had to be rewritten at the last minute or alternatively that this useful category was not used. Whichever the case the result was poorly constructed plans and poor planning practice.

## The Resource Management Act 1991 in action

The balance of this chapter gives a basic guide to how the RMA works and in particular the plans and processes to which it gives rise. Although in places the original forms will be referred to, the RMA model described here is the one that reflects the changes created by the 2009 amendments to the act.

### The transition provisions

Introducing new legislation with new requirements for plan making, consent granting and decision making could not be achieved overnight and consequently the RMA contains substantial transition provisions in Part XV. These complex and lengthy sections of the act originally served to clad the old planning system in new clothing, transforming, for instance, district schemes into district plans after a simple public advertisement and rendering conditional uses as discretionary activities and specified departures as non-complying activities. The essential technical language of planning was also altered and there seemed to be a specific policy of altering all major terms – schemes became plans, uses became activities and ordinances became rules. This is justified as it ensures the minimum of confusion between the RMA and its predecessor but can sow confusion in the period when the newly christened district plan still uses the old nomenclature but is used in the new RMA processes. Long institutional memory seems to be an integral part of the planning system, applying to both planners and their clients on both sides of the administrative divide. This seemed to add to the general confusion of the first years of the act's operation.

It was obviously essential that the planning system continue to function and, although I can locate no earlier figures, by 1996/7 some 57,461 resource consents were being processed each year, and in subsequent years this averaged over 52,000 consents a year (Ministry for the Environment 1997a: v). Many of those consents would have been processed in terms of plans written under the previous legislation or, in the case of regional councils, catchment board by-laws. The first district plan written under the RMA, the Gulf Islands section of the Auckland City District Plan, was notified in April 1994 and was operative by the end of 1999. By 2009 only one local body, the Rodney District Council, still did not have what came to be known as a first-generation RMA district plan, and in fact most

city and district councils are contemplating second-generation district plans. This highlights the time that planners struggled with the complex time-consuming processes associated with the transition arrangements, while commencing and completing the process of writing a replacement plan and educating the greater public about the new concepts and processes. However, given that most plans are being replaced before their ten-year statutory life is exhausted, it is a signal that these first-generation plans were generally variable in their quality.

### The hierarchy of plans

The RMA, reflecting local government reform, created plan roles and responsibilities for the three levels of government in what has been called a co-operative mandate. That meant that individually and in concert they would, through their plans and actions under the act, all contribute to the achievement of sustainable management. There has been a tendency to characterise this co-operative mandate (see May 1995 and Ericksen *et al*. 2003) as a new development. It was in fact a mixture of the old and the new as planning legislation had always stressed the setting of national priorities through the matters of national importance, which would be given effect to by the often robust intervention of the Town and Country Planning Directorate in both planning applications and reviews of the district schemes written and then implemented by local government. What was different was the insertion of an active regional level of government that was given specific planning tasks which were part of the linked whole of the sustainable management mandate and philosophy. The more explicit philosophy of the RMA combined with its clear assignment of roles and responsibilities merely made the co-operative aspects more explicit and central. Although early renditions of RMA guidance used the term hierarchy, suggesting the dominance of one level over the other, subsequent decisions from the appeal body, the Planning Tribunal (the Environment Court after 1996), stressed that the system should be seen instead 'as a coherent network of Plans and other instruments which in no way implies inferiority' (*Canterbury Regional Council* v *Banks Peninsula District Council* [1995] 3 NZRMA 452). Equally the new assignment of roles and responsibilities was intended to ensure that decision making was undertaken at the closest level to which it was given effect, for example land is a resource used locally and therefore the decisions should be made by district and city councils. This is usually referred to as a devolved mandate, an approach that has been maintained through the act's many changes up to 2010. In 2010, using the Environmental Protection Authority (EPA), created in 2009 amendments to the RMA, there appeared to be some moves to transfer some regional council powers, particularly in resource allocation, to the national level. It is, however, a system that is dependent on all

levels of that devolved mandate playing their assigned part. The three levels of plan and policy roles and responsibilities are addressed in Parts II–V of the RMA.

### THE NATIONAL LEVEL

The ministry responsible for the RMA is the Ministry for the Environment (MFE), which was to provide general guidance on the act and its operations. It was also to prepare national policy statements (NPS) and national environmental standards (NES) when and where the Minister directed that these would be appropriate. National policy statements (S45) have a potentially broad remit, from environmental issues that affect more than one region or the country as a whole, to obligations derived from global agreements, to practices to implement economic instruments. National environmental standards (S43) were much more specific and technically focused, and could address standards for contaminants, water quality, levels and flows, air quality, noise and discharges to soil, with all standards expected to have both national relevance and application. Initially it was expected that there would be a steady stream of NPS and NES, which would serve four purposes. First, it would guide regional and city/district councils as to the most important issues to be addressed in the new plans. Second, it would support and enhance consistent decision making on resource consent applications by providing a common policy or environmental standard on which decision makers could rely. Third, it would ensure that a set of common environmental standards on water quality, for instance, were applied across the country, developing an even standard of environmental response and freeing regional councils in particular to address the issues that were unique to their regions. Fourth, it would form the first step of instituting the act's co-operative mandate. The coast was to be treated separately, with the Department of Conservation (DOC) being charged with producing the national level policy statement called the New Zealand Coastal Policy Statement (NZCPS). The NZCPS focuses on the management of the coastal environment, including consideration of issues of special concern to Māori.

Although there were high expectations that the NPS, NES and NZCPS would be rapidly forthcoming, this was to prove a vain hope. The NZCPS was produced relatively promptly by the Department of Conservation, but no other national guidance was forthcoming. The first NPS on electricity transmission was not made operative until 2008 and the first NES on air quality became operative in October 2004. At present a number of other NPS and NES are under preparation, with the NPS on renewable energy about to become operative. It is only in the coastal area that there has been any real exercising of the central government mandate, with the first NZCPS becoming operative in 1996, and the second-generation

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NZCPS presently awaiting ministerial approval. It is generally accepted that the NZCPS was only prepared in the 1990s because the act made its preparation compulsory. This reluctance to fulfil the central government mandate, discussed further in later chapters, is generally regarded as a result of a policy decision rather than a product of the complexity of the process. Part V of the RMA essentially allows the Minister to develop his own process with none of the extended consultation and appeal rights that are part of plan making at the other levels.

In 2009 the amendments to the RMA created the EPA, which was originally given quite limited functions to deal with applications that were called in; that is, the processing of a consent for a matter of national importance was removed from the local level to be processed and determined at the national level. In mid-2010 the functions of the EPA were significantly extended and it was established as a Crown Agent. The latter is of particular importance as Crown Agents deal with high-level and significant issues and are subject to appreciable oversight and control by the Minister. There are few Crown Agents, with the most prominent being the government drug-purchasing agency Pharmac. The EPA will now take over all the regulatory responsibilities of the MFE, which will be left to focus on policy, plus the regulatory functions of the Hazardous Substances and New Organisms Act 1996, the Ozone Protection Act 1996, and the Climate Change Response Act 2008. This last act controls the Emissions Trading Scheme, which further enhances the potential power of the EPA. Announcing the changes Dr Nick Smith, the Minister for the Environment, stated that the reform was intended to provide 'stronger national direction to the environmental roles of regional and district councils' (Smith 2010a).

### The regional level

At the regional level regional councils are charged with pursuing 'integrated management of natural and physical resources' [S30(1)] and are required to produce a regional policy statement (RPS) and may produce a regional plan or plans. Essentially, regional councils were to concentrate on water, air and land, although the last was limited more to how land is impacted upon by the other resources or how in turn it impacts on them. For instance, regional councils were interested in controlling soil erosion as this had a direct impact on water quality and flood hazard mitigation and took a variable interest in urban expansion, which had the potential to undermine the sustainable management of natural and physical resources. The RPS states the significant resource management issues facing the region, those of concern to iwi in the area and the policies and methods that would be used to achieve integrated management. If a regional council chose to produce a plan that would include enforceable rules, it could produce an overall

regional plan, a logical step if integrated management of natural and physical resources was its mission, or a series of plans. At the outset there were regional plans dealing with single issues such as water quality but by the beginning of this century more regional councils had moved to produce regional plans addressing all resources. In 2005 the Horizons Regional Council (the name used by the Manawatu-Wanganui Regional Council) produced One Plan, the first plan to integrate the RPS with a single regional plan. The act then went on to specify a quite complex process for the formulation of regional and district plans that followed a common process. The issues the regions were to address in their plans within the overarching goal of achieving integrated management of natural and physical resources can be summarised as:

1. control of the actual or potential effects of the use, development or protection of land that is of regional significance;
2. control of the use of land for:
   - (a) soil conservation
   - (b) maintenance and enhancement of water quality
   - (c) maintenance of water quantity
   - (d) avoidance or mitigation of natural hazards
   - (e) prevention or mitigation of adverse effects of the storage, use, disposal and transport of hazardous substances;
3. control of the taking, use, damming or diversion of water;
4. control of the quantity, level and flow of water, including maximum or minimum flows of water;
5. control of the taking or use of geothermal energy;
6. control of the discharge of contaminants in or onto land, air or water;
7. introduction or planting of exotic plants on the beds of a lake or river;
8. control of activities on the surface of the water;
9. objectives, policies and methods for maintaining indigenous biological diversity – included by amendment in 2005;
10. identification and monitoring of contaminated land – included by amendment in 2005;
11. the strategic integration of infrastructure with land use – included by amendment in 2005.

Diverse as the list is, it was very firmly focused on the natural environment and logically related more directly to the concerns of sustainable management.

The coast was again subject to a separate system through the compulsory requirement for a regional coastal plan, which was to provide for the integrated

management of the coastal marine area[2] and which was subject to approval by the Minister of Conservation.

In the coastal marine area the regional coastal plans had to address the following:

1. control of the extraction of sand, shingle, shell or natural material from any part of the foreshore and seabed vested in the Crown or regional council;
2. control of taking, use, damming and diversion of water;
3. control of the discharge of contaminants in or onto land, air or water and discharges of water into water;
4. control of dumping and incineration of waste and other matter and the dumping of ships, aircraft and offshore installations;
5. control of activities on the surface of the water;
6. prevention or mitigation of adverse effects of the storage, use, disposal and transport of hazardous substances.

Thus regional councils had extensive plan-writing requirements, which had to be undertaken at the same time as they were creating their governance and administrative structures.

## THE DISTRICT LEVEL

The narrowest remit was given to city/district councils, which were to focus on 'integrated management of the effects of the use, developments or protection of land and associated natural and physical resources of the district' [S31(1)(a)]. As such, city/district councils largely retained their traditional planning role of controlling the use of land, particularly in urban areas, as well as dealing with associated concerns such as noise and subdivision. The inclusion of the latter, which was previously controlled through a combination of provisions in the Local Government Act 1974 and the planning legislation, was an uncomfortable fit in the RMA. Its inclusion was disputed by the New Zealand Institute of Surveyors, the professional body for surveyors, throughout the reform process. In 2005 subdivision became a means of achieving sustainable management rather than a duty. The reasons for this are somewhat arcane and in practice little has changed in terms of how subdivisions are dealt with in the planning system. In New Zealand, subdivision is a somewhat different area, derived from this country's adoption of the Torrens system of guaranteed land titles. This is a system that is used in South Australia and some Canadian provinces, and means that every parcel of land has a legal description and surveyed boundaries that are recorded in a land

registry. It means that land can be bought and sold rapidly and with full confidence. However, it also means that there are strict controls over the creation of titles that are the final outcome of any subdivision consent. Thus it is an area in which the surveyor rather than the planner is likely to dominate in process terms.

The regions and the city/district councils shared some overlapping functions with regard to natural hazards, hazardous substances, the maintenance of indigenous vegetation, activities on the surface of the water and contaminated land. Creating joint responsibilities had the potential to create a 'turf war' but has in fact worked surprisingly well. In the natural hazard area, for instance, regional councils largely take responsibility for identifying and mapping natural hazards and district/city councils develop rules to control development on affected land. With activities on the surface of the water, the provisions of S33 were used to transfer this power from city/district councils to the regional council, as was done in a number of areas.

### Integration between levels

Clearly, it was an overlapping mandate that would require significant co-ordination and co-operation to produce a focused and logical planning system. Consistency was essentially achieved through a series of sections in the act that originally required regional and district plans not to be inconsistent with a national policy statement and a district plan not to be inconsistent with a regional policy statement or regional plan. This first provision was changed in 2005 to require lower-level plans to give effect to national policy statements and national environmental standards, which creates a much more direct linkage. The gradual emergence of more NPS and NES will also ensure that plans, particularly at the regional level, will share similarities as there will only be limited means by which they can be given effect to and because in some cases the NPS or NES will specify how this is to happen. Equally, since 2005 city and district councils have been required to give effect to the provisions of regional policy statements and plans, which again should see more integration between the two levels as second-generation plans emerge.

A standardised approach to plan formats was not new, although the detail was, and that was probably a response to the complaints that plans varied too much across the country. There were at the time, and still are, regular calls to create some type of standardised plan that would apply across the country, an approach that ignores the variations in issues that inevitably occur and the differences that would be produced from a process with high levels of public input through compulsory consultation. Inevitably this creates plans with different concerns and ways to address those concerns.

## Plan making

One of the strengths of the RMA is that it includes very specific processes for the formulation of all policy statements and plans that are created at the regional and city/district levels. These are detailed in the First Schedule to the act. Its second strength in this area is with regard to the actual format of plans, although this was somewhat diluted in 2005 when elements of the original plan format, particularly issues, were made voluntary. However, so far most plans have retained issues as a part of their structure, although some will choose to abandon some of the less useful elements, such as the principal reasons for adopting, which are now well covered by S32 reports.

### Plan formats

Box 2.1 details the basic structure or format for a district or regional plan. The highlighted elements are those parts of the plan that were still compulsory elements after the 2005 amendment to the RMA, with the others becoming optional.

This standardised format was not hugely different to the one that already existed under the previous legislation, though its application to all plans was new. However, despite a common starting point provided by this prescribed format, district plans in particular, as well as regional plans, are enormously variable. Technology has made them more accessible, and few councils would not now have their plans available online or in a downloadable format.

### The plan formulation process

A basic step-by-step guide to formulating a plan was detailed in the First Schedule. It has commonly taken anything from three to eight years to complete a plan to the point at which it becomes operative. In the MFE's *Annual Survey of Local Authorities 1998/99*, it was estimated that on average a regional plan cost $1.05 million and a district plan $2.35 million to prepare, take through the processes and become operative (Ministry for the Environment 1999a: 25), although it should be stressed that larger authorities with more complex problems probably faced bills in the vicinity of $3–5 million. Moreover these figures are now a decade old, suggesting that second-generation plans will be more expensive to produce. The steps in plan formulation are detailed in the following sections.

#### Step 1: Consultation

Plan writing commences with public consultation. Given the provision that a local

**Box 2.1** The basic format of plans

| | |
|---|---|
| Issues | These are the resource management issues that the plan is concerned with, for example the pollution of waterways or urban expansion |
| Objectives | This is what the plan is trying to achieve, for example to improve the quality of the water in the Awatea stream |
| Policies | This is a statement of what you will achieve, at a more detailed level, if you achieve the plan's objectives, for example to ensure that the water in the Awatea stream is of batheable quality by the year 2010 |
| Rules | These are the specific enforceable parts of the plan that must be complied with if the objectives and policies are to be achieved |
| Methods to be used | These are the rules and other methods, such as education, that will be used to achieve the objectives of the plan |
| Principal reasons for adopting objectives, etc. | At its most simple, this is a justification/explanation of why the objectives and policies have been put in the plan and why the rules and other methods have been selected to achieve those objectives and policies |
| Environmental results anticipated | These are the outcomes that the plan will achieve, which in turn will achieve the purpose of the act, that is, sustainable management of natural and physical resources |
| Information requirements | This gives details of what information must be supplied when a resource consent application is made |
| Cross-boundary issues | This details how issues will be dealt with that are not confined to a single local authority area. A common issue here is airports, particularly approach paths |
| Monitoring | This is the processes that will be used to monitor both the outcomes of the plan and its contribution to achieving sustainable management |

Source: Author.

authority 'may consult anyone else' in the writing of its plan, consultation ranged wide and included the usual government departments and tangata whenua.[3] Consultation has become almost a mania within the New Zealand planning system and in aligned acts such as the Local Government Acts of 1974 and 2002, which makes consultation the starting point of any plan-making process. The RMA is, however, silent on exactly how that consultation should be undertaken. Thus every local body, again in the absence of any guidance from the MFE, who might have been expected to provide such good practice advice, invented its own processes and approaches. Most erred on the side of providing generous

opportunities for participation and it was not uncommon for the consultation stage of plan making to continue for a year or more and to involve workshops, meetings, charettes and a cascade of paper. Most planners rapidly recognised that a central aspect of the consultation was to educate the public about the RMA and its philosophy, as without this it was almost impossible to undertake any meaningful consultation. Many found that the public were often surprised at the strong environmental focus of the new legislation and it was often difficult to explain how the act would work in an urban context. The MFE's advice in this respect was for planners to guide their communities 'to consider sustainability initially from the biophysical/ecological perspective and to clarify the key issues and priorities that are raised by looking at such things as biophysical limits and thresholds' (Fookes 1992: 4). Anyone who has undertaken any public consultation that involves a wide cross-section of the public could probably predict the outcome of trying this approach. Gradually there was also a realisation that this type and extent of consultation could be expensive in terms of time and money and also often threw up a wide range of often contradictory information that was less than environmentally enlightened. Consultation, it was quickly discovered, rarely leads to consensus. In the consultation I was involved with there was often a desire for things to continue much as they had in the past or to intervene in social and economic aspects of society in a manner that the RMA neither contemplated nor allowed for.

### STEP 2: PREPARATION OF THE PLAN

The preparation of the plan inevitably involved further consultation with politicians and interest groups, although some councils would circulate a draft plan for public comment in the expectation, often proved incorrect, that this would reduce the number of submissions on the final plan. One of the new provisions was the requirement to produce an S32 report, which was clearly aimed as a disciplinary measure to ensure that planners did not produce unnecessary rules. Again there was little guidance on how to produce such a report and the situation was made more complex by constant and major amendments of S32. Ideally the report is produced as the plan is being developed and requires a local authority, when writing a plan and considering the adoption of an objective, policy, rule or other method, to assess what alternative to a rule might be used. Basically, S32 in a simple form asks:

1. Is each objective the most appropriate way to achieve the purpose of the act?
2. Are the policies, rules or other methods the most appropriate means, in terms of efficiency and effectiveness, for achieving the objectives?

The evaluation must take into account the benefits and costs of policies, rules and other methods and the risk of acting/not acting if there is uncertainty or insufficient information on the subject matter of the policies, rules or other methods. Although not an explicit aspect of the present version of S32, there is an explicit aim in earlier versions of S32 to encourage the use of alternative techniques such as education and information rather than rules. It was certainly a very prominent aspect of the original form of S32, which actually provided a list of these alternative methods. One of the most misunderstood aspects of S32 is the reference to benefits and costs, which is often regarded as a requirement for a full cost–benefit analysis of the plan provision or alternative method of the type undertaken for development projects. Rather, it suggests a formal process of identifying and weighing up alternatives, a process better suited to planning issues that often involve matters that cannot be easily valued. As Miller (2000) suggests, in the end the outcome was little different to standard planning approaches of considering alternatives as part of the rational planning model.

### STEP 3: NOTIFICATION, SUBMISSIONS AND FURTHER SUBMISSIONS

When the plan is completed it is notified; that is, it is made available to the public for comment for a minimum of forty working days. The term working day, which was used throughout the RMA, was essentially defined as every day except weekends, statutory holidays and the period from the 20 December to 10 January, the last representing the traditional Christmas/summer holiday break. Anyone can make a submission, in support or in opposition, using the prescribed form. That form seeks to identify which part you are concerned with, why you are concerned with it and what you want done; that is, should the part be modified, replaced or removed? Again, this was little changed from the previous system, beyond the lack of any requirements that a submitter prove they were affected to a greater degree than the public at large. All submissions received are then opened for inspection to allow anyone to make further submissions. This further submission process is again a carryover from previous legislation and has always been an issue for debate within the profession. The theory is that if a possible submitter had inspected the plan and was happy with its contents then they should be given the opportunity to oppose or support a submission that would change that plan. Whereas submission numbers can run to the thousands, further submissions are lodged in much smaller numbers. A district plan can be altered at any time at the council's behest or at the request of an individual or organisation. The latter was a new provision instituted by the RMA and is undertaken on a cost recovery basis, with no guarantee of success. Most private plan changes, as they are known, seek to rezone land, often on the city edge, to allow for new residential development. If

they are accepted by the council this does not necessarily mean that the council agrees with them but rather that it can find no grounds in terms of the very narrow criteria provided by the act to decline the request. This can mean that the council will become a submitter in opposition to a private plan change it is processing.

### STEP 4: HEARING OF SUBMISSIONS

The hearings stage is probably the most time-consuming part of the process after the initial plan-writing stage. Hearings in accordance with S39 are to be conducted in public and 'without unnecessary formality' (S39 RMA). Given that the Māori language, Te Reo, is an official language, submissions can be presented in Te Reo and hearing procedures must 'recognise tikanga Māori' [S39(2)(b)]. Tikanga Māori are Māori customary values and practices and in this context might involve a submitter giving their whakapapa (family genealogy) before they give their evidence or the proceedings beginning with a kairanga (a sung greeting that may include a prayer). Each submission and associated further submissions are assessed and a report produced on them, which become part of the material that the hearings committee would consider in making its decision. All parties also have the opportunity to verbally present their position, making it a very open but time-consuming process. In the period up to 2003 the hearings committee would have been made up solely of councillors. In 2003 the institution of the Making Good Decisions programme by the MFE aimed to improve the performance of councillors at hearings but was also intended to involve others such as lawyers and planners who would become independent commissioners. On completing the course, individuals become accredited hearings commissioners who are able to sit on any hearings committee. Thus today the hearings committee could be a mixture of councillors and commissioners or commissioners alone; and, although a councillor or commissioner can sit alone, committees usually involve at least three people.

### STEP 5: DECISIONS AND APPEALS

Decisions, along with the reasons for the decisions, are provided in writing and submitters and further submitters have thirty working days to lodge an appeal with the Environment Court. Historically, the planning system in New Zealand has always provided for some form of appeal for those dissatisfied with the decision of the local body, something that was probably essential when decision making was delegated to such a low level of government. In 2000 an Environmental Legal Assistance Fund Advisory Panel was created to assist public interest groups to take cases to the Environment Court and beyond. It has a limited budget but its

existence does help community groups in particular to take part in the increasingly expensive appeals system.

The Environment Court is a court of record that hears appeals primarily arising from the RMA but also those arising from ten other acts, including the Local Government and Historic Places Acts. The court is chaired by Environment Court judges who are also District Court judges, who usually sit with two Environment Court Commissioners, appointed on the basis of their knowledge and experience in areas in which the court hears cases. This has seen planners appointed to these positions along with individuals from a range of other professions such as engineering and from the sciences. The Environment Court is divided into a series of circuits as the court always tries to hear cases as close to the location as possible. Cases are allocated by the Principal Environment Court Judge.

For the last decade or more the court has encouraged the use of dispute resolution to either resolve appeals or at least narrow the grounds of appeal. Mediation is compulsory and Environment Court Commissioners act as the mediators. If an appeal reaches the court the case is conducted on a de novo basis, though in recent years there have been considerable attempts to streamline the process to ensure cases are dealt with expeditiously. This has included the creation of three 'tracks' for cases that see them essentially divided into those highly likely to go to a full hearing, those that could be at least reduced in scope by mediation and those that the parties agree should go on hold, often because the parties are involved in active negotiations. If the matter is heard by the court it is conducted by lawyers with planners acting as evaluative witnesses and other experts providing technical evidence. Not surprisingly it can be an expensive and time-consuming process. The decisions of the Environment Court can be appealed on points of law to the High Court and hence to the Supreme Court, which has replaced the Privy Council as the final legal appeal body. There is also the right to seek a judicial review under the Judicature Amendment Act 1972, which can be and is used at an earlier stage to challenge local body decision on notification, for instance. Thus, the New Zealand planning system offers substantial opportunities for contesting the decisions of planning decision makers, which contrasts strongly with the much more limited appeal opportunities built into the Australian and English systems.

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### STEP 6: PLAN MADE OPERATIVE

This is a fairly basic step that sees the plan updated to include all changes made through successful submissions or appeals. It is then made operative through a formal notice placed in the papers and it is possible, by application to the Environment Court, to make a plan partially operative, excluding those parts still under appeal. The process from start to finish can and does take up to eight years

and it was perhaps for this reason that a system of rolling review was provided for in the 2009 amendment. This will allow a council to review one or more parts of its plan rather than the plan as a whole.

## Resource consents

### The basic system

The New Zealand planning system has always had at its core a clear recognition of property rights, particularly those associated with land. The planning legislation has quite consistently attempted to allow those rights to be exercised as long as that has no adverse effects on other property rights or, as in the case of the RMA, the environment. The act created five types of consent: land use consents and subdivision consent granted by city/district councils, and water permits, discharge permits and coastal permits granted by regional councils. The burden of processing consents has never been evenly spread, with 24 per cent of consents in 2005/6 being subdivision consents, 59 per cent land use consents, 3 per cent coastal permits, 5 per cent water permits and 8 per cent discharge permits (Ministry for the Environment 2007: 6). Since 1953 the New Zealand planning system has provided for two basic types of rights to use land. The first is 'as of right use', now called permitted activities, which basically allows the land or other resources to be used as, say, an industrial site as long as it can comply with the specified performance standards, conditions or terms – the RMA unfortunately allows the use of all these descriptors. These performance standards essentially attempt to identify any adverse effects of an activity on the environment and to provide a solution that avoids, remedies or mitigates that adverse effect. This is best illustrated by an extract from a district plan, which is shown in Box 2.2.

If an activity cannot meet these performance standards or the adverse effects cannot accurately be predicted ahead of time it becomes subject to a requirement for a resource consent. The resource consent categories, as they have historically, provide for a hierarchical system from controlled activities to non-complying activities. From the point of view of the applicants, the further you go up the hierarchy (see Box 2.3), the greater are the monetary, time and resource costs and the less the prospect of getting a consent granted. For the consent authority, that is, a city/district unitary or regional council, the further up the hierarchy of consents you go the more time and resources are needed to process the consent and the higher the likelihood of an appeal. Outside the resource consent system are prohibited activities, used for activities such as building in hazard-prone areas, for which no application can be made. The classification of activities into the different resource categories occurs within a zoning system

**Box 2.2** Permitted activity example

### R 12.6.2 CONSTRUCTION, ALTERATION OF, AND ADDITION TO BUILDINGS AND STRUCTURES

The construction, alteration of, and addition to buildings and structures is a Permitted Activity provided that the following Performance Conditions are complied with:

(i) Maximum Building Height
Any buildings or structures shall comply, in terms of maximum height, with R 20.4.10.1
*Explanation*
*This performance condition sets a maximum height for any buildings or structures within the Industrial Zone to prevent penetration of the Airport Protection Surfaces as set out in R 20.4.10.1*

(ii) Height of any building on a site which fronts to or adjoins a residentially zoned site
Compliance with Rule 11.6.1.2(ii)
*Explanation*
*The building design controls described in R 11.6.1.2(ii) are also intended to deal with the effects of industrial areas on residential areas at street interfaces*

(iii) Road Setback
(a) On sites fronting onto any arterial or principal road, any building or structure, excluding signs, shall be set back no less than 8 metres from the road frontage
(b) On all other sites any building or structure, excluding signs, shall be set back no less than 3 metres from any road frontage
*Explanation*
*The road setback standard ensures that more uniform site presentation occurs along roadways where the industrial/residential interface is broken by sporadic industrial development. Within established or developing industrial areas the road setback standard will also maintain consistency in existing building development patterns and provide an area for visual amenity planting*

(iv) Landscape Amenity
Compliance with Rule 11.6.1.2(v)

(v) Servicing
Compliance with Rule 20.3.8.1, Loading Space Standards

(vi) Access
Compliance with Rule 20.3.9.1, Access Standards

(vii) Parking
Compliance with Rules:
20.3.7.1 Parking Spaces for People with Disabilities
20.3.7.2 Parking Provision for All Zones Except Inner Business Zone
20.3.7.6 Car Park Landscape Design
20.3.7.7 Formation of Parking Spaces

(viii) Air Noise Control
Compliance with R 10.7.1.1(h)

Source: Palmerston North City Council (2000) *Palmerston North City District Plan*, Palmerston North: Palmerston North City Council.

**Box 2.3** The resource consent hierarchy

*Controlled activities* These require a resource consent with a limited assessment of environmental effects (AEE) but may have some standards or terms prescribed by the plan. All other effects are assessed by the consent authority who must grant these consents although they may be subject to conditions

*Discretionary activities* These come in two types:

- *Restricted discretionary activities* – in which the district/regional plan limits and details the particular effects or matters that the council is interested in and which must be covered by an AEE. The consent authority can only consider those aspects when making its decision and setting conditions. Such applications can be declined, or approved subject to conditions.
- *Discretionary activities* – in this case the consent authority has not restricted the matters in which it is interested by provisions in its plan. Consequently the AEE must address all environment effects. It is also a type of application, which can be declined by a consent authority, or approved, usually subject to conditions.

*Non-complying activities* This is an application to undertake an activity that contravenes a rule in the plan. It requires a detailed AEE and is assessed in terms of the usual sections of the act and in terms of S104D. Again it is an application, which can be declined by the consent authority, or approved, usually subject to conditions.

Source: Author.

that is based on the classic separation of incompatible activities. This creates the major zone types of industrial, residential and business, etc., which may then be divided into variant zones, such as a residential zone that provides for medium-density residential developments. Historically, zoning has been used in New Zealand plans from their inception and has survived the change of legislation with its differing focus. Although zones are generally not used in regional plans, the consent categories are used with the other resources, such as water and air, that the RMA covers.

## Resource consent processes

The RMA is based on the presumption that all resource consents for land, water or other resource use would be subject to a standard and universal process. This is largely achieved by the act but there are some variations to provide for the specific characteristics of a particular resource. For instance, when dealing with resources such as air and water a precautionary approach can be used, and an applicant may propose or a consent authority may impose a condition using the 'best practicable option'. However, both approaches are specifically excluded from use in land use consents, which run with the land not the applicant. These are granted in perpetuity, whereas a discharge consent or water permit will be granted for a specified period such as ten years. All applications are made on a common form, provided in the act, which local authorities provide to applicants. The application must include an AEE in accordance with the Fourth Schedule. The act provides the most basic assistance in Schedule 4 as to what an AEE should include. Consequently, there have been years of debate on what makes an adequate AEE and this is often the basis for consent authorities' requests for further information (S92). District and regional plans all have information requirement sections, which will detail general application requirements and specific requirements for different types of activity. When all of the information and AEE are complete then the application is formally lodged with the consent authority and a preliminary fee is paid.

The requirement to produce an AEE is the cornerstone of the environmentally focused resource consent system because it is in that report that the applicant identifies the adverse effects on the environment that will arise from the proposal, who will be affected by those adverse effects and what will be done to 'avoid, remedy or mitigate' them. The 'avoid, remedy, mitigate' requirement is part of S5, the definition of sustainable management, so ensuring that this is achieved is the major means by which the resource consent will contribute to achieving sustainable management. Like much of the RMA this is fine in theory, but the practice has proved more challenging, particularly as beyond very large government projects

there was little experience of producing AEEs. There was also the question of how and by what means did an AEE differ from an environmental impact assessment (EIA), the more commonly used international term. Scale also caused problems as an AEE made sense for a large project but rather less sense for smaller projects, particularly those in urban areas. The local authority's power to seek further information became a source of friction in the system, with claims that it was used to delay the processing of applications. This was galling to applicants who pointed to the existence of time frames within which applications were supposed to be processed, but a lack of any punitive consequences if these time frames were not met. As a result, in the 2009 amendments to the act, limits were put on the power to seek further information in an attempt to speed up the process. Anecdotal evidence from the world of practice suggests that consent authorities are now accepting only complete applications so the extra information seeking occurs before the processing time frames come into play. Further, if the consent authority does not meet the time frames then it must offer the applicant a discount on any consent fees, which can see up to 50 per cent of the fees returned to applicants. This is a powerful incentive in a cost recovery system.

The application can then go through several consent paths depending on two essential aspects. The first is the assessment made by the consent authority under S94, which largely focuses on the effects of the proposal and the existence and response of any affected parties. Affected parties are any person or organisation who will be adversely affected by the proposal and are identified by the consent authority. The applicant then has the opportunity to approach these affected parties to obtain their written consent, which usually involves a signature being attached to any plans to ensure that the party has agreed to the development as submitted. The adverse environmental effects of the proposal are then assessed to determine if they are more than minor. From these two assessments comes the decision on notification, which basically takes three potential paths as follows:

1. if the effects are minor and there are no affected parties or all affected parties have given written consent then the application will be non-notified;
2. if the effects are minor and some of the affected parties have given consent then the application follows a limited notification path;
3. if the effects are more than minor and the affected parties have or have not all given consent then the application is notified.

This appears to be a simple system but in reality there are endless issues with determining if effects are minor and frequent pressure from applicants and sometimes the political arm of the consent authority to ensure that the majority

of applications are non-notified. On the other side environmental groups and affected communities often complain that too few parties are regarded as affected and too few applications are notified. Until 2009 the presumption in the act was that applications would be notified, but the statistics collected by the MFE since 1995 suggest that changing to a neutral presumption was hardly necessary. In 1995 the MFE began to survey local authorities on a range of compliance issues to collect data on performance and with the very real expectation that delinquent or poor performers would be shamed into better performances, given that the statistics were provided for each local authority. The highest number of consents notified was in 1995/6 when 8 per cent were notified, the corollary being that 92 per cent were non-notified (Ministry for the Environment 1996: 1). In most years 4–5 per cent of consents were notified and, when limited notification was introduced to overcome unnecessary notifications, only 1.5 per cent of consents went through this process (Ministry for the Environment 2006: 2). If an applicant requires consent from a city/district and a regional council there is provision for joint hearings and a unified administrative system.

When an application is notified a notice is placed in the paper and affected parties are informed by mail. There is then a period of twenty working days in which to make a submission. Again the submission rights are wide, and anyone can submit on any application that has increased problems with trade competition. Competing supermarket chains, oil companies and other businesses use the planning system to try to thwart competitors. Many appear to have developed a deep interest in environmental issues, and in a local case an oil company was worried about the safety of children attending a local primary school. There are also tales of vexatious submitters but often little evidence to back these claims. In some cases, however, an applicant's vexatious submitter is a community's environmental guardian. Nevertheless, this has become a very political issue and the 2009 amendments have introduced extensive provisions to deal with trade competition and vexatious submitters, while trying to narrow who is deemed to be an affected party. Section 95E now requires a consent authority to determine that a person is affected if 'the adverse effects on the person are minor or more than minor (but are not less than minor)' [S95E(1)]. Such changes seem unlikely to do anything but create more legal judgements through expensive appeals. In the last decade there has been a significant increase in the number of notification decisions that are taken to judicial review by the High Court. This is an expensive process that may not ultimately change the outcome of the resource consent.

When the submission period has closed the consent authority may convene, at the request of any of the parties, a pre-hearing meeting, the intention of which is to try to see if any of the issues raised by submitters can be negotiated on or the

issues reduced. In many cases it provides an opportunity for misunderstandings to be corrected, particularly for complex applications. Whether an application is notified or not there is no standardised process with regard to hearings and decision making. Section 100 states that a hearing is held if any of the applicant, submitters or consent authority requests it. Generally, when an application has been notified the consent authority will request a hearing, which must be held twenty-five working days after the submission period closes, a period within which the pre-hearing meetings and any mediations must also be held. It is in this period that the planner must produce a report, the Section 42A report, which is circulated to all parties before the consent hearing. As with plan hearings, consent hearings are held without undue formality and must respect tikanga Māori, with all parties being given an opportunity to present their case to a hearings committee. The 2009 amendment allows applicants and submitters to request and pay for an independent commissioner on the hearings committee and this is much more likely to be used in consent hearings. In the last decade there have been increasing moves, often to save money for applicants and submitters, to delegate decision making to officers. In 2005/6, 87 per cent of all resource consent decisions were made by officers under delegated authority (Ministry for the Environment 2007), although these are probably lower-level consents. Applicants enjoy a very high success rate, with less than 1 per cent of applications being declined in every year that statistics have been collected. There has been similar stability in the percentage of consent decisions appealed to the Environment Court – usually about 1 per cent of all decisions. As such it would appear to be largely a responsive system, though that is not the way it is portrayed in the press.

## Other provisions

For many planners one of the achievements of the RMA was to institute a much more effective and comprehensive enforcement process that requires compliance with the requirements of the act, plans and conditions of consent. The RMA provides for a number of enforcement techniques and includes fines and prison terms as deterrents. Although there are still issues with enforcement, generally local authorities are more assiduous in pursuing non-compliers, and some regional councils use helicopter surveys to identify problems with discharges. This arises partly out of the other aspects of the RMA, the requirement under S35 to ‘gather information, monitor and keep records’. Monitoring takes three basic forms: state of the environment (SOE) monitoring, compliance monitoring and plan effectiveness monitoring. The first two types of monitoring, although expensive in the case of SOE monitoring, are largely achievable, but plan effectiveness monitoring both has been slow to develop and is difficult to undertake.

## Conclusion

Change in any sphere is always difficult but, despite the less than fortuitous circumstances, there was surprising good will and a positive air in October 1991. Nevertheless, there was an awareness that the new act was problematic and that there was a major task ahead in educating users of the planning system on how to use it. There were also significant challenges, not least the expectations that the new act created about the environmental outcomes it would achieve. Since the act's inception it has been subject to a dizzying number of amendments that have, over time, reduced the internal coherence of the act. Equally, the existence of the Environment Court, although providing a rigorous and above all neutral forum for the resolution of appeals, also generates a huge amount of case law, which in turn affects the everyday practice of planning. The last nineteen years have proved that the challenges of introducing legislation that takes a new direction should not be underestimated and that making sustainable management the cornerstone of that system is controversial, particularly for those who use the system.