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CPD WEBINAR

Recent Reforms: Making the Resource Management Act Great Again?

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Introduction

This summary paper is intended to provide general practitioners with an overview of the Resource Legislation Amendment Act 2017 ("**RLAA**") and to highlight the potential implications of the RLAA for their clients. It includes a high level consideration of the implications of the RLAA on the statutory plan development process, but focuses more on the consenting implications which may arise on a day-to-day basis.

Background

The RLAA is the outcome of a protracted process which commenced in 2013 with a Ministry for the Environment discussion document entitled "*Improving our Resource Management System: a Discussion Document*". Many issues raised in that document were controversial, particularly with Councils and environmental groups. However, the reform process was persevered with and the Ministry for the Environment announced that it was preparing a Bill in early 2015.

The Resource Legislation Amendment Bill was introduced into the house on 26 November 2015. It was subject of submissions and consideration by the Local Government and Environment Select Committee during the course of 2016 before stalling, as the Government was unable to secure sufficient support to pass the Bill. It remained in a state of limbo while negotiations occurred between the Government and other political parties, before the Bill was eventually passed in 6 April 2017 with support from the Maori Party. Royal Assent was received on 18 April 2017.

The RLAA involves amendments to a number of pieces of legislation including the Resource Management Act 1991, the Public Works Act 1981, Reserves Act 1977, Conservation Act 1987 and the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012. However, the key and most fundamental changes are to the RMA, which is what we will focus on in this paper and the webinar.

Timeframes for Implementation

The RLAA provides for a number of provisions which take effect:

- the day after Royal Assent (which was given on 18 April 2017);
- from 18 October 2017; and
- from 18 April 2022.

The provisions which took immediate effect, included the "national direction" provisions, which relate to National Policy Statements, National Environmental Standards, the New Zealand Coastal Policy Statement, National Planning Standards and the new Mana Whakahono a Rohe (iwi participation arrangements) concept. While these matters will be of occasional interest to general practitioners, we anticipate that they will be of less interest than the consenting matters. Accordingly, we will address these matters only selectively, and briefly.

Many of the concepts which are likely to be of particular interest will come into force from 18 October 2017. These include:

- deemed permitted activities;
- (further) restrictions on public and limited notification resource consent applications;
- (further) limitations on rights of appeal to the Environment Court from resource management decisions; and

- provisions relating to concepts such as fast-track applications for resource consents, the ability to strike out submissions etc.

In many ways, the above changes will provide opportunities for prospective applicants for resource consents. An understanding of these provisions, and their implications relative to the status quo, may influence how these persons approach the resource consent process, including the timing of applications.

The key matter that takes effect only from 18 April 2022, relates to financial contributions. Essentially, the RLAA will repeal those sections which enable Councils to require resource consent applicants to make a financial contribution as a condition of any resource consent granted. This will force Councils to use the separate Development Contributions regime provided for under the Local Government Act 2002. (The majority of Councils including Auckland Council have already moved to using the Development Contributions regime in recent years.)

Consent Processes and Notification

The RLAA introduces a number of changes to the provisions that govern when applications for resource consent will be required, how they are processed and whether or not those applications should be notified for submissions by the public or affected persons. A number of these changes include novel concepts which are likely to require judicial interpretation in order to properly understand their implications. However, many also represent opportunities for persons looking to undertake activities or works that involve relatively minor non-compliances with district planning instruments, or involve only a small number of potentially affected neighbours.

Deemed Permitted Activities

The RLAA introduces the new category of deemed permitted activities. Under the RMA, permitted activities are activities specified in planning instruments, for which resource consent is not required. Activities which are deemed to be permitted activities as a result of the RLAA include "boundary activities" and activities that involve only marginal or temporary non-compliances with the district plan. Regardless of the prescribed activity status of the activity under the relevant district plan (ie, whether controlled, restricted discretionary, fully discretionary or non-complying activities) these activities may be treated as "permitted", and therefore no consent in required for them.

Boundary Activities

"Boundary activities" are:

- an activity that requires resource consent because of one or more boundary rules; and
- where the "infringed boundary" is not a "public boundary".

A boundary activity will be permitted if written approval is obtained from each "infringed boundary owner", who must also sign a plan showing the proposed infringement. Definitions of the various activities are set out in s 87AAB. We do not summarise those definitions in this paper, but observe that there would appear to be scope for debate (and confusion), particularly in respect of irregularly shaped allotments or where a single boundary of the application site might involve a number of adjoining allotments – the RLAA does not distinguish between parts of a boundary, where not all adjoining neighbours may be affected by the non-complying boundary activity. It is also notable that deemed permitted activity status for a boundary activity is not available in respect of public

boundaries. It is not clear why private individuals are capable of providing informed consent to a boundary activity, but local authorities and/or the Crown are not.

Marginal or Temporary Non-Compliances

Section 87BB provides that marginal or temporary non-compliances may be deemed permitted activities. The consent authority has discretion to consider these as permitted activities where:

- the activity would be permitted except for marginal or temporary non-compliance; and
- the adverse effects of the activity are no different in character, intensity or scale than they would be in the absence of the non-compliance; and
- any adverse effects on any person are less than minor.

While the intent of section 87BB might be to create a laudable alternative to unnecessary and costly council consent processes, all three requirements set out above require that the consent authority make a subjective judgment that is amenable to challenge by way of judicial review. It seems unlikely that risk averse local authorities will choose to initiate this process until there is sufficient judicial guidance available to determine when the process is available.

Limitations on Notification for Certain Activities

The RLAA also introduces further restrictions on both public and limited notification of certain activities, including subdivision, residential activities and boundary activities. The relevant provisions come into force from 18 October 2017, which means their implications for clients that are currently, or in the short term, looking to undertake any activities within these categories should be considered. In particular, depending on the nature of the activity intended, delaying the date of application for consent may result in a more streamlined and less costly consent process.

Under the RLAA, public notification (where any member of the public is entitled to lodge a submission and become involved in the local authority hearing process) has been precluded for most subdivision and residential activities, and almost all "boundary activities", except where there are "special circumstances" which warrant public notification. Note: what constitutes "special circumstances" is fraught – there have been a number of arguably inconsistent decisions on applications for judicial review relating to the question of whether special circumstances existed or not.

"Residential activities" are activities that require consent under a planning instrument, are "associated with" construction, alteration or use of one or more dwellinghouses, and are on land intended under the district plan to be used principally for residential purposes (this could include a significant residential development.) On the face of it, the interpretation of what comprises a residential activity and what might not could be subject to different interpretations. Even the definition of "dwellinghouse" seems open to interpretation.

The limitation on public notification for subdivision, residential activities or boundary activities is reflected in new subsection (1A) of section 120 of the RMA, which prescribes that there is no right of appeal against the whole or any part of the local authority's decision on any such activities. This could have unforeseen consequences, in that where a Council makes a decision to decline or impose inappropriate or unwanted conditions on any application for these activities, the *applicant for consent* is unable to lodge an appeal to overturn the decision to decline consent, or to excise or modify the conditions imposed on any consent granted by the local authority. In practice, it is often

the applicant for consent, particularly in the case of subdivision consents, that appeals the local authority's decision in order to challenge conditions of consent that are unworkable. It will be interesting to see whether these changes to s 120 result in an increase in applications for judicial review decisions to challenge the legality of conditions imposed on subdivision (and other) consents granted by local authorities.

Statutory Planning Instruments – Content and Development

In recent years, there has been a trend towards development of bespoke and/or streamlined processes for the development of planning instruments. For example, in Auckland, this involved specific amendments to the Local Government (Auckland Transitional Provisions) Act 2010, to enable the special hearing process for the Auckland Unitary Plan by the Auckland Unitary Plan Independent Hearings Panel. In Christchurch, this involved the Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014.

The RLAA introduces new concepts of "collaborative planning processes" and "streamlined planning processes". These processes contain key differences from previous processes which many practitioners have participated in.

The "Collaborative Planning Process" is intended to provide for community participation at the front end of the planning process, as an alternative to the standard Schedule 1 RMA plan development process. The policy intent is that the collaborative process will lead to decisions that have a higher degree of public support given they were developed by community representatives and were transparently tested with the wider community. Local authorities can elect to use this process after considering a number of matters set out in the RLAA. Except in limited circumstances, it cannot withdraw after the process is publicly notified. The matter is then handed to a collaborative group for consideration and preparation of a "consensus report" within terms of reference. The local authority then prepares and notifies a planning document. Submissions are provided for, including by persons involved in the collaborative planning group. A review panel holds hearings and prepares a report on the planning document, and the panel can recommend changes to the consensus recommendations. The local authority can accept or reject the panel's recommendations. The local authority's decision can be appealed on the merits, by way of rehearing, to the Environment Court, but only where the local authority changes a provision in a way that was not based on the consensus recommendation, or where the consensus group opposed a recommendation of hearing panel which the local authority then accepted. Decisions can also be appealed to the Environment Court on points of law.

Comment: This is a significant departure from the standard Schedule 1 RMA process. The process clearly incentivises a higher level of "up front" consultation, however, it is not clear that the "everyday" affected individual would be in a position to be involved in that process. Accordingly, there is a risk that the process would be dominated by well-resourced operators and interest groups, with limited ability for individuals or stakeholders to then challenge the process by way of appeal to the Environment Court. Further, the RLAA provides that no private plan change can be made to a planning instrument developed under the collaborative planning process within three years after that instrument becomes operative.

The "streamlined planning process" is available only on direction of the Minister. The Local authority can apply for a direction where one or more certain criteria are satisfied (such as that it implements a national direction or addresses a "significant community need"). The local authority then proposes a process for determining the proposed plan, which at a minimum must include an opportunity for

written submissions, preparation of a report showing how submissions have been considered, and evaluations of the costs and benefits of the planning instrument per ss 32 and 32AA of the RMA. Importantly, there is no express minimum requirement that a hearing is held. In any event, the Minister then determines whether to make the direction sought by the local authority and/or whether to modify the process proposed by it. The local authority must then comply with the terms of the Minister's direction and thereafter submit the planning instrument to the Minister, whether or not the Minister has accepted the local authority's proposed process, or modified it. The Minister may then decline or approve that planning instrument. The only means of challenging that decision of the Minister is by way of application for Judicial Review to the High Court.

Comment: The authors' understanding is that the purpose of this reform was to allow bespoke planning processes, like the Unitary Plan or Christchurch Replacement District Plan. However, we query whether local authorities would look to utilise this new process, given the lack of any guarantee that the kinds of participatory safeguards provided for as part of each of those processes would be applied. The process places significant discretion with the Minister to determine the final form of the plan development process. There are no express safeguards in terms of the ability to control the process or outcome, or for affected persons to participate in decision making that will affect them at the local level. It is arguably a significant derogation from the principle that environmental decisions should be made at the local level, where the effects of those decisions will be most keenly felt.

Another significant change made by the RLAA is that plan changes and plan variations are able to be limited notified. Prior to the RLAA, all such planning instruments had to be publicly notified, and any person had standing to lodge a submission in respect of them, and participate in the local authority level hearing process. The possibility of limited notification means that plan changes that are relatively narrow in scope might be able to be notified only to those persons that are directly affected by the proposed change/variation. It is likely that only a narrow category of plan changes or variations will be amenable to limited notification, given the difficulty of identifying all persons who are directly affected. However, this has the potential to enable a more straightforward process for less controversial proposed changes and variations.

Conclusion

The RLAA introduces a number of novel concepts into the RMA. It will take some time for local authorities, practitioners/professionals and other regular RMA "customers" to get to grips with these. Guidance from the Courts may be required to confirm the effect of some changes.

The clear intent of the RLAA is to provide further streamlining of consenting and plan-making processes, and there certainly appear to be opportunities provided for persons looking to undertake, particularly relatively minor, residential development projects. However, as is common in the case of legislative reform, the meaning in a number of provisions inserted by the RLAA is not entirely clear. There is scope for ongoing dialogue with local authorities, and potential challenge to decisions made under these provisions.