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COVID and Streamlining Resource Management

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Simplifying and streamlining environmental and resource management law have been the buzz words of the past decade. My presentation focuses on the trajectory of these legislative developments in the context of New Zealand and the procedural impact of the COVID-19 pandemic.

1 Streamlining and simplifying the consent process

Public participation in environmental decision-making is an important aspect of the *Resource Management Act 1991* (RMA), the principal statute governing the New Zealand environment. However, public participation under the RMA has been eroded by successive ad hoc amendments designed to streamline and simplify the consent process. For example, significant amendments in 2009 and 2017 removed (respectively) the presumption in favour of notification and the general discretion of local authorities to notify consent applications. Cumulatively, these streamlining and simplifying reforms have reduced the likelihood that consent applications will be notified to the point where only 2 per cent of applications are now publicly notified. While the *Resource Management Amendment Act 2020* was designed to roll back these reforms it is unlikely, in practice, to increase public participation because the basic architecture of the previous amendments remains intact.

The impact of local authority decisions about notification of consent applications is stark. Absent notification, interested members of the public are deprived of the rights to make submissions about applications, to be heard before the relevant local authority, and to appeal decisions to the Environment Court on merits and law and beyond that to the Senior Courts on questions of law.

Additionally, the RMA amendments in 2009 and 2017 significantly narrowed the scope of the notification assessment and the Senior Courts are now generally reluctant to quash non-notification decisions unless satisfied that the local authority has acted unreasonably or irrationally in the *Wednesbury* sense.

Most recently, the *COVID-19 Recovery (Fast-track Consenting) Act 2020* that is designed to urgently promote employment, support recovery from the economic and social impacts of COVID-19, and support investment certainty across New Zealand, provides for consent applications for nominated projects to be decided by expert consenting panels appointed by the Minister for the Environment and limits appeals by providing for appeals to the High Court and beyond that to the Court of Appeal on questions of law only. These appeals are "final" and appeal to the Supreme Court is precluded.

2 Alternative planning processes

Generally, the RMA provides open standing for any interested member of the public to make submissions about proposed policy statements and plans, to be heard before the relevant local authority, and to appeal decisions to the Environment Court on merits and law and beyond that to the Senior Courts on questions of law. However, these public participation rights have also been eroded by ad hoc statutory interventions designed to provide for alternative planning processes.

For example, the *Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010* was enacted to resolve freshwater management issues in the Canterbury region and provided for submissions about the proposed regional plan to be heard and decided by commissioners appointed by the Minister for the Environment. Provision was also made for appeals to the High Court on questions of law only and beyond that to the Court of Appeal (thereby excluding the jurisdiction of the Environment Court).

Likewise, the *Local Government (Auckland Transitional Provisions) Amendment Act 2013* was enacted to provide for the preparation of a combined plan following local government amalgamation and reorganisation in Auckland (New Zealand's largest metropolitan area). The statute provided for submissions about the proposed combined plan to be heard by an independent hearings panel appointed by the Minister for the Environment and chaired by an Environment Judge. Provision was also made for appeals to the Environment Court on merits and law where the panel's recommendations were rejected by the local authority, or to the Senior Courts on questions of law where the panel's recommendations were accepted by the local authority.

Additionally, the *Resource Management Amendment Act 2020* provides for an alternative freshwater management process to address persistent issues regarding water quantity and quality across New Zealand. Provision is made for freshwater hearings panels to be convened by the Chief Freshwater Commissioner appointed by the Minister for the Environment. Similar to the *Local Government (Auckland Transitional Provisions) Amendment Act 2013* (noted above) limited appeal rights are provided. But no further appeal lies to the Supreme Court "by leave or otherwise".

Most recently, the report of the Resource Management Review Panel, *New Directions for Resource Management in New Zealand* (June 2020) noted the concerns of some submitters about delays in the resource management system through appeals to the Senior Courts. In response, the report observed that any delay inherent in further appeals is outweighed by the importance of preserving access to the Senior Courts, and that continued access should be provided to the Supreme Court given its capacity to deliver landmark judgments. But the report shied away from making a formal recommendation supporting continued access to the Supreme Court. Likewise, the Parliamentary Commissioner for the Environment in his response to the report, *RMA Reform: coming full circle* (October 2020) endorsed the use of independent hearing panels and

limited appeal rights, but made no comment on the future role of the Supreme Court in environmental decision-making.

3 The trajectory of legislative developments

The trajectory of these legislative developments points to a future that is likely to be very different from the brave new world of 1991 when New Zealand became the first country to legislate for sustainable management.

It is unlikely that New Zealand will turn back the clock and very few consent applications will in future be publicly notified.

The role of the specialist Environment Court will be marginalised as limited appeal rights continue to take hold across the system in relation to both consent applications and proposed policy statements and plans, but it is unlikely to be completely excluded. The *Local Government (Auckland Transitional Provisions) Amendment Act 2013* and the *Resource Management Amendment Act 2020* appear to have set a pattern for limited appeals to the Senior Courts on questions of law to become the norm.

More importantly precluding access to the Supreme Court in environmental cases is likely to be fraught.

For example, the Senior Courts have adopted a consistent approach to privative or ouster clauses following the Court of Appeal decision in *Bulk Gas Users Group v Attorney General* [1983] NZLR 129 that effectively deprived ouster clauses of any practical effect. The approach in *Bulk Gas* is consistent with the New Zealand Bill of Rights Act 1990 (NZBORA) that affirms the right to judicial review. Put simply, the NZBORA requires ouster clauses to be interpreted as permitting judicial review, unless the only meaning that could be given to the relevant statutory provision is one that excludes judicial review.

Putting aside the need to justify prohibiting a statutory right of appeal to the Supreme Court, it is unclear whether the right to judicial review could

be constrained in the same way. For example, Tom Bingham expressed doubt as to whether Parliament could oust the judicial review jurisdiction of apex courts in his book on *The Rule of Law*, and the majority in the United Kingdom Supreme Court made a similar observation in *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, where they also drew attention to the practical difficulty in any attempt to craft an ouster clause that could effectively prohibit an apex court from exercising inherent judicial review jurisdiction. Viewed in this way, prohibiting statutory rights of appeal to the New Zealand Supreme Court would likely be pyrrhic, because the Court's inherent judicial review jurisdiction would remain intact.

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