fisheries management, and the management of aquaculture activities.
- (4) In consulting persons for the purposes of subclause [\(2\)](#), a local authority must undertake the consultation in accordance with section [82](#) of the [Local Government Act 2002](#).

[Exp. Note: I seek guidance re the above.]

6 Making submissions

- (1) Any person, including the local authority in its own area, may, in the prescribed form, make a submission to the relevant local authority on a proposed policy statement or ~~plan~~ manual that is publicly notified under clause [5](#).
- (2) The prescribed form shall include the option of using email to make the submission and for the submitter to nominate that all future communications be in email; and
- (3) The local authority shall set up systems and information exchanges which facilitate the use of the local authority web page and email addresses for the exchange of notices and submissions between submitters and between the submitters and the local authorities.

7 Public notification of submissions

- (1) A local authority shall publicly notify, through a prominent advertisement, and on its web site —
 - (a) The availability of a summary of all decisions requested by persons making submissions on a proposed policy statement or ~~plan~~ manual; and
 - (b) Where the summary of decisions and the submissions can be inspected, including the local authority's web site; and
 - (c) The date on which further submissions close, which date shall not be less than 20 working days after the date of notification; and
 - (d) The address for service of the local authority, including the local authority's email address.
- (2) A local authority shall send a copy of the public notice advising of the summary of all decisions requested by persons making submissions to all persons who made submissions.

[Exp Note: Further attempts to save the forests!]

8 Further submissions

Any person, including the local authority in its own area, may, in the prescribed form, which shall include an email format as a option, make a further submission to the relevant local authority, but only in support of or in opposition to those submissions made under clause [6](#) on a proposed policy statement or ~~plan~~ manual.

8A Service of further submissions

Where a person makes a further submission under clause [8](#), that person shall, within 5 working days after making the submission to the local authority, serve a copy of the further submission on the person, either by mail or by email, who made a submission under clause [6](#) to which the further submission relates.

16A Variation of proposed policy statement or ~~plan~~ manual

- (1) A local authority may initiate variations (being alterations other than those under clause [16](#)) to a proposed policy statement or ~~plan~~ manual, or to a change,
 - (a) at any time before the approval of the policy statement or ~~plan~~ manual.

(b) except that a variation cannot be made to policy statement or manual within two years of such policy statement or manual becoming operative unless the variation is required to implement a designation or other means of providing for a public good and such a variation has been approved by the Regulatory Review Committee.

(2) The provisions of this Schedule, with all necessary modifications, shall apply to every variation as if it were a change.

[Exp. Note: Provides for emergency changes after due process.]

17 Final consideration of policy statements and ~~plans~~ manuals. ~~other than regional coastal plans~~

(1) A local authority shall approve a proposed policy statement or ~~plan manual (other than a regional coastal plan)~~ once it has made amendments under clause [16](#) or variations under clause [16A](#) (if any).

(1A) However, a local authority may approve a proposed policy statement or ~~plan manual (other than a regional coastal plan)~~ in respect of which it has initiated a variation.

...

APPENDIX A

The Constitutional Context of a Regional Policy Statement or manual and District manual. (as presented to Whakatane District Council for inclusions as Chapter One of their proposed District Plan.)

1.1 APPROACH TO AND APPLICATION OF THIS DISTRICT PLAN

Whakatane District Council is a local authority within the meaning of the Local Government Act 2002 (LGA). That Act sets out in Section 10 that the purpose of local government is –

- (a) to enable democratic local decision-making and action by, and on behalf of, communities; and
- (b) to promote the social, economic, environmental, and cultural well-being of communities, in the present and for the future.

The Resource Management Act 1991 (RMA) requires District Plans to be developed and to take effect within a *legal system*¹.

That legal system comprises among other things -

¹ Legislation Advisory Committee Guidelines, page 44. [hereafter LAC Guidelines]

- * the Bill of Rights Act 1990 (in particular) and other relevant Acts – eg the Property Law Act 1952.
- * fundamental common law principles²;
- * principles of administrative law³; and
- * principles and rules of equity.

The meaning of an Act must be ascertained from its text and in the light of its purpose.⁴

The *purpose* or *objects* of the Act provide particular clarity to the meaning and interpretation of specific clauses in an Act so that Acts will work as Parliament intended them to.⁵

In addition, interpretation is required to give effect to the *fundamental values* of our legal system.⁶

Note, in particular, that when interpreting Acts there is a duty *to ensure that the rights of the citizen are upheld*.⁷

Further meaning is clarified by reference to relevant common law principles.⁸

How a local authority exercises its powers is referenced in the LGA. Of particular significance are the following extracts:-

(a) s12(4): A territorial authority must exercise its powers under this section wholly or principally for the benefit of its district.

(b) s14(1): In performing its role, a local authority must act in accordance with the following principles:

A local authority should –

- (i) conduct its business in an open, transparent, and democratically accountable manner; and

² -ibid – page 46

³ Administrative law is:- ...

the law relating to governmental power

the body of general principles which govern the exercise of powers and duties by public authorities
the manner in which public authorities must exercise their functions

Wade & Forsyth, Administrative Law, 9th ed, 2004

⁴ Section 5(1), Interpretation Act 1999

⁵ LAC Guidelines, page 69

⁶ LAC Guidelines, page 69

⁷ LAC Guidelines, page 75

⁸ LAC Guidelines, page 72

- (ii) give effect to its identified priorities and desired outcomes in an efficient and effective manner; and
- (iii) should make itself aware of, and should have regard to, the views of all in its community.

Other factors relating to interpretation may be referenced via the footnote below.⁹

1.2 SUMMARY

From the foregoing authorities it may be realised that there are very important principles that apply to the whole sequence of ‘preparation, implementation and administration’ (RMA s72) of district plans so that they may properly pursue and secure the purpose and intention of that Act.

Preparation of the district plan is arguably the most challenging responsibility because it is the stage that fashions the foundations that are at the root of either an effective and efficient plan – or conversely a plan that can precipitate economic, social and cultural decline and trigger significant controversy in a community.

Thus it is vital that, in the preparation of a plan, *rules are only made* when it is clear that all other ways of achieving the purpose of the RMA have been identified, properly analysed and found wanting for achieving appropriate pursuit of the purpose of that Act.

It is the s32 provision in the RMA (properly interpreted and applied) that provides the primary tool and discipline for making sure that rules are only contemplated and taken when they are absolutely necessary for achieving the purpose of the RMA. And in particular s32 must show beyond reasonable doubt that on balance the use of statutory powers is in the public interest.

It is such rigour that is at the very root of the principles necessary for the taking of regulatory powers as set out above in the examples extracted from the LAC Guidelines (and by reference to those Guidelines as a whole).

In that regard it must be noted that the principles contained in those LAC Guidelines are the benchmark reference for interpretation of the responsibilities that a local authority has for recording under s32 the reasons for justifying, forming and proposing a rule.

⁹ LAC Guidelines, page 67 to 69

Arguably, only in that way can a local authority demonstrate that it is administering effectively and efficiently its responsibilities in taking regulatory powers.

Thus a local authority must carry out a preliminary s32 analysis to justify *contemplating* the taking of a rule-making power. A local authority that advances a draft rule without that analysis breaches the principles of acting responsibly, reasonably and transparently; it also puts the community to significant disadvantage in grappling with submissions in an effective manner.

It is significant that Parliament chose to depart from the ‘centralist’ and ‘top-down’ approach to planning that preceded the RMA in the form of the Town and Country Planning Act. The purpose was clearly to enable the *particular circumstances* of a district or region to be primary ‘drivers’ in the formation of plans – the ‘bottom-up’ approach.

Thus, the task in this plan is to optimize the pursuit of the purpose of the RMA having particular regard for the particular circumstances in the district.

In the event that central government or regional government should advance requirements upon a district plan that are clearly not in the public interest for that district, then that district authority has a duty to assert that circumstance and represent the interests of its community to those authorities.

This introduction is considered necessary as an aid to public understanding of the principles giving rise to this Whakatane District Plan; the principles giving rise to its implementation and administration; and the principles underlying its interpretation.

So the application of proper statutory interpretations together with the applicable principles set out above provides a sound approach to identifying issues and associated objectives, policies and methods on the *approach* to a plan – and then provides appropriate bases for *administering* it.

Appendix B

(Footnote references underlined)

Footnote 1

LEGISLATION ADVISORY COMMITTEE GUIDELINES
Guidelines on Process and Content of Legislation
2001 edition and the 2003 Supplement
Legislation Advisory Committee May 2001

Note: These Guidelines will be amended from time to time. The latest version will be on the Internet at <http://www.justice.govt.nz/lac/index.html>.

LAC - Pg 44

“...Statutes are read as taking effect in a legal system, among all the other laws. Statutes are the superior law and prevail over the common law. But there is often doubt as to exactly how and whether a particular provision of a statute will mesh in or prevail over *existing* law.”

Footnote 2

LAC - Pg 46

“The following issues are discussed in this Chapter:

Part 1: Does the legislation comply with fundamental common law principles?”

Footnote 3

Wade & Forsyth, Administrative Law 9th Edition, Oxford 2004

“A first approximation to a definition of administrative law is to say that it is the law relating to the control of governmental power.” - Pg 4

“As a second approximation to a definition, administrative law may be said to be the body of general principles which govern the exercise of powers and duties by public authorities.” –

Pg 5

“...the law about the manner (emphasis in original) in which public authorities must exercise their functions, distinguishing function from structure and always looking for general principles.” - Pg 5-6

Footnote 4

Interpretation Act 1999, Section 5(1).

[Interpretation Act 1999](#)

[Part 2 Principles of interpretation \(s 5 to s 7\)](#)

5 Ascertaining meaning of legislation

- (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.
- (2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.
- (3) Examples of those indications are preambles, the analysis, a table of contents,

headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.

Compare: 1924
No 11 s [5\(j\)](#)

Footnote 5 & 6

LAC – Pg 69

“The purposive approach ensures that **Acts will be made to work as Parliament intended them to**, rather than being subjected to an artificially strict construction which could impede Parliament's will.

Nevertheless, it is important to note the limitations on the purposive approach. First, it is the text of the Act which is being interpreted, and words can only be stretched so far. Even the purposive approach does not allow words to be given meanings they cannot bear.⁷⁶

Secondly, the purposive approach needs to be balanced against, and sometimes reconciled with, the approach to interpretation which **gives effect to the fundamental values of our legal system**. We refer to this later.⁷⁷ Thirdly, it is important that the purposive approach only be used when it is quite clear what the parliamentary purpose is. It does not entitle interpreters to guess at purpose, or invent one of their own.⁷⁸”

⁷⁶ *Cutter v Eagle Star Insurance Co Ltd* [1998] 4 All ER 417 at 425.

⁷⁷ Below, under the heading ‘Values’

⁷⁸ *Chan Chi-hung v R* [1996] 1 All ER 914 at 922.

Footnote 7

LAC – Pg 75

“When interpreting Acts, a court owes a duty not just to Parliament to ensure that its intention is carried out, but also to society **to ensure that the rights of the citizen are upheld**. This consideration tempers the purposive approach.

Footnote 8

LAC – Pg 72

“*Common law*

The common law has a long history, and has shaped some of our most fundamental areas of law, including contract and tort. If statutes are enacted in those areas there is sometimes a question as to how significantly, if at all, they change the common law. While it has been authoritatively stated that it is only if the words of the statutory code are “of doubtful import” that one should seek assistance from the earlier common law,⁹⁴ it is in fact quite common for courts to interpret statutes as not departing from established **common law principles**. Thus, the Contractual Remedies Act 1979, which enacts an apparently simple code about misrepresentation and cancellation of contract for breach, has on several occasions being interpreted by the Court of Appeal as not disturbing established common law principles.⁹⁵ It is most important, however, to adopt this style of interpretation only after very careful consideration. Some Acts were passed to remedy defects in the common law, and it would be to stultify their purpose to hold that they perpetuated it. It is important always to familiarise

oneself thoroughly with the purpose of the Act; this may indeed have been to reform rather than preserve the common law.

.....

94 *Bank of England v Vagliano Bros* [1891] AC 107 at 144 and 145 per Lord Herschell.

95 For example, *Garratt v Ikeda* [2002] 1 NZLR 577 and *Thompson v Vincent* [2001] 3 NZLR 355.”

Footnote 9

LAC – Pg 67 - 69

Not attached – please see LAC Guidelines.

Additional references

1. In addition of particular interest is:

LAC - Part Pgs 73 – 74

“*Social, economic, and environmental context*”

Courts sometimes have regard to social, economic, and environment factors to better understand the purpose and intent of a statute.⁹⁹ This type of material can assist in a number of ways.

- An examination of the historical context prior to the passing of the Act may lead to a better understanding of the problem or mischief it was meant to remedy, and, consequently, of its purpose.
- It can be helpful to understand the current conditions in which the Act must continue to operate; this is particularly so of specialist statutes such as the Commerce Act 1986 and the Resource Management Act 1991.
- It may enable an interpreter to assess what the result of a particular interpretation is going to be. For example, when the Court of Appeal had to determine whether future earnings should be classified as matrimonial property it received evidence to enable it to understand the effects of such an interpretation on the relevant communities of interest.¹⁰⁰

Nevertheless, it has been said in relation to this sort of material, that theory and practice are not well-developed in this country; “the basis on which judges should receive extra-statutory contextual information ... presently remains elusive in New Zealand”.¹⁰¹”

99 See Sir Ivor Richardson, “The role of judges as policy makers” (1985) 15 VUWLR 46 at 51 and 52.

100 *Z v Z (No 2)* [1997] 2 NZLR 258. And see *Williams v Attorney-General* [1990] 1 NZLR 646 at 681.

101 Justice McGrath, “Reading legislation and Ivor Richardson” in Carter, D and Palmer, M (eds), *Roles and perspectives in the law: Essays in Honour of Sir Ivor Richardson* Victoria University Press, Wellington, 2002, at 617 and 618.”

2. Cabinet Manual 2001 – pg 69 Sec. 5.35

COMPLIANCE WITH LEGAL PRINCIPLES AND OBLIGATIONS

5.35 Ministers must confirm compliance with legal principles or obligations in a number of areas when bids are made for Bills to be included in the programme and priorities are awarded. In particular, Ministers must draw attention to any aspects that have implications for, or may be affected by:

- the principles of the Treaty of Waitangi;
- the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 or the Human Rights Act 1993;
- the principles in the Privacy Act 1993;
- international obligations;
- the guidelines contained in *LAC Guidelines: Guidelines on Process and Content of Legislation*, a publication by the Legislation Advisory Committee.

5.36 When a Bill is subsequently submitted to the Cabinet Legislation Committee for approval for introduction, the Minister is required to confirm in the covering submission that the draft Bill complies with the legal principles and obligations identified in paragraph 5.35. Ministers must also provide information on a range of other matters to ensure compliance with various public law standards (see the chapter on Bills in the Cabinet Office *Step by Step Guide* for details).

5.37 The Legislation Advisory Committee is a ministerial committee, established by the Minister of Justice. It has two main functions:

- **Providing guidance on the development of legislation:** The Legislation Advisory Committee produces guidance on issues that are fundamental to the development of legislation, such as proper processes and basic legal principles. The Committee updates and reissues guidelines from time to time.
- **Scrutinising Bills:** The Committee advises on these issues in relation to particular legislation, when requested to do so.

The Legislation Advisory Committee works independently and its views do not necessarily reflect those of the government of the day.

5.38 Government departments developing new legislation should consider at an early stage whether there are issues they should discuss with the Legislation Advisory Committee. It is preferable for the Committee to have the opportunity to comment on issues arising in relation to a Bill before it is introduced, although the Committee can and does also make submissions to select committees.

5.39 The Attorney-General is required to draw the attention of the House to any Bill that appears to be inconsistent with the rights and freedoms contained in the New Zealand Bill of Rights Act 1990. These issues should be identified at the earliest possible stage. The Ministry of Justice is responsible for examining all legislation for compliance with the Bill of Rights Act 1990 and advising the Attorney-General. The Crown Law Office examines Bills developed by the Ministry of Justice.

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APPENDIX C

The RMA Regulations Review Tribunal – the most important reform of all.

Background

The RMA was drafted and passed into legislation during a time of great hostility to central planning and control. Many of those involved had vivid memories of central planning under the Muldoon governments and were determined to finally lock that stable door.

Hence the Act devolved plan preparation and decision-making down to local government following the well accepted principle of subsidiarity – which holds that problems are best addressed at the level where the problems exist.

However, no one foresaw the extent to which the planners would prevail over the intentions of the legislators and how difficult it would prove for untrained staff to write RMA planning documents which were coherent and intelligible.

There is a strong economic thread running through the Act. In particular, section 32 requires that all objectives, policies, methods and rules be subject to a cost and benefit analysis in order to guarantee outcomes with a net public benefit.

The section may as well not exist, in spite of numerous attempts to strengthen the purpose and implementation of the section. This reflects a common view among ‘environmentalists’ that “you cannot put a price on the environment”. Planners receive no training in cost and benefit analysis and local bodies do not go out of their way to employ people with skills in this art.

Also published plans frequently contain whole sections which are *ultra vires* the Act.

The theory was that the process of submission and further submission would address such structural failings. However, most submissions come from landowners, or groups focusing on specific rules and zones, and so many of these deep structural failings are never subject to adequate scrutiny – or indeed may escape any scrutiny at all.

Communities then have to deal with plans which are clearly faulty but which have gained the “standing” of a plan that has survived this presumably rigorous process. Environment Court judges routinely advise advocates and witnesses “It is what the plan does say which counts – not what you think it should say.”

One Barrister has said “If a plan presumes that water flow up hill, then, in that district, we probably have to presume it does.” Remedying such errors can take years.

The costs imposed on communities by plans which are unintelligible, unlawful, and which fail to promote a net public benefit are immense. This is made even worse by the fact that plans are given considerable weight from the date of their publication.¹⁰

For example, the ARC is routinely attempting to enforce its Proposed Plan Change 6 by lodging objections and making decisions even though the Proposed Plan Change has not yet been to a single hearing, and even though at least three Barristers have made submissions strongly arguing that Plan Change 6 is completely *ultra vires*.

Such documents should not be imposed on communities without some check for their basic legality and constitutional integrity.

The costs have been massive.

Finally, the legislators never imagined it would take so many councils so long to achieve Operative Plans and Policy Statements. The result is that in some jurisdictions an application may be tested against ten or more documents in various stages of progress through the process.

In theory the Environment Court can address these failing in planning documents but this is an expensive and time-consuming process. Councils and the Courts should not have to deal with documents which are fundamentally flawed. The door should be locked long before the horse has bolted.

Finally, because each document is individually authored planning documents vary hugely even within regions.

The system is beginning to collapse under its own weight.

The Precedent of the Regulations Review Committee.

The Executive arm our central government generates regulations derived from Acts passed by Parliament. The preparation and implementation of such regulations is subject to scrutiny by a special committee of Parliament called *The Regulations Review Committee*.

The Standing Orders of the House of Representatives establish the powers and functions of the committee, which are:

- To scrutinise all regulations

¹⁰ They should not be, but they are.

- To consider draft regulations referred by a Minister of the Crown and report back to the Minister
- To examine regulation-making powers in bills before other committees
- To investigate complaints about the operation of regulations
- To conduct inquiries into any matters related to regulations.

The Committee may consider any matter relating to regulations and report on it to the house.

The Regulations Review Committee examines **all** regulations.

The grounds for referring a regulation to the house are, that the regulation:

- (a) Is not in accordance with the general objects and intentions of the statute under which it is made:
- (b) Trespasses unduly on personal rights and liberties:
- (c) Appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made:
- (d) Unduly makes the rights and liberties of persons dependent upon administrative decisions which are not subject to **review** on their merits by a judicial or other independent tribunal:
- (e) Excludes the jurisdiction of the courts without explicit authorisation in the enabling statute:
- (f) Contains matter more appropriate for parliamentary enactment:
- (g) Is retrospective where this is not expressly authorised by the empowering statute:
- (h) Was not made in compliance with particular notice and consultation procedures prescribed by statute:
- (i) For any other reason concerning its form or purport, calls for elucidation.

The ARC Proposed Plan Change 6 could probably be referred to the House by this committee on each and every one of these grounds – except possibly (d).

The Act which establishes *The Regulation Review Committee* defines a regulation as:

- (a) Regulations, rules, or bylaws made under an Act by the Governor-General in Council or by a Minister of the Crown:
- (b) An Order in Council, Proclamation, notice, Warrant, or instrument, made under an enactment that varies or extends the scope or provisions of an enactment:
- (c) An Order in Council that brings into force, repeals, or suspends an enactment:
- (d) Regulations, rules, or an instrument made under an Imperial Act or the Royal prerogative and having the force of law in New Zealand:
- (e) An instrument that is a regulation or that is required to be treated as a regulation for the purposes of the Regulations Act 1936 or Acts and Regulations Publication Act 1989 or this Act:
- (f) An instrument that revokes regulations, rules, bylaws, an Order in Council, a Proclamation, a notice, a Warrant, or an instrument, referred to in paragraphs (a) to (e).

This list is extensive and does not specifically exclude planning documents prepared under the Resource Management Act, and indeed proposed planning documents could possibly be captured by (e) above. However, the Centre's proposed reform should not depend on a ruling by a court or an administrative decision.

Also, the work-load involved in examining every planning document prior to publication would probably overload this existing Committee which is already busy dealing with scores of issues every year. (The Committee subjected 475 new sets of regulations to scrutiny last year.)

Furthermore, the proposed review of RMA documents probably needs specialised skills, and hence almost certainly requires the establishment of a new specialist committee, with access to scientific and economic advice. Such a tribunal could be called the RMA Regulatory Review Committee, and would report to the existing Parliamentary Regulations Review Committee.

The Proposal

Parliament should establish an RMA Regulatory Review Committee (the RRRC) with access to specialist advice in law drafting, public law, economic analysis, and risk analysis, as well as scientific and statistical advice where necessary as part of section 32 considerations).

All proposed RMA planning documents would be referred to the RRRC prior to publication, and could not be published without having been approved by the Regulation Review Committee as the parent organization.

The RRRC would not challenge those decisions properly made by District and Regional Councils, which are best made at the local level.

Its function would be to test proposed plans firstly against the following criteria:

- (i) their intelligibility. (i.e. well drafted).
- (ii) their legality. (*vires* the RMA)
- (iii) the quality of their section 32 analysis. (net public benefit)

The Tribunal would also, in conjunction with the Regulations Review Committee, test any proposed RMA document against the general criteria of the Regulations Review Committee, having particular regard to whether the document:

- (i) is not in accordance with the general objects and intentions of the statute under which it is made:
- (ii) trespasses unduly on personal rights and liberties:
- (iii) appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made:

The Tribunal would distribute its decisions and findings to councils so that those preparing planning documents would benefit from the inputs of both Committees.

A sound “template” or “templates” would emerge quite quickly and would be the result of evolution rather than so-called “intelligent design”.

This progress towards some measure of uniformity would address another major complaint from users of the RMA.

Limiting References to the Environment Court.

The next step in this proposed reform is to limit references to the Environment Court to matters relating to applications and use.

In other words any Appeals against a Proposed Plan would be lodged with the RRRC not with the Court.

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This would have several advantages in that the RRRC could look at a connected group of “appeals” relating to a single planning document as one case requiring a single decision. This would help maintain the integrity of planning documents.

At present the court has to deal with each reference as presented. The court tries to deal with connected matters by handing down “interim decisions” but this only delays the process and means that the

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