

1 August 2008

OPTIONS TO REFINE AND SIMPLIFY THE RESOURCE CONSENT PROCESS

Bill Loutit
James Hassall
Tim Fischer



Simpson Grierson

Barristers & Solicitors
Auckland & Wellington, New Zealand
www.simpsongrierson.com

CONTENTS

	PAGE
1. INTRODUCTION	1
2. WHERE DO ISSUES ARISE?	1
3. ASSUMPTIONS	2
4. PROCEDURE	2
Rejection of applications	2
Time taken for applications to proceed to council hearing	3
Notification	4
Payment of council processing fees	5
Filing fees.....	6
Scale of costs.....	7
Necessity for notices of reply	8
Standing	10
Continuation of proceedings by section 274 parties	11
Consent notices	13
Section 357 objections	14
Trade competition	16
5. SUBSTANTIVE MATTERS	17
Permitted baseline	17
Cumulative effects.....	20
Environmental compensation	20
Priority between applicants	21
The impact of the Woolley decision on restricted discretionary activities	22
Section 9(8).....	23
6. OTHER ISSUES	25
7. CONCLUSION	25

1. INTRODUCTION

- 1.1 Simpson Grierson has been asked to prepare this "Think-Piece" for the Ministry for the Environment suggesting options to refine, modify and simplify the resource consent process under the Resource Management Act 1991 (**RMA**).
- 1.2 The paper is not a comprehensive review of the RMA or those parts of the RMA related to resource consent processing. Nor, in having this paper prepared, is it an indication that the Ministry has immediate plans to amend the RMA.
- 1.3 Instead, this paper sets out a range of issues where, through experience of the day-to-day application of the RMA, it is considered that improvements to the RMA could be made.

2. WHERE DO ISSUES ARISE?

- 2.1 The RMA is frequently the target of complaints especially when it comes to the processing of applications for resource consent.
- 2.2 The Ministry for the Environment's *Resource Management Act: Two-yearly Survey of Local Authorities 2005/2006*¹ provides a range of statistical data on resource consent processing. It indicates that of the 51,768 applications processed in the 2005/2006 financial year, 73% were processed within the statutory time limits.
- 2.3 Of non-notified applications, 74% were processed within the statutory time frames but only 56% of those which were publically notified met the time limits and 60% of applications with limited notification. However, it is interesting to note that non-notified applications make up 94.4% of all applications. Publically notified applications constituted 4.1% of applications and 1.5% of applications received limited notification.
- 2.4 As well as arising from delays in processing applications, complaints, it can be safely assumed, arise where an application is declined or ends up in the Environment Court. The Ministry's survey indicates that only 0.69% of applications were declined in the 2005/2006 year and 1% of applications were appealed to the Environment Court. The level of dissatisfaction in relation to these issues appears to increase exponentially based anecdotally on the level of complaint.
- 2.5 From this information the conclusion can be drawn that increasing the efficiency and effectiveness of processes by local authorities will have the greatest impact on the implementation of the RMA and that increasing efficiency and effectiveness in Environment Court processes may have a positive impact on the level of complaint.
- 2.6 Issues arise in two broad areas: procedure and substantive matters.
- 2.7 In relation to procedure, the length of time taken to obtain a consent and the unwieldy, bureaucratic process that has to be gone through are key complaints.
- 2.8 In relation to substance, the interpretation of key provisions of the RMA by the Courts has created a complexity which is, at times, difficult to untangle.

¹ Published in March 2007 by the Ministry for the Environment.

- 2.9 These problems need to be addressed without undermining the environmental outcomes.

3. ASSUMPTIONS

- 3.1 Any particular approach to the RMA will have philosophical underpinnings and it is difficult to comment in a vacuum. For example, if public/community involvement is a key focus, then increased bureaucracy may be acceptable. If development is to be given a boost then a very simple structure in the RMA would be appropriate.
- 3.2 We have assumed a similar balance to that presently existing and have focused on suggestions for improving the current statute. Where an approach may have a flow-on effect, we have attempted to identify that.
- 3.3 Many of the "problems" with the RMA which capture attention are anecdotal but we have assumed there is some validity to them without obtaining empirical evidence.
- 3.4 In all cases, there is always the option of retaining the status quo. We have not stated this in each case but have focused on options involving change.

4. PROCEDURE

Rejection of applications

Statement of problem

- 4.1 The quality of applications is not uniformly of a high standard. If poor quality applications enter the system, they can impact on its efficiency. Section 88(3) enables councils to remove poor applications from the process but only within the first 5 days (or 10 days, if extended²). Anecdotally, the application of section 88(3) does not appear to be causing problems in councils with well developed document and information management systems. Smaller councils may have difficulty in being able to provide sufficient staff with relevant experience to make a judgement within the allowed timeframe on all applications as they come in the door. It may be the case that the person assessing an application for adequacy is not the same person who ends up undertaking the final assessment.
- 4.2 Difficulties have arisen for councils where they have rejected applications under a blanket policy without assessing the application for adequacy.³
- 4.3 There may also be a difficulty in determining whether an application should be rejected from the start or whether attempts should be made to remedy the application through requesting further information.⁴

² Sections 37 and 37A RMA give consent authorities or local authorities the power to extend time limits subject to certain conditions.

³ See *SMW Consortium Ltd v Tasman District Council* W034/06, 09/05/2006 (EC).

⁴ Under section 92 RMA.

Significance

- 4.4 In isolation this issue is not of great significance, however, it is one of many areas which, from councils' point of view, causes concern. This is especially so in meeting the statutorily imposed timeframes, particularly with larger-scale applications for consent.

Previous amendments to the RMA

- 4.5 The provision was introduced on 1 August 2003.

Options

- 4.6 Excluding the 5-day "rejection period" from the overall decision making period of 20 working days⁵ would assist councils in applying section 88(3).

- 4.7 This would obviously have the effect of extending the time period for assessing resource consent applications. However, the benefit in enabling greater attention to be given to consideration of the adequacy of applications and inadequate applications being culled from the system may help balance an extension in time.

Related issues

- 4.8 This is related to further information requests.

Time taken for applications to proceed to council hearing

Statement of problem

- 4.9 This is core to the perceived problems with the RMA. From the applicant's point of view, the times taken to process consents is excessive. One of the concerns for councils is that there is a one-size-fits-all approach to the time periods contained in the RMA.

- 4.10 A simple height to boundary infringement is given the same time to process as a complex industrial activity with a raft of issues not complying with the relevant plans and within the jurisdiction of both a regional and district council. In the second case, the issues may also be factually complex and require the input of a number of council officers with different specialities. Dealing with these matters is likely to take more time (even with the permitted extensions) than is allocated in the RMA.

- 4.11 A further point of delay is where an application is notified. In the industrial scenario mentioned in the paragraph above, it would not be surprising to receive a raft of submissions in both support and opposition, each raising issues which may suggest further information is required and certainly requiring further time in assessment on the part of the council officers.

- 4.12 An unrealistic expectation is created for applicants with complex proposals by having only one set of time limits. It is also likely that complex applications skew the monitoring results provided to the Ministry.

Significance

- 4.13 As already stated, the time pressure felt by councils and the time expectations held by applicants is of great significance to how the RMA works or is perceived to work.

Previous amendments to the RMA

- 4.14 These issues are dealt with in a raft of different RMA provisions which have not been stated here.

⁵ Contained in section 115 RMA.

Options

- 4.15** In order to cater for the increasing complexity of some applications, amendments to the RMA could be made to establish a two-tier system similar to the "Standard Track / Complex Track" case management tool used for matters before the Environment Court.
- 4.16** Rather than set fixed time limits for matters which a council assesses to fall within the complex track, the length of time to process any such application could be agreed upon between the applicant and council. To be clear, the suggestion here is that applications on the complex track not be subject to the time limits imposed by the RMA.
- 4.17** The benefits of such an approach would be to enable applicants to have realistic expectations of the likely time an application will take to assess and perhaps allow a better allocation of council resources to deal with applications in the different tracks. It may also provide a clearer and more accurate statistical breakdown of the time taken to process consents.
- 4.18** Determining what constitutes a "complex" application may be problematic and some councils may be tempted to classify all applications as complex in order to avoid the otherwise applicable time limits. However, the use of the word "complex" in circumstances which require the exercise of discretion is not without precedent in other legislation.⁶

Related issues

- 4.19** Various issues impact on the time taken to have an application heard including the section 88(3) rejection process and notification.

Notification

Statement of problem

- 4.20** Apart from controlled activities which do not need to be notified, all other applications are open to some form of notification. The decision whether or not to notify is often contentious and can lead to applications for judicial review in the High Court involving considerable delays and cost.
- 4.21** It is, however, an important decision as indicated in the following paragraphs from the decision of the Supreme Court in *Discount Brands*:⁷

[116] Because the consequence of a decision not to notify an application is to shut out from participation in the process those who might have sought to oppose it, the court will upon a judicial review application carefully scrutinise the material on which the consent authority's non-notification decision was based in order to determine whether the authority could reasonably have been satisfied that in the circumstances the information was adequate in the various respects discussed above.

[145] The statutory policy inherent in the non-notification regime involves a balance between the interests of applicants and the public in having uncontroversial applications dealt with promptly and without the additional expense of notification, and the rights of public participation

⁶ See for example section 89P Child Support Act 1991 and 125(5) Legal Services Act 2000 where the exercise of a discretion turns on identifying a "complex" matter.

⁷ *Westfield (New Zealand) Limited v North Shore City Council* [2005] NZRMA 337.

which the Act prima facie affords. Reconciliation of the competing interests in harmony with the policy of the Act suggests that in cases of any real doubt the application should be notified.

Significance

4.22 This issue has the potential to cause huge costs to councils and applicants. It is the area from which most RMA-related judicial review stems. While the number of notification decisions which are judicially reviewed is perhaps low, the cost of such proceedings is disproportionately high.

4.23 We note that, in the context of plan changes, there is a lot of pressure to move the activity status of activities lower down the continuum in the hope of avoiding public notification.

Previous amendments to the RMA

4.24 Notification of applications has been a feature of both the Town and Country Planning Act 1977 and the RMA.

Options

4.25 The present regime for notification may be providing too much discretion to councils in deciding whether or not to notify. It is not an option to completely do away with all discretion as the end point of such an approach is either full notification of all applications or no notification of any applications, neither of which is desirable.

4.26 However, in order to reduce the circumstances where judicial review is undertaken, a council's discretion could be reduced by requiring all applications for non-complying activities to be notified.

4.27 Non-complying activities, by their very nature, involve proposals which are outside the controls otherwise adopted in planning instruments and should, it can be argued, be subject to public scrutiny on a case-by-case basis.

4.28 In the 2005/2006 financial year, only 7% of applications processed through to decision were for non-complying activities.⁸

4.29 Given the relatively small number, full notification for all such activities may not pose an excessive burden on councils (and, in fact, many may already be notified) but may assist in reducing the number of contentious notification decisions.

4.30 The existing regime would continue to apply to applications for other than non-complying activities.

Related issues

4.31 This topic is related to the rejection of applications under section 88(3).

Payment of council processing fees

Statement of problem

4.32 Anecdotally, councils frequently find themselves in the situation of having to hand over a resource consent prior to the council's processing fees being paid and then experiencing difficulty in collecting those fees.

4.33 Sections 114 and 115 require decisions on applications to be notified within certain time frames. This is undoubtedly because notification is tied into the

⁸ *Resource Management Act: Two-yearly Survey of Local Authorities 2005/2006*, MfE Wellington, page 2.

period within which an appeal must be filed. This means that consents are required to be released without payment.

Significance

- 4.34 From the perspective of councils, this issue is one which causes some frustration. The inability to effectively and efficiently recover costs when they are not paid in the context of processing fees adds unnecessarily to councils' expenses.

Previous amendments to the RMA

- 4.35 This matter has not been specifically addressed in the RMA context.

Options

- 4.36 Add into the RMA a provision similar to section 208 of the Local Government Act 2002 (relating to development contributions) enabling councils to prevent the commencement of a resource consent until the council's fees have been paid.
- 4.37 As the workload of councils and the pressure to complete assessment of resource consents increases and with the increasing complexity of the information contained in applications, the cost of processing consents has risen, especially where external consultants are used to fill gaps in council capabilities. It is appropriate that councils be given a lever with which to obtain payment.

Related issues

- 4.38 This matter is related to the powers of councils under the Local Government Act 2002.

Filing fees

Statement of problem

- 4.39 The filing fee currently prescribed by clause 35 of the Resource Management (Forms, Fees, and Procedure) Regulations 2003 is \$55. This enables any participant in proceedings before a council to very quickly and cheaply lodge a notice of appeal without necessarily conducting a full analysis of the strengths and weaknesses of their case and without any focus on the consequences for other parties involved.
- 4.40 Commencing proceedings is often a tactic to delay the commencement of a resource consent and the current filing fee does not cause an intending appellant to pause and think.
- 4.41 While public participation in the RMA processes is part of the ethos of the RMA, there does not appear to be a balancing focus on people's obligations.
- 4.42 Increasing the level of immediate financial commitment required to partake in proceedings may encourage people to weigh up the need to become involved.
- 4.43 We note that the fees to lodge and set down proceedings in the District and High Courts has been increased considerably in recent years. The District Courts Fees Regulations 2001 requires payment of \$149 to file an originating document and \$60 for statements of defence or appearances. A hearing fee for each half-day or part of a half-day, after the first half-day of \$750 is mandated. In the High Court, the standard filing fee is \$1,100. The standard setting down fee is \$1,000 and the standard hearing fee is \$1,300 for each half-day or part half-day after the first day.

Significance

- 4.44 Both developers and council officers would agree that this is a matter of significance insofar as the low level of filing fees encourages participants in the environment court process who have less than robust cases. The delays caused by people taking unsupported or unsupportable cases leads to the delay in the system.

Previous amendments to the RMA

- 4.45 The level of filing fee has remained unchanged at \$55 since the Resource Management (Forms) Regulations 1991.⁹

Options

- 4.46 Increasing the level of the filing fee only may have the effect of penalising appellants when it is a range of different participants who should be required to pay a fee of some kind.
- 4.47 However, introducing a more structured fee regime which sets amounts for different parties and different steps similar to those in the District and High Court Rules may provide a fair solution. This may discourage people with unmeritorious cases or whose aim is to cause delay.

Related issues

- 4.48 This matter is linked to a scale of costs.

Scale of costsStatement of problem

- 4.49 Costs in proceedings before the Environment Court are currently awarded at the discretion of the Court.¹⁰ There is no scale of costs.
- 4.50 The Court's "broad discretion is unfettered but of course must be exercised on a principled basis and not as a penalty."¹¹
- 4.51 The High Court has described the tension inherent in resource management cases as follows:¹²

[42] ... There are no rules that apply to the Environment Court which establish a proposition that costs should be awarded in favour of the successful party. Resource management issues often reflect the interface between conflicting but legitimate goals. There is an inevitable tension between the sustainable management of natural and physical resources against the wish of people and communities to use and develop their environment.

[43] It would be certainly wrong to penalise those who reasonably and legitimately pursue development, just as it would be wrong to unfairly penalise those who seek to preserve natural and physical resources from such use and development ...

⁹ Clause 28.

¹⁰ Section 285, RMA.

¹¹ *White v Waitaki District Council* C126/2006, 29 September 2006, Alternate Environment Judge McElrea.

¹² *Tairua Marine Limited v Waikato Regional Council* CIV-2005-485-04, 29 June 2006, Asher J (HC Auckland).

- 4.52 However, the Court's broad discretion and the wide range of awards made by the Court create an uncertainty for those who are contemplating becoming involved in proceedings before the Environment Court as to what costs they are likely to incur.

Significance

- 4.53 The issue of the costs of the Environment Court process is often raised. Providing a scale appears to be a relatively straightforward means of addressing the issue.

Previous amendments to the RMA

- 4.54 Section 285, which gives the Environment Court the broad powers to award costs, has been largely unchanged since the introduction of the RMA. That section was based on section 147 of the Town and County Planning Act 1977.

Options

- 4.55 To provide a level of certainty in relation to costs, a scale of costs could be developed for the Environment Court.

- 4.56 Such a scale should not fetter the Court's ultimate discretion to decide costs on a case by case basis. In both the District Court Rules and the High Court Rules, the discretion of those Courts is expressly reserved.¹³

- 4.57 The Environment Court (endorsed by the High Court) has referred to the District Court Rules for guidance on a principled basis upon which to award costs.¹⁴ The High Court noted:

[36] In choosing to rely on the District Court Scale the Environment Court was not simply adopting a convenient formula from another court. It was applying a method of calculation of time and hourly rates approved by the Rules Committee. While this calculation might have been done by the Rules Committee in the context of civil litigation, it did provide a benchmark as to what constituted a reasonable remuneration for legal costs in terms of the market for legal services.

- 4.58 As noted in the paragraph quoted above, the District Court's scale of costs for general civil litigation may not be entirely appropriate in the context of RMA litigation. A specifically tailored scale would need to be developed. In most cases, this scale would be appropriate and provide a level of certainty for all participants in RMA litigation.

Related issues

- 4.59 This issue is related to filing fees. Imposing a scale of costs may also cause would-be participants to think carefully about the risks of being involved in Environment Court proceedings and deter unmeritorious appeals.

Necessity for notices of reply

Statement of problem

- 4.60 Notices of reply to notices of appeal are seen as pro forma and something which add nothing to the conduct of an Environment Court hearing. They are usually not referred to again by the parties.

¹³ See Rule 45 District Court Rules 1992 and Rule 46 High Court Rules.

¹⁴ See *Tairua Marine Limited v Waikato Regional Council* and *White v Waitaki District Council* above.

4.61 For councils, who are most often the party completing the reply, they are seen as a cost which could be avoided.

4.62 There is, perhaps, a similarity between notices of reply and statements of defence in civil proceedings. However, the "pleadings" in a civil matter establish the scope of proceedings and parties are bound to their statements. In RMA proceedings "jurisdiction" or scope of an appeal is established by other means such as original submissions or the application to the Council. Statements of defence are appropriate in an adversarial context where they are the first document filed by the responding party and, therefore, need to set out that party's position. The commentary in McGechan on Procedure notes:

HR130.02 Purpose of statement of defence

The rule recognises three long-established propositions as to statements of defence:

- (a) Answering specific allegations: One purpose is to answer specific allegations made in the statement of claim, such answer being by admission or denial.*
- (b) "Affirmative defences": Another purpose is to state "affirmative defences", ie matters of defence which do not arise in themselves from admissions or denials of the plaintiff's allegations.*
- (c) Clear and particular: A statement of defence, like a statement of claim, must be clear and particular as opposed to evasive and general.*

4.63 Notices of reply also need to be considered in light of the Environment Court's Standard Track Directions. Those directions encompass most, if not all, of the matters which must be addressed in notices of reply. The Directions encourage a collaborative approach by parties, among other matters, in identifying unresolved issues. Also, through the encouragement of negotiation and mediation, matters which are stated as being issues in a notice of reply are often overtaken.

4.64 The Standard Track Directions form a much more useful document in the build up to a hearing and force parties to consider whether the matter can be resolved or at least focus on what the relevant issues are.

Significance

4.65 This issue is not of great significance but appears to be an easily winnable benefit in reducing unnecessary cost.

Previous amendments to the RMA

4.66 The requirement to file and serve a notice of reply was carried over from the Town and Country Planning Regulations 1978.¹⁵

Options

4.67 Make the requirement to provide a notice of reply discretionary. The discretion could be left to the Court to exercise based on whether it considers there would be any value in providing it.

4.68 Remove the requirement for notices of reply.

4.69 Replace the requirement for notices of reply with a statutorily mandated version of the Court's Standard Track Directions.

¹⁵ Clause 57.

Related issues

- 4.70** The Court's Standard Track Directions have given a clear indication that the Court considers parties should adopt a more collaborative approach to resolving issues rather than immediately adopting adversarial stances. If that is to be an approach generally adopted in RMA processes, that needs to be made clearer.

Standing

Statement of Problem

- 4.71** The issue arises in the context of making submissions on an application under section 96 and subsequent involvement in proceedings under section 274 and the breadth of people who may wish to be involved.
- 4.72** In relation to involvement in proceedings, section 96 allows any person to make a submission on a notified application for resource consent. Section 274, as well as allowing submitters to be involved in proceedings before the Environment Court, gives an opportunity to people with an interest in proceedings greater than the public generally or people representing a relevant aspect of the public interest to be involved.
- 4.73** Where an application which is not notified or not publicly notified is appealed, there may be an argument that an opportunity should be given for increased involvement. However, in that case, the reason for the lack of or reduced notification would have been that the effects were assessed as being minor¹⁶ and either no people were likely to be affected or only a limited number of people were likely to be affected.¹⁷
- 4.74** To provide the potential to increase the number of participants at the Environment Court hearing stage creates room for arguments as to who should be involved and consequent delays.

Significance

- 4.75** This issue is significant in the context of dealing with delays in the environment process.

Previous amendments to the RMA

- 4.76** This matter has been of perennial interest to legislators.
- 4.77** Changes to sections 274 and 271A in 2003 addressed discrepancies between "parties" and "participants".

Options

- 4.78** In relation to applications which are not notified or limited notified, there should be no opportunity for any persons other than those already involved to participate in any appeal to the Environment Court. The test that the effects are minor which has to be met prior to a decision not to notify or to limited notify means that such applications are already at the low end of the scale. To expand involvement at the Environment Court stage seems counter-intuitive.
- 4.79** In the context of notified applications, the making of a submission (for anyone other than the applicant and consent authority) should establish standing for all subsequent proceedings. As suggested below, the standing should be to commence an appeal. This may have the effect of placing greater weight on the council hearing process. This is in accord with amendments to the RMA which

¹⁶ In accordance with section 93(1)(b).

¹⁷ In accordance with section 94.

have bolstered the council hearing by requiring, among other matters, the accreditation of hearing commissioners¹⁸ and clarifying the powers of those commissioners during the hearing process.¹⁹

- 4.80** If a submitter wishes to be involved in an appeal, they may do so by commencing their own appeal rather than filing a section 274 notice. Multiple appeals are already dealt with by the Court and will not cause problems. Establishing a person as an appellant will clarify that person's involvement in proceedings and perhaps encourage greater focus on matters that should be in issue.
- 4.81** Alternatively, leave to become a party may be sought from the Court. Rule 83 of the District Court Rules 1992 gives that Court the ability to grant leave to various parties to become involved in hearings. Interestingly, clause (g) of that rule gives the Court the power on application or of its own motion to:

Where a local authority, public body, or other representative body is itself the plaintiff, or is a party whose interests appear to the Court to be adverse to those of the inhabitants of any locality or any class of persons, or a considerable section of them, direct in what manner those inhabitants or that class or that section shall be represented.

- 4.82** The benefit of applying for leave is that it would give the Court some control over who becomes involved in a hearing. Such control could be exercised on a similar basis to the controls councils are given to prevent repetition or the presentation of irrelevant material.²⁰
- 4.83** For these reasons section 274 should be deleted.

Related issues

- 4.84** This relates to the issue of continuation of proceedings by section 274 parties.

Continuation of proceedings by section 274 parties

Statement of problem

- 4.85** A party to proceedings under section 274 may not oppose the withdrawal or abandonment of proceedings "unless the proceedings were brought by a person who made a submission in the previous proceedings on the same matter."²¹
- 4.86** It appears anomalous that an appellant who has commenced proceedings may withdraw them without objection whereas a submitter who has commenced proceedings may face the prospect of their withdrawal being challenged.
- 4.87** The possibility of a section 274 party continuing proceedings or forcing proceedings to continue also arises where the applicant/appellant settles with the respondent council but the section 274 party is unwilling to do so.
- 4.88** In previous versions of the RMA, a participant in proceedings under section 271A was deemed to be an appellant and was able to continue proceedings as an appellant in their own right.²²

¹⁸ See section 39B introduced in 2005.

¹⁹ See sections 41A, 41B and 41C introduced in 2005.

²⁰ See sections 40(2) and 41C(6). Rule 78 of the District Court Rules 1992 enables the Court to limit the number of participants "to those whose presence before the Court is necessary for a due and just determination of the issue or issues arising out of the proceeding."

²¹ Section 274(5).

²² *Mullen v Parkbrook* [1999] NZRMA 23, page 36.

- 4.89** Under the present version of the RMA, a party under section 274 is something less than a deemed appellant because they cannot oppose the withdrawal of proceedings except in particular circumstances. They may still be able to delay the settlement of proceedings and, indeed, force an appeal to go to a hearing where other parties have settled.
- 4.90** The applicant for a resource consent and any submitter have the right to appeal to the Environment Court under section 120. They are also given the opportunity to become involved under section 274. That section, however, also gives the right to be involved in Environment Court proceedings to people who may not have been involved in the matter before the council which originally determined the application. Such people include those with an interest in proceedings greater than the public generally and those representing a relevant aspect of the public interest.
- 4.91** For the applicant for a resource consent, there is the possibility that on appeal a range of people different to those who had taken part in the hearing before the council will need to be liaised with in any settlement negotiations. If such people are dissatisfied they are able to force the matter to a hearing.

Significance

- 4.92** As with standing above, this issue is significant in the context of dealing with delays in the environment process.

Previous amendments to the RMA

- 4.93** The ability of people or bodies to become involved in proceedings before the Environment Court (or Planning Tribunal) was provided for in section 157 of the Town and Country Planning Act 1977.
- 4.94** That provision was carried through to the RMA in section 274. It has been the subject of various amendments including the addition (and subsequent deletion) of section 271A.

Options

- 4.95** Amendments to the RMA could be made to make it clear that only those who have been involved at the council hearing stage and have commenced their own appeals are appellants in the true sense.
- 4.96** Other people who want to be involved to the extent of "assisting" the Court but not otherwise accepting the responsibility of being an appellant should be treated as something less and should not have effective veto powers when it comes to settlement.
- 4.97** One possibility is to limit such people to the role of providing evidence to the Environment Court to assist its determination of an appeal. People who want such a role could be required to apply to the Court setting out reasons why their evidence will assist the Court in determining an appeal and the right be given to true parties to proceedings to object to the involvement of any such people. On the other hand, the power of the Environment Court to require further expert assistance or to obtain evidence from different sources could be made clearer.
- 4.98** Limiting the role of people who do not wish to become appellants is appropriate when considered in the light of the powers that are given to councils in relation to hearings. The particular powers set out below make it clear that a focus is to be brought to bear on proceedings. An Environment Court hearing should be more focused in the following ways:

- (a) Require witnesses to attend under the Commissions of Inquiry Act 1908 (section 41 RMA);
- (b) Direct someone not to present the whole or part of a submission if it is irrelevant or not in dispute (section 41C(6) RMA);
- (c) Limit the circumstances in which parties having the same interest in a matter may speak or call evidence in support to prevent excessive repetition (section 40(2)); and
- (d) Direct that evidence and submissions be recorded, taken as read, or limited to matters in dispute (section 41C(1)(b)).

Related issues

4.99 This relates to the issue of standing.

Consent notices

Statement of problem

4.100 The Resource Management Amendment Act 2005 amended the process for varying or cancelling a consent notice. Uncertainties remain as to the relationship with pre-existing case law and the basis on which variations or cancellation of a consent notice are to be assessed (for example, discretionary activity). There is also a common perception that consent notices are more permanent than appears to be the case and it may be appropriate to consider whether this perception should be given statutory recognition.

Significance

4.101 Consent notices appear to be relatively easily removed (for example, where there has been a change in council with a different attitude towards environmental protection). If stronger environmental protection is considered necessary, this issue needs to be addressed. Having said that, the removal of consent notices is not a matter which arises frequently.

Previous amendments to the RMA

4.102 The Resource Management Amendment Act 2005 substituted section 221(3) and inserted a new section 221(3A). Prior to the amendments the Council simply agreed to vary or cancel a consent notice. The effect of the amendments was that sections 88 to 121 and 127(4) to 132 apply, with all necessary modifications, in relation to an application made to vary or cancel a consent notice under subsection (3)(a) or a council initiated review conducted under subsection (3)(b). A variation or cancellation of a consent notice under section 221(3) must therefore generally be processed and considered as if it were an application for resource consent. There are several issues arising from these amendments.

4.103 Section 221 does not specify the activity status to be applied in considering an application or the consent authority's review of any condition specified in a consent notice. The activity of varying or cancelling a condition in a consent notice is unlikely to be classified under a district plan. There is an argument that section 77C of the RMA applies and consideration under section 221(3) should proceed as if it were a resource consent for a discretionary activity. However, this argument is not perfect because section 77C is not expressly stated to apply in section 221(3A). Similarly, section 127(3) is not stated to apply. An alternative approach is perhaps that the variation or cancellation is assessed in accordance with the classification of the original activity which gave rise to the consent notice.

- 4.104** In *Kapiti Environmental Action Incorporated v Frandi*²³ the Court of Appeal found that, when considering an application for variation or cancellation of a consent notice, it is appropriate for the territorial authority to consider the reasons why the conditions were originally imposed, and to make its decision having regard to those reasons. This decision related to section 221 as it existed prior to the 2005 amendments. The Court observed that if the consent authority fails to have proper regard to the circumstances in which the condition was imposed, questions could arise as to whether its power under section 221(3) was being exercised for the purposes of the RMA, and an agreement to cancel or vary a consent notice under section 221(3) could potentially be set aside.
- 4.105** Although the relevance of this test is uncertain in light of the amendments providing for the application of sections 88 to 121 and 127(4) to 132 of the RMA, there is a good argument that the test remains applicable. However, if this is the case, there are uncertainties associated with its application. For example, should the reasons why the conditions were originally imposed be considered with the other relevant matters such as those provided for in section 104, or should they be given some elevated importance, such as being considered as a condition precedent?
- 4.106** There are good planning reasons for considering why a consent notice was originally imposed. However, there are practical difficulties associated with this consideration. It will not always be apparent from the face of a consent notice why it was imposed. Similarly, it will not be apparent how significant the imposition of a consent notice was in making the decision to grant consent e.g. but for the consent notice, would subdivision consent have been granted? There is a possible perception amongst both decision-makers and submitters that consent notices are more permanent than is in fact the case. Consideration of the reasons why a consent notice was originally imposed could ensure that consent notices are more "durable".

Options

- 4.107** Amend the RMA to clarify the basis on which variations or cancellation of consent notices should be assessed, and to clarify that it is appropriate for the territorial authority to consider the reasons why the consent notice was originally imposed and to make its decision having regard to those reasons.

Related issues

- 4.108** We are not aware of any related issues.

Section 357 objections

Statement of problem

- 4.109** Objections under sections 357 to 357B could be criticised because they are heard and decided by the same entity that made the primary decision (acknowledging that the decisions are often likely to be made by different people). This could result in bias towards retaining the decision made by the original decision-maker, and could introduce an element of "going through the motions". That is, the correct process would be followed without the decision-maker having a truly open mind on the matter. An appeal to the Environment Court would then be necessary and the objection process would have had little benefit. Putting aside the potential for bias, the lack of finality in having objections determined by the consent authority in the first instance could also support the argument that objections under sections 357 to 357B are unnecessary. It could also be argued that

²³ [2003] 2 NZLR 338.

objections are provided for in respect of an unnecessarily high number of decisions.

Significance

- 4.110** This is not an issue which needs immediate attention as the number of objection hearings is limited.

Previous amendments to the RMA

- 4.111** Sections 357 to 357D were inserted by the Resource Management Amendment Act 2005, to replace the previous provisions relating to objections.

- 4.112** Sections 357 to 357B provide for a right of objection in respect of certain decisions made by a consent authority under the RMA. The Resource Management Amendment Act 2005 increased the number of decisions that may be objected to. Additional rights of objection include where a submission has been struck out under section 41C(7), where an existing use certificate has been applied for under section 139A, where a consent authority declines to process or consider an application or submission pursuant to section 99(8), and where an application is made under section 221 to vary or cancel a consent notice. Many of the matters which may be objected to under sections 357 to 357B are matters for which there is no right of appeal under section 120, although there is some overlap between the sections meaning that an appeal may be lodged under section 120 or an objection may be made under sections 357 to 357B. Objections under sections 357 to 357B are decided by the consent authority concerned, and the decision on that objection may then be appealed to the Environment Court.

Options

- 4.113** Only 1.3% of decisions were objected to under section 357 in the 2005/2006 financial year and of those 2% (14 in total) were appealed to the Environment Court.²⁴

- 4.114** Two possible options are immediately apparent: amend the RMA by deleting the provisions providing for objections to the consent authority, and provide for direct appeal to the Environment Court; or remove the right of appeal to the Environment Court on decisions on objections, making the decision of the consent authority final.

- 4.115** Given the small number of decisions which ultimately make it to the Court, the first option will not impact greatly on efficiency. However, if objections continue to be heard by councils, the issue of apparent bias remains.

- 4.116** Anecdotally, the objection process is not viewed with favour. It is often seen as an unnecessary or time wasting step.

- 4.117** Although having such matters dealt with by the Environment Court will increase that body's workload, the number of objections is relatively small. Having the ability to have objections determined directly by the Environment Court may improve the perception of the process. That may also assist in establishing a measure of consistency of approach across the country. It is our preferred option.

- 4.118** If objections are to be made directly to the Environment Court, they could be determined by Environment Court Commissioners, either on the papers or in a hearing.

Related issues

- 4.119** We are not aware of any related issues.

²⁴ *Resource Management Act: Two-yearly Survey of Local Authorities 2005/2006*, MfE Wellington, page 14.

Trade competition

Statement of Problem

- 4.120** This issue arises in the context of trade competitors and the perception that resource management issues are used to mask commercial goals which would otherwise be excluded from consideration under section 104(3)(a) of the RMA.
- 4.121** That section provides that a consent authority must not have regard to trade competition when considering an application. The High Court has clarified that what matters "is that there be a competitive activity having a commercial element; not the status of the body carrying on that activity".²⁵ Trade competitors are clearly not precluded from being involved in resource management matters, only from raising matters of trade competition against applications.
- 4.122** However, isolating those aspects of a submission or evidence which relate to trade competition is problematic. Simply objecting to an application and thereby causing delay to an application may amount to the creation of a competitive advantage. Even if this were able to be identified as trade competition, the remedy would be to disallow any involvement. Preventing trade competitors from becoming involved is in itself problematic. Firstly, identifying the competitors of a business may be difficult and, secondly, preventing involvement by trade competitors may encourage creative means of avoiding that status. This could involve the use of non-trading companies to conduct litigation or the funding of third parties to do the same.

Significance

- 4.123** This issue is significant in that many high profile cases are taken to the superior courts which, at their core, are matters of trade competition. Lessening the impact of trade competition by other names would be a benefit to the reputation of the RMA.

Previous amendments to the RMA

- 4.124** What is meant by "trade competition" has not been defined in the RMA however the provision in section 104 relating to trade competition has been broadened. Until 1993, it stated:

(3) *When considering an application for a resource consent a consent authority shall not take into account the effects of trade competition on trade competitors.*

- 4.125** The provision currently states:

(3) *A consent authority must not—*
 (a) *have regard to trade competition when considering an application:*

Options

- 4.126** The prohibition against considering "trade competition" when making decisions on applications for resource consent should be removed. Trade competition rears its head in many different guises and is currently not effectively excluded from the resource consent process. The supermarket wars in North Shore City are testimony to that.

²⁵ *Montessori Pre-School Charitable Trust v Waikato District Council* [2007] NZRMA 55, paragraph 19.

4.127 Ultimately, the interaction between businesses in the sense of the impact of one on the other's profitability is a matter of "economic wellbeing" covered by the definition of sustainable management in section 5.

4.128 Dealing with trade competition directly as one factor to be weighed in decision making would lead to transparency. The fact that a proposal may have a negative impact on existing competitors may not, ultimately, be given much weight. However, in having it raised, a context is provided for any other "environmental" issues which might be put forward and that may change the overall weighting to be given to a trade competitor's arguments. It may also avoid the complexity created by trade competitors at present in attempting to avoid raising issues of trade competition.

Related issues

4.129 This topic is related to standing.

5. SUBSTANTIVE MATTERS

Permitted baseline

Statement of problem

5.1 The permitted baseline concept was developed through several important Court of Appeal decisions. It was later modified by statute but the statutory amendments have an uncertain relationship with the common law baseline. The approach is piecemeal and correct application of the permitted baseline test is not clearly described in the RMA. This could impede efficient decision making and increase the risk that the permitted baseline will not be consistently applied by different decision-makers, particularly at council level.

Significance

5.2 This issue impacts on almost every resource consent application. In our experience it is an area which is not well understood by those working with the RMA and has the potential to lead to arguments in the Environment Court.

5.3 Clarifying what is included in the permitted baseline may assist in speeding up the resource consent process.

Previous amendments to the RMA

5.4 The "permitted baseline" test was first articulated by the Court of Appeal in *Bayley v Manukau City Council*.²⁶

*The appropriate comparison of the activity for which the consent is sought is with what either is being lawfully done on the land or could be done there **as of right**. In the present case **the starting point is that business activities are permitted.***

5.5 This was supplemented by *Smith Chilcott Ltd v Auckland City Council*²⁷ in which the Court of Appeal found that the comparison must not be to some purely hypothetical possibility that is "fanciful", that the permitted baseline approach is relevant to the assessment of the merits of a resource consent application as well

²⁶ [1999] 1 NZLR 568 (CA).

²⁷ [2001] 3 NZLR 473 (CA).

as notification matters, and that the application of the permitted baseline was mandatory.

- 5.6 In *Auckland Regional Council v Arrigato Investments Ltd*²⁸ the Court of Appeal extended the comparison to the environment:

As it exists or as it would exist if the land were used in a manner permitted as of right by the plan.

- 5.7 The Resource Management Amendment Act 2003 amended the RMA to give statutory recognition to the "permitted baseline" concept. Amendments were made to introduce a statutory baseline in respect of both notification decisions (sections 94A and 94B) and substantive decisions on resource consent applications (section 104(2)).

- 5.8 Section 94A of the RMA as amended provides that:

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) may disregard an adverse effect of the activity on the environment if the plan permits an activity with that effect; and

...

- 5.9 Section 94B of the RMA as amended provides that:

(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) may be treated as not being adversely affected if, in relation to the adverse effects of the activity on the person, the plan permits an activity with that effect; or

...

- 5.10 Section 104 of the RMA as amended provides that:

(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

...

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

- 5.11 The statutory baseline obviously differs from the baseline established by common law in that it is discretionary, rather than mandatory. However, there are aspects of the common law baseline that are not expressly referred to in the statutory baseline.

²⁸ [2002] 1 NZLR 323 (CA).

- 5.12 The relationship between the common law baseline and the statutory baseline has been considered in several cases. In *Rodney District Council v Eyres Eco-Park Ltd*²⁹ the High Court held that the enactment of the statutory baseline modifies the common law baseline, but does not replace it in its entirety. The Court noted in respect of subsection 104(2) that:

The sub-section was enacted by a Legislature well apprised of the common law test. Had it intended to supplant the common law entirely, then rather more explicit language might have been expected. Section 104(2) is brief, and appears as a matter of simple statutory construction to be aimed at the introduction of a discretion which did not formerly exist while limiting the permitted baseline to the effects of activities permitted by the plan. To that extent it has modified the common law approach, but there is nothing to suggest that the Legislature intended the concept of a permitted baseline test to become entirely statutory. After all, it had its genesis in the cases, and the Legislature has sought simply to modify the concept by building upon the discussions contained in the authorities.

- 5.13 This dual approach has the potential to result in confusion and uncertainty when applying for or considering resource consents. This could be avoided by more thoroughly addressing the permitted baseline in the RMA. This would appear to be of particular assistance to decision-makers at council level. There is also a strong argument that, given the importance of the permitted baseline test, it should be more comprehensively addressed in the RMA. We are aware of the following issues that might arise with the statutory baseline, although further resources would be required to analyse each in depth:

- (a) Whether the "non-fanciful" test is applicable, and appropriate, in respect of the statutory baseline;
- (b) Whether the statutory baseline involves a comparison with the environment **as it exists** or as it would exist if the land were used in a manner permitted by the district plan;
- (c) Whether the statutory baseline involves a comparison with the effects of controlled activities which the District Plan has not restricted control over, or restricted discretionary activities in respect of which the District Plan has not reserved discretion; and
- (d) Whether the permitted baseline analysis must be confined to the site that is subject to a resource consent application, as distinct from the receiving environment, and whether the permitted baseline should extend to include unimplemented resource consents.³⁰

Options

- 5.14 Although the permitted baseline has been incorporated in the RMA, it is not a code and there is still considerable room for argument as to what should be included within the baseline. To reduce uncertainty, further detail as to what can and cannot be included in the baseline could be incorporated into the RMA. This would promote more efficient and consistent decision making between councils.

²⁹ High Court Auckland CIV-2005-485-33 13 March 2006 Allan J.

³⁰ In *Queenstown Lakes District Council v Hawthorn Estates Limited* [2006] NZRMA 424 the Court of Appeal found that the permitted baseline assessment should be limited to the effects of the developments on the site that is the subject to a resource consent application. The Court emphasised that it should not be applied for the purpose of ascertaining the future state of the environment beyond the site, although unimplemented consents could be considered as part of the environment under s104(1)(a).

5.15 The specific matters to be included in the permitted baseline are really a matter of policy. It may also be of benefit if any amendments made it clear whether the provisions dealing with the permitted baseline were intended to be a code or not.

5.16 Of course, codifying the permitted baseline in this manner may reduce flexibility.

Related issues

5.17 We are not aware of any related issues.

Cumulative effects

5.18 This topic is considered at length by Philip Milne of Simpson Grierson in his paper *When is Enough, Enough? Dealing with Cumulative Effects Under the Resource Management Act* which was prepared for the Ministry for the Environment. The conclusion in the paper was that no amendment to the RMA was required and remains our position in this regard.

Environmental compensation

Statement of problem

5.19 Environmental compensation does not have a strong statutory basis and the RMA gives little indication of how environmental compensation is to be implemented, if it is in fact contemplated by the RMA. This is likely to result in an ad hoc and inconsistent approach to environmental compensation. The concept of environmental compensation can be criticised on the basis that it could be seen as "buying" resource consent.

5.20 Environmental compensation can be defined as "any action (work, services or restrictive covenants) to avoid, remedy or mitigate adverse effects of activities on the relevant area, landscape or environment as compensation for the unavoided and unmitigated adverse effects of the activity for which consent is being sought."³¹

5.21 In *JF Investments* the Environment Court concluded that off-site works or services, or a covenant, if offered as environmental compensation or a biodiversity off-set, will often be relevant and reasonably necessary under section 104(1)(a) if it meets the following requirements:

- (a) it should preferably be of the same kind and scale as work on-site or should remedy effects caused at least in part by activities on-site;
- (b) it should be as close as possible to the site (with a principle of benefit diminishing with distance) so that it is in the same area, landscape or environment as the proposed activity;
- (c) it must be effective; usually there should be conditions (a condition precedent or a bond) to ensure that it is completed or supplied;
- (d) there should have been public consultation or at least the opportunity for public participation in the process by which the environmental compensation is set; and

³¹ *JF Investments Limited v Queenstown Lakes District Council* C048/06 (EC).

- (e) it should be transparent in that it is assessed under a standard methodology, preferably one that is specified under a regional or district plan or other public document.

5.22 This effectively accepts environmental compensation as a relevant consideration and introduces a regime for applying and implementing environmental compensation.

5.23 We understand that the *JF Investments* decision was appealed to the High Court, but proceedings were discontinued. There do not appear to be any other decisions on environmental compensation at the High Court level. It could therefore be appropriate to consider giving environmental compensation a stronger statutory basis if that is desired by the legislature, and to develop a statutory regime for applying and implementing environmental compensation.

Significance

5.24 This issue concerns a developing area of the RMA and, as yet, has not received great attention. If it continues to develop, environmental compensation could be seen as giving developers the opportunity to "purchase" their way out of adverse environmental effects and should be addressed.

Previous amendments to the RMA

5.25 This issue is not specifically mentioned in the RMA.

Options

5.26 Amend the RMA to provide a statutory regime for applying and implementing environmental compensation. Even if environmental compensation is able to be utilised in the RMA as it currently stands, there are no guiding principles such as those articulated in *JF Investments*. These could be included in the RMA as relevant considerations providing a framework that is consistently applied.

Related issues

5.27 We are not aware of any related issues.

Priority between applicants

Statement of problem

5.28 The rules relating to priority between applications for resource consent which compete for the use of a resource have been altered by the decision *Central Plains Water Trust v Ngai Tahu Properties Limited & Anor*³². The decision could result in practical difficulties for consent authorities and uncertainties for both consent authorities and applicants.

Significance

5.29 There have recently been some high profile cases in this area but they arise infrequently. However, when this issue arises it is likely to be in matters of some public importance. This suggests that a thorough analysis of the benefits and disadvantages of any particular regime needs to be undertaken.

Previous amendments to the RMA

5.30 The RMA does not provide any means of determining priority between applications for resource consent which compete for the use of a resource. Principles of priority have been developed over time by the Courts, most recently in *Central Plains*. Prior to *Central Plains*, priority was attained at the point the

³² [2008] NZCA 71 (CA). Leave to appeal was granted to Ngai Tahu Property Limited on 24 June 2008 in decision [2008] NZSC 49.

applicant lost control of the process, being when an application was able to be publicly notified. When associated applications were required but had not yet been lodged, priority was not attained. It appears that subsequent to *Central Plains*, an application gains priority when it is filed, provided that it cannot be regarded as insubstantial or incomplete under section 88(3) of the RMA. This would apply notwithstanding that further information may be required under section 92 of the RMA, or that further resource consents are required to lawfully implement the proposal. *Central Plains* also holds that if an applicant has knowledge of a prior application for the same resource, they cannot gain priority, at least in a water-take situation.

- 5.31** The *Central Plains* decision could be problematic for the following reasons:
- (a)** it is uncertain whether the previous law applies where subsequent applicants have no knowledge of a previous application;
 - (b)** there are likely to be practical difficulties in a consent authority reliably assessing the applicant's state of knowledge in order to determine priority, given that an application may not indicate whether the applicant is aware of any competing proposal; and
 - (c)** the "insubstantial or incomplete" test sets a low threshold which could encourage "place holder" applications.

- 5.32** The previous "ready for notification" test would be more practical for consent authorities to apply, and avoids applicants attaining priority on the basis of incomplete applications. Also, the previous test would be more consistent with an integrated resource management approach meaning that all necessary and related applications are filed at the same time so that the overall effects of a proposal can be considered.

Options

- 5.33** This matter could be dealt with by simply providing for priority on a "ready for notification" basis in the RMA.

- 5.34** Issues arise as to whether this is an appropriate point in time from which to measure priority. It may not be appropriate in all cases, for example in relation to the allocation of natural resources such as water.

- 5.35** How this issue is incorporated into the RMA, requires a policy decision.

Related issues

- 5.36** We are not aware of any related issues.

The impact of the Woolley decision on restricted discretionary activities

Statement of Problem

- 5.37** Historically many consent authorities have not considered Part 2 in assessing restricted discretionary applications. The decision *Auckland City Council v The John Woolley Trust and S J Christmas*³³ means that this approach is not correct and as a result the assessment of restricted discretionary applications has become more complex and time-consuming than may have originally been thought.

³³ CIV-2004-404-3787, 31 January 2008, Randerson J (HC Auckland).

Significance

- 5.38 This issue is likely to cause increasing problems as many councils have significant numbers of restricted discretionary activities in the district plans. As more applications attempt to grapple with the *Woolley* decision, we expect to see litigation around this point.

Previous amendments to the RMA

- 5.39 In *Woolley* the High Court was asked to determine whether Part 2 of the RMA applies to an application for resource consent for a restricted discretionary activity. The Court found that when deciding to grant a restricted discretionary resource consent application, Part 2 matters can be taken into account by a consent authority. However, when refusing to grant a restricted discretionary activity application, the only matters that can be taken into account are those which the consent authority has restricted the exercise of its discretion to. Similarly, Part 2 matters cannot be relied upon when imposing conditions on a consent for a restricted discretionary activity, beyond those relevant matters to which the consent authority has restricted its discretion.

- 5.40 The implications of the decision are that where there are Part 2 matters that support the granting of consent, there would be a wider range of relevant considerations than those that the Council has restricted its discretion to.

- 5.41 It appears that historically many consent authorities have not considered Part 2 in assessing restricted discretionary applications. This means that, in light of *Woolley*, decisions on restricted discretionary applications have become more complex and time-consuming than may have originally been thought. Also, effects which the Council is concerned with, and has therefore restricted its discretion over, could be outweighed by Part 2 considerations. It could also be seen as artificial and impractical to separately consider granting resource consent and declining resource consent as appears to be required by *Woolley*.

- 5.42 In practice, restricted discretionary status is widely used and it would be common for activities that could raise Part 2 matters to be classified as restricted discretionary. However, given the historical approach to restricted discretionary activities, the relevance of Part 2 may not have been realised by consent authorities in making the plan provisions. These issues could be addressed through amendment to the RMA.

Options

- 5.43 Amend the RMA to make clear that Part 2 is not a relevant consideration when assessing restricted discretionary activities.

Related issues

- 5.44 The complexity caused by the number of different activity classifications.

Section 9(8)Statement of problem

- 5.45 Overflying aircraft have the potential to create significant adverse effects in terms of noise. Aircraft are also of considerable importance for social and economic reasons. Section 9(8) of the RMA limits noise controls in relation to overflying aircraft. However, there are uncertainties relating to the correct interpretation and application of section 9(8).

Significance

- 5.46 This issue does not arise frequently but could be clarified relatively simply.

Previous amendments to the RMA

5.47 Section 9 of the RMA provides that:

- (1) *No person may use any land in a manner that contravenes a rule in a district plan or proposed district plan unless the activity is—*
- (a) *Expressly allowed by a resource consent granted by the territorial authority responsible for the plan; or*
- (b) *An existing use allowed by section 10 or section 10A.*
- ...
- (4) *In this section, the word use in relation to any land means—*
- (a) *Any use, erection, reconstruction, placement, alteration, extension, removal, or demolition of any structure or part of any structure in, on, under, or over the land; or*
- (b) *Any excavation, drilling, tunnelling, or other disturbance of the land; or*
- (c) *Any destruction of, damage to, or disturbance of, the habitats of plants or animals in, on, or under the land; or*
- (d) *Any deposit of any substance in, on, or under the land; or*
- (da) *Any entry on to, or passing across, the surface of water in any lake or river; or*
- (e) *Any other use of land—*
*and **may use** has a corresponding meaning.*
- (5) *In subsection (1), **land** includes the surface of water in any lake or river.*
- (6) *Subsection (3) does not apply to the bed of any lake or river.*
- (7) *This section does not apply to any use of the coastal marine area.*
- (8) *The application of this section to overflying by aircraft shall be limited to any noise emission controls that may be prescribed by a territorial authority in relation to the use of airports.*

5.48 Subsection (8) was inserted by the Resource Management Amendment Act 1993. There is little useful material in the explanatory introduction to the RMA or in *Hansard* which casts light on the reasons for the enactment of section 9(8).

5.49 The following issues arise in relation to the correct interpretation and application of section 9(8):

- (a) it is unclear whether the section excludes the effects generated by overflying aircraft from consideration under section 104(1);
- (b) there is no clear distinction between activities that constitute "overflying" and activities that are "in relation to the use of an airport"; and
- (c) there is an issue as to whether section 9(8) excludes adverse effects generated by the overflying aircraft from the scope of district plan regulation.

5.50 These matters could be clarified through legislative amendment.

Options

5.51 A policy call needs to be made as to when the RMA applies to noise generated by overflying aircraft and when it does not. It may be that this can be addressed

through establishing a height limit above which the RMA in relation to overflying aircraft does not apply.

- 5.52** Without amendment, there is the potential for different councils to have different controls applying to overflying aircraft and requirements for resource consents. This has not happened to date but a definition as mentioned above would prevent this from happening.

Related issues

- 5.53** Whether the general duty to avoid unreasonable noise under section 16 of the RMA applies to adverse effects generated by overflying aircraft.

6. OTHER ISSUES

- 6.1** The following are further topics which could be dealt with but due to budgetary constraints are outside the scope of this think piece. We have listed them in what we consider to be the decreasing order of priority:

- (a) How the disruption caused by vexatious submitters and participants in proceedings before the Environment Court can be eliminated;
- (b) The appropriateness or otherwise of reinstating security for costs;
- (c) Whether the Environment Court should continue to hear matters "de novo" or move towards being an appellate court that has greater regard to the decisions in relation to facts of the original hearings panel;
- (d) Whether and how direct applications to the Environment Court should be made;
- (e) Whether there should be a ministerial veto and its extent in light of the High Court's decision in *Whangamata Marina Society Incorporated v Attorney-General of New Zealand* CIV-2006-485-709, 18/09/2006, Fogarty J (HC Wellington); and
- (f) Clarification of the role of planning documents in decisions to notify (and particularly regional documents in land use consent applications) in light of the High Court's decision in *Auckland Regional Council v Rodney District Council* [2007] NZRMA 535.

7. CONCLUSION

- 7.1** Delays and costs associated with obtaining resource consents are anecdotally the biggest problems with the RMA. Every person who has come across the RMA will have different views on how it can be improved. It is doubtful that there are any solutions which would satisfy a majority of people. The matters we have focused on suggest relatively small changes which in isolation may not have much impact but together could work to address problems.
- 7.2** Some of the criticism of the RMA arises from perception rather than reality. For that reason, we have suggested a complex track for appropriate applications which would assist in managing the expectations of applicants.

- 7.3** While the ethos of the RMA is to provide for public participation, that participation could be more focused. Much time is spent dealing with non-issues or repetitive issues and this slows the entire process, especially at council hearing and Environment Court hearing stages. We have suggested changes to the way in which participation in the process by interested parties takes place not to discourage public participation but to ensure it is focused.
- 7.4** Reducing the costs to councils will lower the costs for all participants in the RMA process and so giving councils greater powers to knock inadequate applications out of the process at an early stage, doing away with the need for notices of reply and giving councils more leverage in recovering fees will be of benefit.
- 7.5** The issues we have raised under the heading "substantive matters" have come to the fore in the course of argument before the Courts. As with all legislation, its testing through the judicial process can raise issues which were not anticipated at the time of its drafting. The issues we have raised would benefit from further legislative clarification which, in turn, may assist in improving the efficiency of the RMA.