

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

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 area² 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

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

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.