Environmental Defence Society

Assessing the impact of the government's legislative changes

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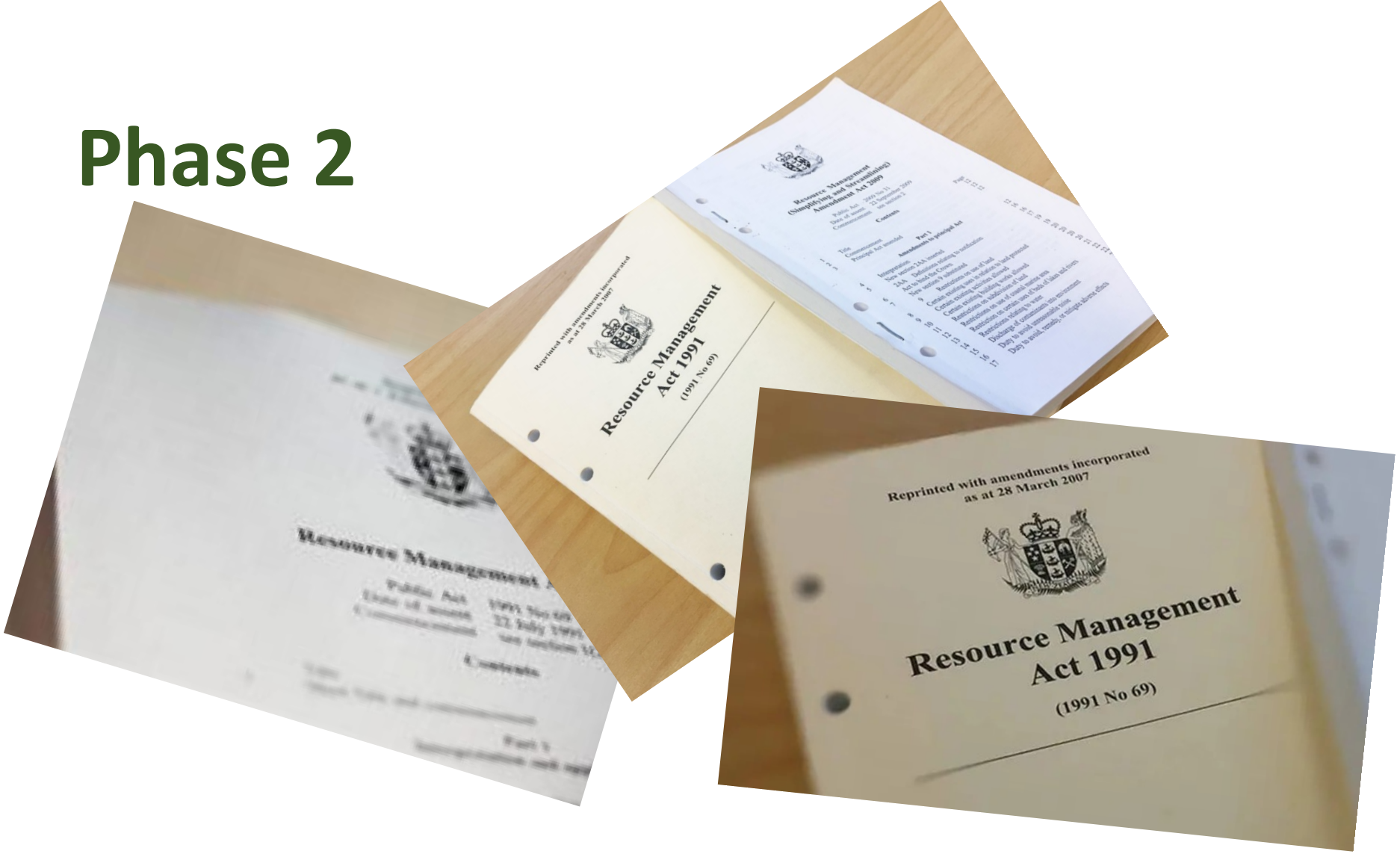
Introduction

- Assessing the possible impact of the government's reforms on impact assessment
- Phase 1 – repeal of the Natural and Built Environment Act and Spatial Planning Act (with some exceptions)
- Phase 2 – four key bits (Fast-track Approvals Bill, RM Amendment Bill #1, RM Amendment Bill #2, extensive national direction changes – plus more!)
- Phase 3 – replacing the RMA with new legislation based on the enjoyment of property rights
- Two common themes – erosion of impact identification, and weakening of standards against which impacts are assessed

Phase 1: Repeal

- What have we lost?
- Environmental limits
- Targets
- Outcomes
- Legislated spatial planning
- National planning framework
- SBAs, HVBAs, sites of cultural significance etc

Phase 2


Resource Management
Act 1991
(1991 No 69)
Reprinted with amendments incorporated
as at 28 March 2007
Resource Management
Act 1991
(1991 No 69)

Phase 2.1: Fast-track Approvals Bill

- A carve out from normal RMA and other statutory consenting processes for projects having national or regional benefit
- Some positive changes compared to Bill as introduced (eg scrapping of Ministerial decision powers, some timeframes longer, clearer standing for PCE)
- Some gaps in information required – notably re climate change and Te Tiriti
- More significant is what is done with information about impacts…
- Hierarchy of considerations – development purpose comes first (although note unclear effect of cl 24WD)
- Questions about national and regional benefit (benefit for whom?)
- A lack of strategic assessment (eg opportunity cost) – although spatial competition in EEZ
- Panel timeframes
- Opportunity for comment (and provision of information/evidence) is limited
- How many panels can we stand up?

Phase 2.2 RMA Amendment Bill #1

- Resource Management (Freshwater and Other Matters) Amendment Bill
- Makes changes to national direction concerning freshwater and indigenous biodiversity
- AND changes process for creation and amendment of national direction
- Section 32 no longer applies to national direction
- Originally a different version of s 32 would apply, without reference to Part 2, precaution, or further evaluation reports (for where proposals have changed since initial evaluation report)
- Select committee recommended disapplying s 32 entirely, on the grounds that it duplicates other non-RMA evaluation processes applying to national direction (eg regulatory impact assessment)
- "*currently, evaluation of national direction proposals occurs in both a section 32 report and a regulatory impact statement*"

Phase 2.2 RMA Amendment Bill #1

- HOWEVER, are s 32 reports and RISs really the same thing?
- RISs can be waived (and have been, in recent times) by Cabinet in favour of less robust supplementary analysis reports (SARs)
- Time constraints threaten their robustness in evaluating potential impacts. With respect to amendment bill #1 itself, this means:

"no engagement has been undertaken on the preferred option with Iwi/Māori, Post Settlement Governance Entities (PSGE), stakeholders or the general public due to time constraints" and there is "a very constrained analysis of options to address the problem, a lack of data and uncertainty with the analysis."

- RISs/SARs are also not linked to Part 2 of the RMA (criteria are, instead, set by Ministers)

For the first amendment Bill, "*the scope of the proposal was limited by policy decisions taken at Cabinet and by the Minister Responsible for RMA Reform"*

- And see the perils of this in the SAR concerning the Fast-track Approvals Bill, where out of 7 criteria only 2 were protective of the environment/Te Tiriti.


DIRE STRAITS
Romeo and Juliet
Solid rock

Phase 2.2 RMA Amendment Bill #1

- Consultation requirements for national direction (from which significant information and evidence arises) is also being constrained
- No consultation is needed where amendments would "change the time frame for implementation of any part of a national environmental standard".
- Some serious issues….
- What are the proposed solutions?
- Ministers must "consider the appropriateness" of not consulting.
- Ministers should not be able to make councils do things *faster* without consultation.
- But they *can* still make them do it slower. So it doesn't at all address the issue of Ministers being able to unilaterally switch off NESs before they're implemented, irrespective of the potential impacts of doing so.

Phase 2.3 RMA Amendment Bill #2

- A recent letter from the Minister on 14 October has said it will do various things, but scope is not yet clear.
- Greater clarity on the scope of further information requests and requirements for consents
- A one-year limit on consenting some things
- Extending the duration of some consents
- Amendments to reduce ‘overlap’ between the RMA and Fisheries Act (not yet clear what this means)
- Changes to heritage management
- Stronger approach to hazards
- Expected to be introduced before the end of 2024 and passed into law by mid-2025.
- (As an aside, note also the separate amendment legislation extending duration of coastal permits for marine farms by 20 years)

Phase 3: Replacement of the RMA

Replacing the RMA with legislation based on the enjoyment of property rights.

Many questions to grapple with… and no clear answers (yet)

Phase 3: Replacement of the RMA

1. **Narrow the scope of the resource management system and the effects it controls.**

- What is an actionable or material effect that can legitimately be assessed by a regulator?
- It's relatively easy to give examples about rules restricting what people do behind closed doors, gold plating of development, using RMA rules to ration land release due to infrastructure funding constraints, and opportunities for anti-competitive behaviour. But what about grey areas – where activities don't impact on common pool resources and stay within private property boundaries? Are these to be effects that are no longer within the purview of planners and consent authorities, even if they have intergenerational implications? Are they to be assessed only by private entities, assuming that all impacts are factored into market prices?
- For example, what about the protection of productive soil? Contaminated land? Urban form (carbon impacts of sprawling, car-dependent cities)? Landscape and viewshafts? Good urban design? Biodiversity and habitat on private land? The alternative to planning is that we rely on civil law remedies like nuisance – where people fight it out between themselves where their respective property rights are infringed.
- Can a system legitimately control *positive* effects? Will planners have the foundation to help shape communities rather than just prevent harm? Or to improve degraded environments?

Phase 3: Replacement of the RMA

2. Establish two Acts with clear and distinct purposes – one to manage environmental effects arising from activities, and another to enable urban development and infrastructure.

- How is this kind of split possible? If we have two acts with different *purposes*, how do we take a holistic approach to assessing environmental impacts?
- If the split is one Act for land use (ie ss 9 and 10 RMA?) and another for environment (ie the rest of Part 3?), how are the environmental implications of land use to be addressed when planners are assessing impacts? Australian states, such as Victoria, have struggled with overlap and connection between separate land use and pollution control statutes in recent reforms.

Phase 3: Replacement of the RMA

3. Strengthen and clarify the role of environmental limits and their development.

- What do limits include?
- In particular, are limits to be imposed for indigenous biodiversity on private land?
- If not, does this mean that such impacts won't be assessed at all in a future system?

Phase 3: Replacement of the RMA

4. Provide for greater use of national standards to reduce the need for resource consents and to simplify council plans, such that standard-complying activity cannot be subjected to a consent requirement.

- While some things may well be usefully standardised, there may be risks in relying too much on standards linked to permitted activity status, which reduces the ability of authorities to assess the impacts (especially cumulative impacts) of activities. Many impacts may be site-specific and contextualised rather than based on the nature of the operation/activity per se.
- Permitted activity standards may undermine the ability of authorities to understand what activities are being undertaken, and to enforce standards.
- How does this square with a desire for subsidiarity and councils setting limits?

Phase 3: Replacement of the RMA

5. Shift the system focus from consenting which happens before the event to strengthening compliance, monitoring and enforcement.

- This suggests (arguably) the greater use of permitted activity standards and less reliance on consenting.
- While this is an admirable goal, CME is only effective if the impact of permitted activity rules have been assessed well in the first place.
- We can see this in the recent Court of Appeal decision concerning the application of section 70 to agriculture in Southland, where inadequate consideration was given to the effects of a permitted activity rule before including it in the proposed plan.

Phase 3: Replacement of the RMA

6. Use spatial planning and a simplified designation process to lower the cost of future infrastructure.

- This is an admirable goal, but it arguably implies that spatial planning is only about saying where we're building roads, power lines and pipes.
- The value of spatial planning is also in front-ending the strategic assessment of environmental impacts, and protecting "no go" areas while smoothing the path for suitable infrastructure locations.
- Impact assessment may be weakened if spatial planning is seen in a narrow way.

Phase 3: Replacement of the RMA

7. **Realise efficiencies by requiring councils to jointly prepare one regulatory plan for their region**

- An admirable goal again, but there are difficult questions as to how this occurs and what happens if there are differences of opinion across councils as to the relative weight given to environmental objectives and impacts.

8. Provide for rapid, low-cost resolution of disputes between neighbours and between property owners and councils.

- This raises important questions as to who is affected by impacts, and when something is actually a dispute “between” property owners as opposed to a disagreement about a public policy goal.

Phase 3: Replacement of the RMA

9. Uphold Treaty of Waitangi settlements and the Crown's obligations

- This raises the significant question of where impacts affect Māori generally, including non-settled tangata whenua.

10. Provide faster, cheaper and less litigious processes within shorter, less complex and more accessible legislation.

- These are undoubtedly good aspirations, but the question is whether these will come at the cost of robust impact assessment.

Phase 3: Replacement of the RMA

There's also talk of making councils more "accountable" – but this doesn't seem to be referring to strengthening democracy; rather, it seems to be about preventing appeals to the Environment Court, and therefore weakening the testing of evidence.


HOW NOT TO
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AIRPORT
CANCELLED
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Across all phases: the process for legislative reform

- The manner in which reforms are made needs to have robust impact assessment, which we're not consistently getting
- Suspension of full regulatory impact assessment
- Bypassing MfE's climate assessment unit
- Compliance with free trade agreements
- Use of parliamentary urgency
- Removal of Environmental Legal Assistance Fund
- Weakening the role of public submission to select committee, and select committee itself

Concluding comments

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