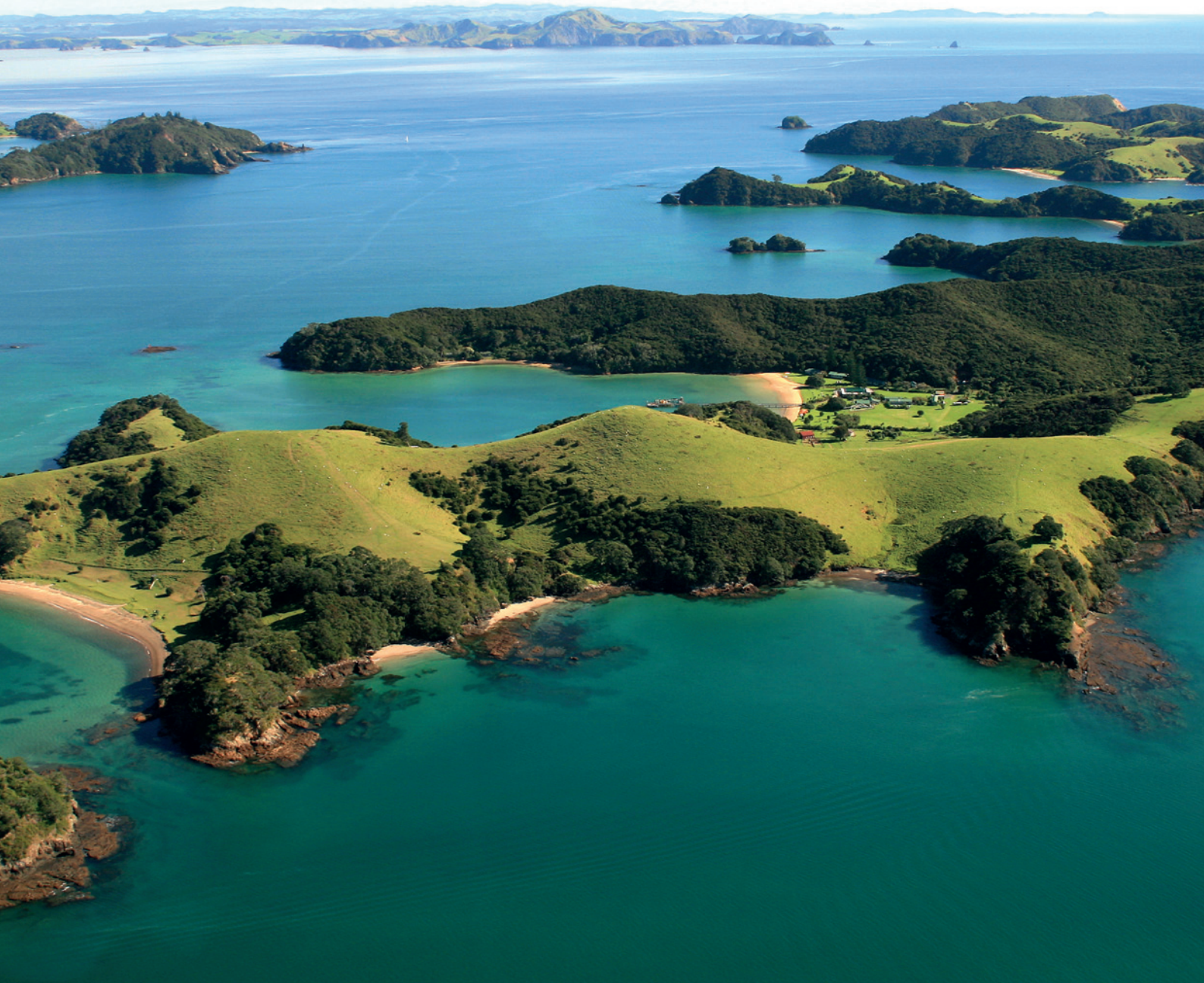
April 2012

Report of the

Environmental Defence Society Technical Advisory Group

on the review of

Sections 6 and 7 of the Resource Management Act 1991



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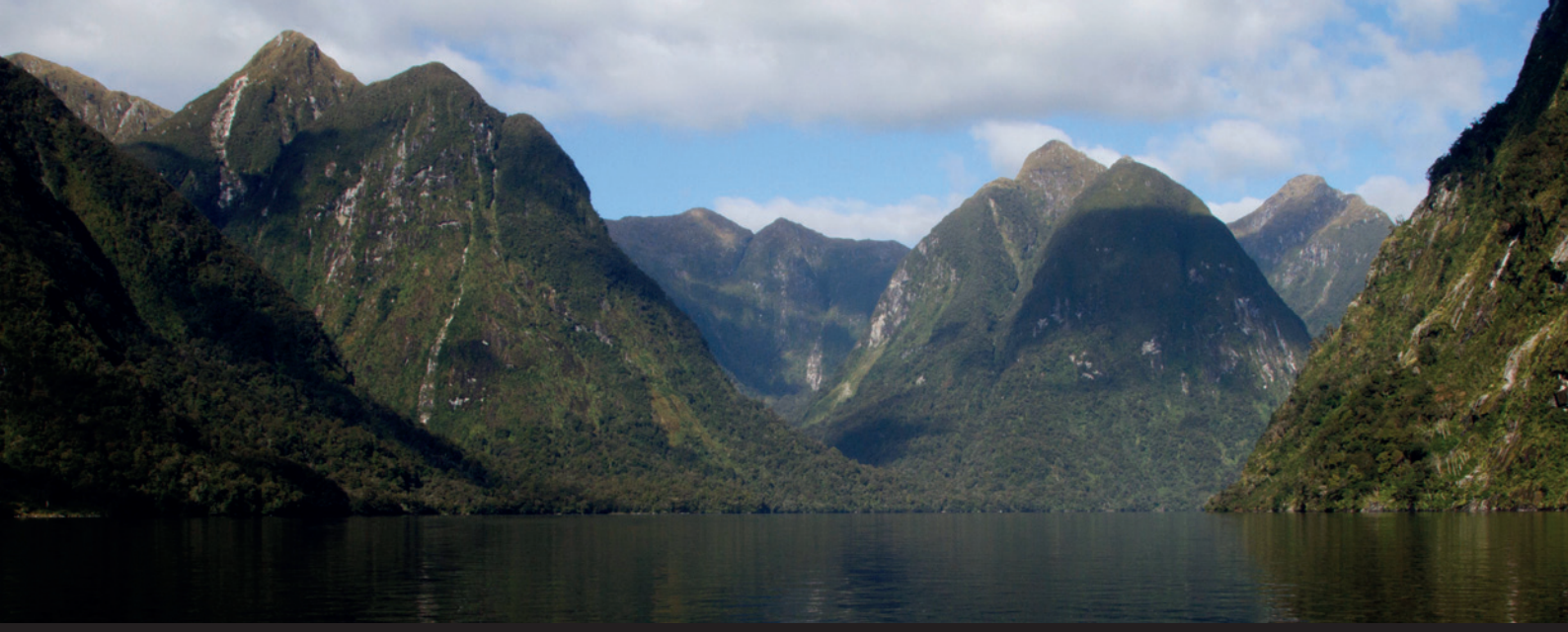


1 Introduction

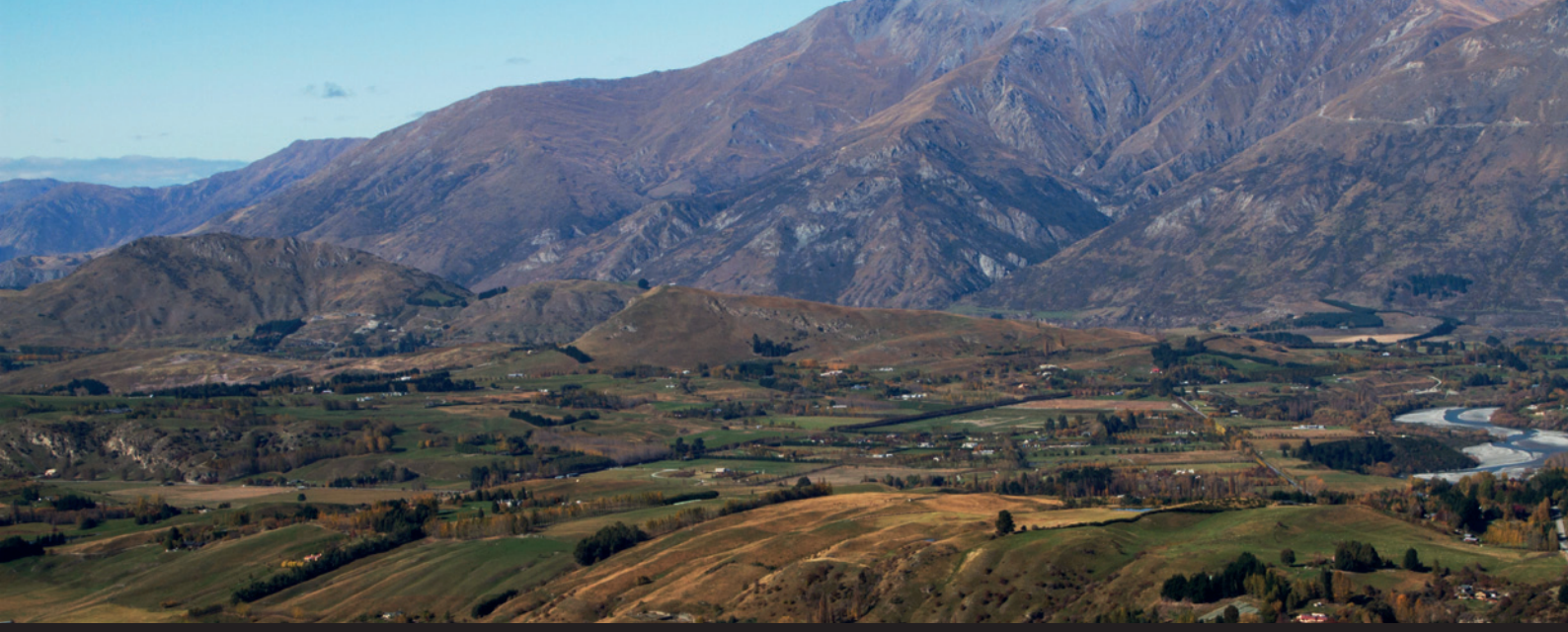
In December 2008, the Government initiated a two-phase programme of reform of resource management in New Zealand. The Government was concerned that the costs, uncertainty and delays of the Resource Management Act 1991 (the **Act**) were adversely affecting New Zealand jobs, infrastructure, and productivity, and promised changes to the Act to simplify and streamline processes without compromising environmental protections.[1]

In 2011 the Government announced its intention to consider amendments to sections 6 and 7 of the Act within the scope of its Phase 2 reforms and announced the establishment of a technical advisory group (**RMA Principles TAG**) to review sections 6 and 7 and report back to Cabinet with recommendations by March 2012.[2]

The Environmental Defence Society (**EDS**) is a public interest environmental law group, formed in 1971. It has a membership that consists largely of resource management professionals. The focus of EDS's work is on achieving good environmental outcomes through improving the quality of New Zealand's legal and policy frameworks and statutory decision-making processes.

In November 2011 EDS convened a technical advisory group (**EDS TAG**) to review sections 6 and 7 of the Act, and produce a report with recommendations. In forming the EDS TAG, EDS sought to assist Cabinet and the Minister for the Environment in their review, by providing the advice of a highly experienced and multi-disciplinary team of resource management professionals.

The EDS TAG's recommendations have been produced independently of the RMA Principles TAG's work. EDS's TAG has, however, adopted the terms of reference, scope of work, and general timeframe of the RMA Principles TAG in order to provide relevant and timely advice to the Government. This report sets out EDS TAG's recommendations.



2 The EDS TAG process

The EDS TAG consists of the following members:

Hon Peter Salmon CNZM QC, Former High Court Judge and current Arbitrator and Mediator and Environmental and Resource Management Dispute Resolution Professional

Stephen Brown, Landscape architect, Director of Brown NZ Ltd

John Burns, Barrister, Burns Fraser Environment Law

Greg Hill, Resource Management Consulting and Independent Commissioner

Raewyn Peart, Policy Director, Environmental Defence Society

Peter Reaburn, Director – Planning, Cato Bolam Consultants

Kelsey Serjeant, Legal Advisor, Environmental Defence Society

Gary Taylor, Chairman and Executive Director, Environmental Defence Society

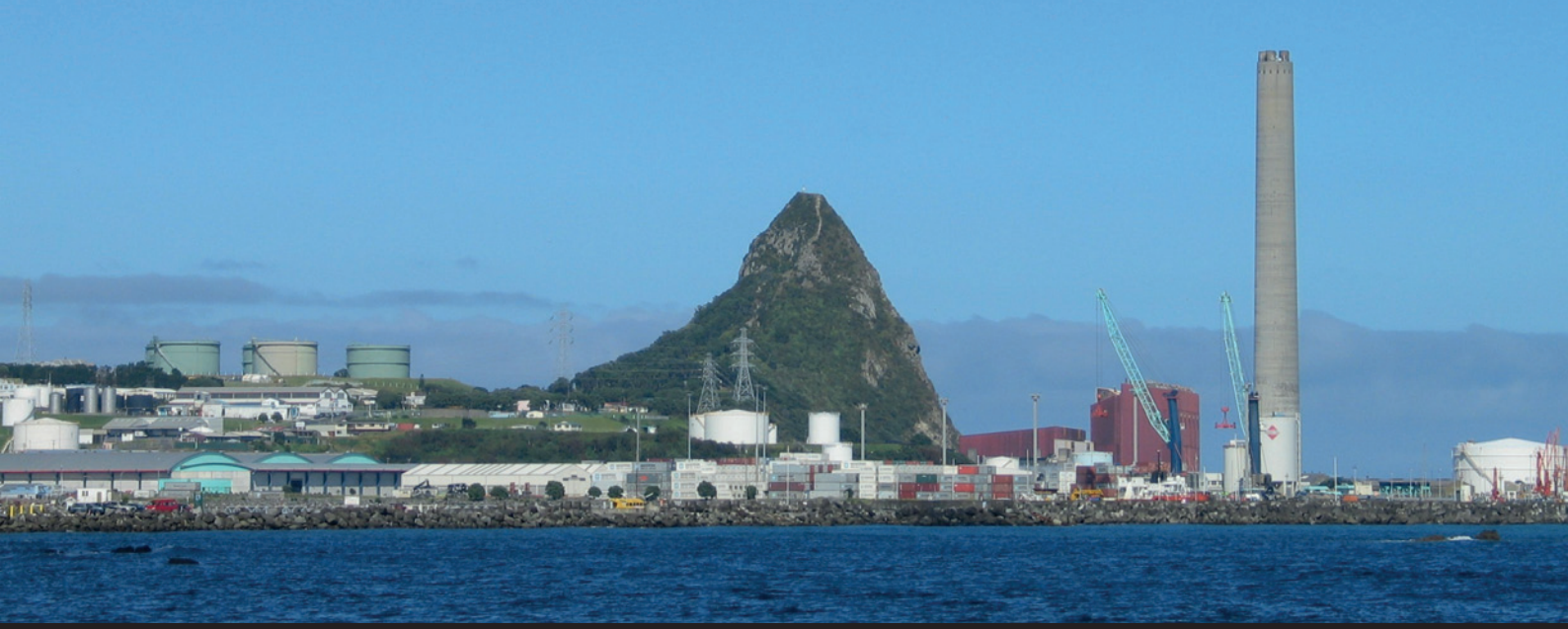
With the exception of Gary Taylor, Raewyn Peart and Kelsey Serjeant, none of the EDS TAG members are members of EDS.

EDS TAG adopted the terms of reference and scope of work of the RMA Principles TAG. The scope of work of the RMA Principles TAG is defined in the following way:

> *The TAG's role will be to undertake a focused review of sections 6 and 7 of the RMA. In particular, they will focus on whether sections 6 and 7 can be improved to:*
>
> - *give greater attention to managing issues of natural hazards noting the RMA issues arising from the recent Canterbury earthquakes*
> - *consider the recommendations for changes to sections 6 and 7 from the urban and infrastructure technical advisory groups in a broader context*
> - *consider changes that would enable the incorporation of the Soil Conservation and Rivers Control Act 1941, River Boards Act 1908 and the Land Drainage Act 1908*
> - *reflect on the provisions relative to the resource management challenges facing New Zealand 20 year on from the RMA's enactment*
> - *promote consistency of interpretation through clear and modern drafting.*
>
> *In carrying out this review, the TAG will be able to consider the range of issues relevant to gain a clear view of the work needed on sections 6 and 7.*
>
> *The review will be limited from considering any matters that may affect other sections of Part Two of the RMA (sections 5 and 8 of the Act, which outline the RMA's purpose and principles).*

EDS TAG discussions, and the subsequent recommendations contained in this report, have been structured to address each of the bulleted items identified in the scope of work of the RMA Principles TAG.

The EDS TAG met in December 2011 and February 2012 and developed its recommendations through the circulation of working papers prepared by EDS. The final report was peer reviewed by several lawyers currently practising in the resource management field.



3 Resource Management Act reform milestones

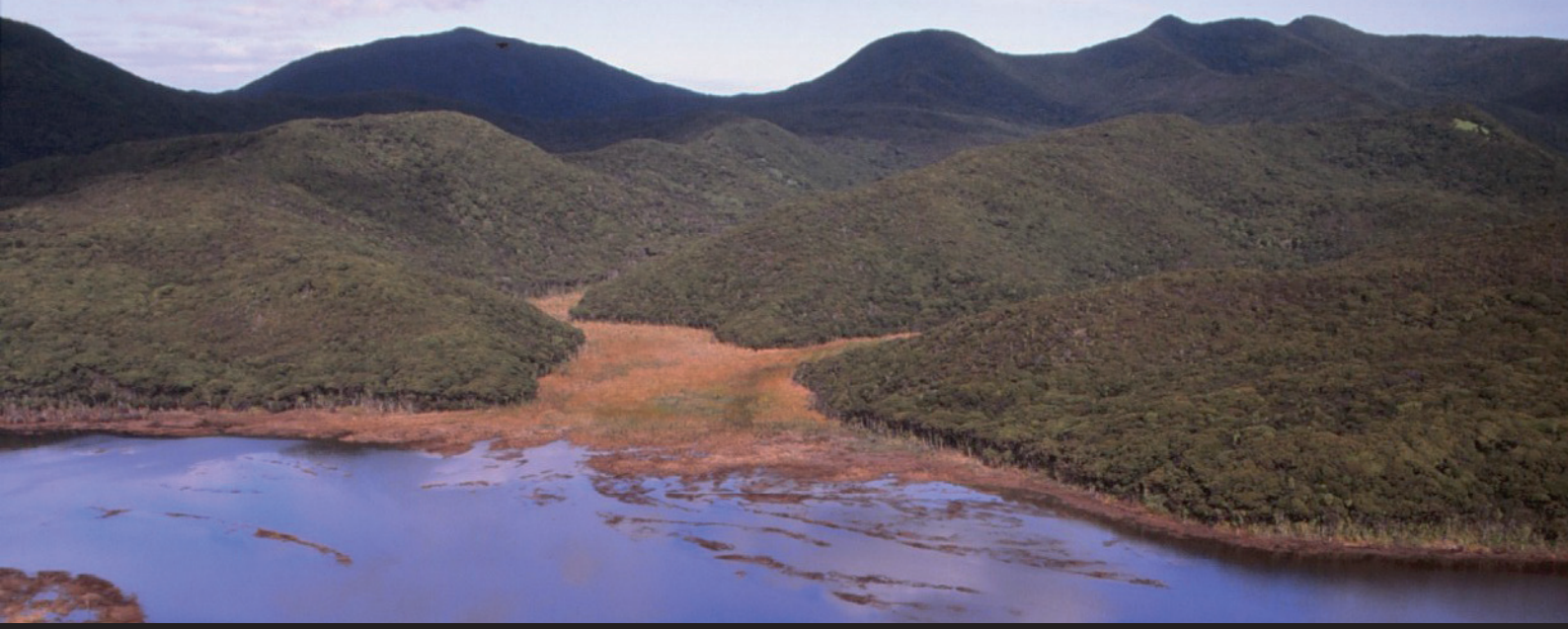
In December 2008, the Government initiated a two-phase programme of reform of resource management in New Zealand. To assist it in developing policy proposals for Phase 1 of this process, the Government appointed a technical advisory group (**Phase 1 TAG**) which provided advice in a report finalised in February 2009. The Phase 1 TAG's advice informed the content of the Resource Management (Simplifying and Streamlining) Amendment Act 2009, which came into force on 1 October 2009.

The Phase 1 TAG recommended that, due to the short time frame of its work, a number of issues be considered more fully as part of Phase 2 of the resource management reforms, including amendments to section 6 and 7.[3]

In April 2009, Cabinet agreed on the issues that would comprise Phase 2 of the resource management reforms, and ten 'work streams' were established to address these issues.[4] The urban planning and infrastructure work streams have been progressed through the formation of two independent technical advisory groups in January 2010 – the Urban Technical Advisory Group (**UTAG**) and the Infrastructure Technical Advisory Group (**ITAG**) – which provided recommendations in reports dated July 2010 and August 2010 respectively.

In October 2010 the Ministry for the Environment released a discussion document called *Building competitive cities* which identified options for reform of the urban and infrastructure planning system reflecting the key recommendations of UTAG and ITAG and further options identified by officials.[5] The Government has not yet identified its preferred option or package of options.

On 7 October 2011 the Government announced its intention to also consider amendments to sections 6 and 7 of the Act within the scope of its Phase 2 reforms and the establishment of a technical advisory group (RMA Principles TAG) to review sections 6 and 7 and report back to Cabinet with recommendations by March 2012.[6] The following section of this report describes how the perceived need to give greater attention to the risks of natural hazards in decision-making has also prompted the Government to review these sections.[7]



4 Background to the review of sections 6 and 7

The Phase 1 TAG recommended that amendments to section 6 and 7 should include reference to social and economic factors, and that a general rationalisation of those sections be considered more fully as part of Phase 2 of the resource management reforms,[8] stating the following in its report:[9]

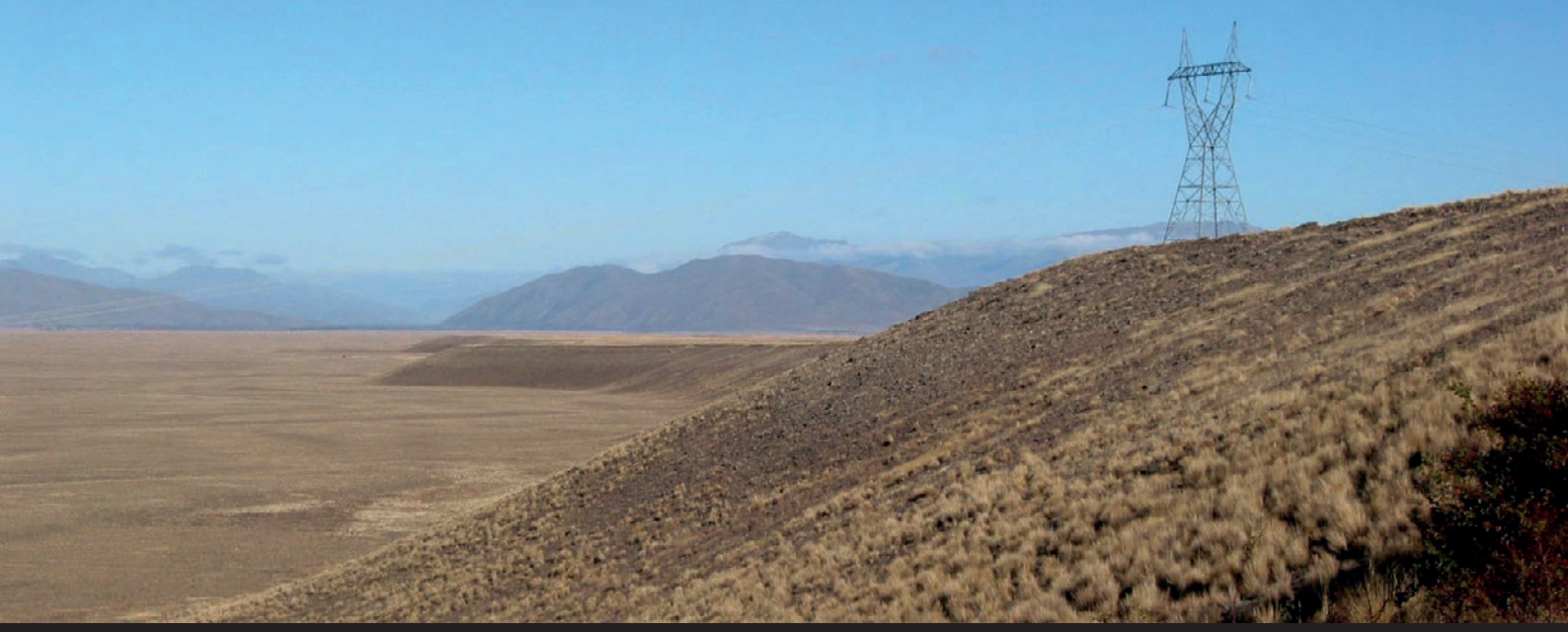
> *Sections 6 and 7 are at present rather a hotch-potch collection of sentiments, all directed at "environmental" issues (as that term is commonly understood), rather than the economic, cultural and social questions which are also central to the sustainability issues which lie at the heart of the Act.*
>
> *From time to time, calls emerge for an amendment to sections 6 and 7 to correct this "imbalance" and insert in those sections references, for example, to "affordable housing" or "the development of infrastructure".*
>
> *The TAG has considered these suggestions, and a related proposal to amend the definition of "environment", and recommends that no changes be made as part of Phase 1 of the reform process.*
>
> *The TAG is concerned that any changes to these sections be thoroughly considered and widely consulted upon, both as to their societal acceptance and their legal effect. It would be unfortunate indeed if an amendment designed to simplify and streamline the Act, were to result in further doubts arising as to the interpretation of, and the weight to be given to, its most important provisions.*

More recent events have also motivated the Government to review these sections. The Government's announcement of its intention to consider amendments to sections 6 and 7 coincided with the release of a Ministry-commissioned report by consultants Hill Young Cooper and Resource Management Group Limited, concerning the extent to which information on liquefaction and lateral spreading hazards were known, available and factored into planning and development processes for specific suburbs in Christchurch. The study area included the eastern suburbs of Christchurch and Brooklands, Kaiapoi and Kairaki/The Pines during the period from 1977 to the present.

The report identified that while there was information on liquefaction and lateral spreading available during the study period, for most of the period under review, information on liquefaction and lateral spreading risk was not specifically factored into zoning and consenting decisions for residential development.[10]

In response to the report's findings, the Minister stated "The problem is the RMA did not – and still does not – require these sorts of risks to be assessed and managed. This reflects the priorities in the RMA of preserving natural character, landscape, flora and fauna, public access, cultural values and heritage over managing natural hazards".[11]

The Government's decision to review sections 6 and 7 within the scope of its Phase 2 reforms is, in part, based on the notion that amendment to section 6 and 7 may enable greater attention to be given to the risks of natural hazards (including earthquakes) in decision-making under the Act.[12]



5 The purpose and principles of the Resource Management Act

Overview

The EDS TAG does not attempt in this report to provide an exhaustive analysis of the case law relating to Part 2 of the Act or traverse the genesis of Part 2 in detail. However an understanding of this Part of the Act, and its interpretation by the courts, is necessary to inform a review of sections 6 and 7.

Part 2 of the Act contains a statement of the Act's purpose and principles. This part guides the functions of regional and territorial authorities in plan-making and policy decisions, and guides decisions as to whether to grant or refuse resource consent applications. The purpose of the Act is set out in section 5. Section 6 provides that all persons exercising functions and powers under the Act are required to recognise and provide for seven matters of national importance. Section 7 provides for "other matters" which persons exercising functions and powers under the Act must "have particular regard to". Section 8 provides that all persons exercising functions and powers under the Act are required to "take into account the principles of the Treaty of Waitangi".

Sections 6, 7 and 8 are to be invoked and applied in the promotion of the Act's purpose.[13] Sections 5, 6, 7 and 8 can be seen as forming a hierarchy of importance, with the Act's purpose being paramount and the terms "take into account" (s8), "have particular regard to" (s7) and recognise and provide for" (s6) placing progressively greater obligation on the decision maker to consider and protect those matters to the extent relevant.[14]

In the seminal case on Part 2, *New Zealand Rail Ltd v Marlborough District Council*, Justice Grieg stated:[15]

> *This Part of the Act expresses in ordinary words of wide meaning the overall purpose and principles of the Act. It is not, I think, a part of the Act which should be subjected to strict rules and principles of statutory construction which aim to extract a precise and unique meaning from the words used. There is a deliberate openness about the language, its meanings, and its connotations which I think is intended to allow the application of policy in a general and broad way. Indeed it is for that purpose that the Planning Tribunal, with special expertise and skills, is established and appointed to oversee and to promote the objectives and policies and the principles under the Act.*

However some commentators suggest the openness of the language in Part 2 has resulted in its interpretation being highly contestable. For example the Planning Tribunal has commented:[16]

> *In seeking to promote the Act's purpose, it quickly becomes apparent that the "deliberate openness" of the legislation, as commented on by Greig J in the Port Marlborough case [1994] NZRMA 70 at 86, may require the decision-maker to arrive at a judgment in circumstances where competing, indeed conflicting, values exist.*

Section 5

The purpose of the Act is set out in section 5:

> ***5 Purpose***
>
> *(1) The purpose of this Act is to promote the sustainable management of natural and physical resources.*

(2) *In this Act,* ***sustainable management*** *means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while—*

(a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and

(b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and

(c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

Section 5 has been described as the "lodestar",[17] guiding the functions of regional and territorial authorities in plan-making and policy decisions, and guiding decision-making on resource consent applications.

There are divergent public perceptions of the meaning of sustainability. The Act concerns the sustainability of the natural and physical environment, and does not (and was not intended to) address social and economic considerations.[18] This is reflected in the Government's deliberate choice of the term "sustainable management" as opposed to "sustainable development".[19]

During the third reading of the Resource Management Bill to Parliament, the Minister for the Environment at the time, Simon Upton, stated that the Government had moved from planning for activities to regulating their effects and that the Government's focus was on externalities (the effects of activities on the receiving environment), rather than attempting to direct or provide for economic or social outcomes.[20]

Upton has since reiterated the Act's purpose was not one involving inquiring into what constitutes people's social, economic and cultural wellbeing, or how they should achieve it. He has been critical of the use of Part 2 to sanction particular uses of resources regardless of their environmental effects.[21]

In *North Shore City Council v Auckland Regional Council* [22] the Court held section 5(2) required consideration in a way in which involved an overall broad judgment.

> *"The method of applying s 5 then involves an overall broad judgment of whether a proposal would promote the sustainable management of natural and physical resources. That recognises that the Act has a single purpose. Such a judgment allows for comparison of conflicting considerations and the scale or degree of them, and their relative significance or proportion in the final outcome. "*

The "overall broad judgment" approach has been adopted in subsequent cases and is the most favoured approach for the Court in interpreting section 5.[23]

Section 6

Section 6 of the Act provides:

> ***6 Matters of national importance***
>
> *In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:*
>
> *(a) The preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development:*
>
> *(b) The protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:*
>
> *(c) The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:*
>
> *(d) The maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers:*
>
> *(e) The relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.*
>
> *(f) The protection of historic heritage from inappropriate subdivision, use, and development.*
>
> *(g) The protection of protected customary rights.*

Section 6 matters are subordinate to the primary purpose of the promotion of sustainable management and therefore section 6 is to be interpreted and applied as an integral part of achieving the overall statutory purpose in section 5.[24] It is well settled that a section 6 matter neither automatically nor necessarily 'vetoes' all other considerations, nor should it be achieved 'at all costs'.[25]

However, the requirement that decision-makers recognise and provide for matters of national importance implies that these values have significant priority. The phrase "recognise and provide" suggests a positive action by decision-makers. The High Court has said of the phrase "recognise and provide" in the context of the Hazardous Substances and New Organisms Act 1996:[26]

> *There is a deliberate legislative contrast between s5 "recognise and provide for" and s6 "take into account". When Parliament intended that actual provision be made for a factor, Parliament said so. One does not "provide for" a factor by considering and then discarding it. In that light, the obligation "to take into account" in s6 was not intended to be higher than an obligation to consider the factor concerned in the course of making a decision—to weigh it up along with other factors—with the ability to give it, considerable, moderate, little, or no weight at all as in the end in all the circumstances seemed appropriate.*

Case law indicates that the matters in section 6 have an important role in shaping the contents of plans. In *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* the Court held:[27]

> *In respect of a district council's functions, including integrated management of land, the starting point for the first stage must be to identify the facts and the appropriate matters to be considered. In particular it is fundamental to consider Part II of the Act. That means it is mandatory to identify the matters of national importance. We do not see how that can be achieved without identifying (necessarily with a broad pencil, but with as much accuracy as possible) the boundaries of the areas concerned. Once the coastal environment, wetlands, lakes, rivers, outstanding natural features or landscapes, areas of significant vegetation, significant habitats of indigenous fauna, or Māori ancestral lands, water, sites, waahi tapu, and other taonga have been identified the general issues tend to be self-generating: how can those resources be protected from inappropriate use or development or have access to them maintained and enhanced, or be recognised and provided for, as the case may be?*

In the EDS TAG's experience, conflicts between section 6 matters rarely arise in practice. We consider this is due to the nature of the matters being natural and biophysical, with the exception of matters that provide for Māori customary rights and relationships to ancestral lands, water, sites, waahi tapu, and other taonga and the protection of historic heritage. This position can be contrasted with the predecessor section in the Town and Country Planning Act 1977 (section 3) which included "The wise use and management of New Zealand's resources" and "The conservation, protection, and enhancement of the physical, cultural, and social environment" alongside matters such as "The preservation of the natural character of the coastal environment and the margins of lakes and rivers and the protection of them from unnecessary subdivision and development".

There have been two changes to this section since the Act's inception:

- Section 6(f) "the protection of historic heritage from inappropriate subdivision, use, and development" was elevated from an 'other matter' by the Resource Management Amendment Act 2003. 'Historic heritage' is defined in the RMA as being 'those natural and physical resources that contribute to an understanding and appreciation of New Zealand's history and cultures' and includes archaeological, architectural, cultural, historic, scientific and technological qualities.
- Section 6(g) was inserted by the Resource Management (Foreshore and Seabed) Amendment Act 2004 and then amended by the Marine and Coastal Area (Takutai Moana) Act 2011. A 'protected customary right' has the meaning given in section 9(1) of the Marine and Coastal Area (Takutai Moana) Act 2011. This means an activity, use or practice established under the Act and recognised by a protected customary rights order or an agreement. Protected customary rights orders can be granted over a specified part of the common marine and coastal area. Such orders recognise a particular activity, use or practice which has been exercised since 1840.

Section 7

Section 7 of the Act provides:

> ***7 Other matters***
>
> *In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—*
>
> *(a) Kaitiakitanga:*
>
> *(aa) The ethic of stewardship:*
>
> *(b) The efficient use and development of natural and physical resources:*
>
> *(ba) The efficiency of the end use of energy:*
>
> *(c) The maintenance and enhancement of amenity values:*
>
> *(d) Intrinsic values of ecosystems:*
>
> *(e) Repealed.*

(f) Maintenance and enhancement of the quality of the environment:

(g) Any finite characteristics of natural and physical resources:

(h) The protection of the habitat of trout and salmon:

(i) The effects of climate change:

(j) The benefits to be derived from the use and development of renewable energy.

The duty to have "particular regard" in the context of section 7 creates "not just an obligation to hear and understand what is said, but also to bring what is said into the mix of decision making".[28] In *Quarantine Waste NZ Ltd v Waste Resources Ltd*[29] the High Court approved a formulation by the Planning Tribunal that an obligation to have particular regard was one which put the Court under a duty to be on inquiry.

More recently the Environment Court in *Long Bay-Okura Great Park Society Inc v North Shore City Council* held that the requirement means the local authority must look into the matter raised, but may in its discretion reject it as insufficiently relevant or worthy of weight.[30]

There have been five changes (including both insertions and deletions) to individual subsections in section 7 since the Act's inception:

- Section 7(aa) "The ethic of stewardship" was inserted by the Resource Management Amendment Act 1997.
- Section 7(ba) "The efficiency of the end use of energy" was inserted by the Resource Management (Energy and Climate Change) Amendment Act 2004.
- Section 7(e) "Recognition and protection of the heritage values of sites, buildings, places, or areas" was repealed by the Resource Management Amendment Act 2003 (and elevated to a section 6 matter).
- Section 7(i) and (j) "The effects of climate change" and "The benefits to be derived from the use and development of renewable energy" were inserted by the Resource Management (Energy and Climate Change) Amendment Act 2004.

Summary of the differences between sections 6 and 7

EDS TAG considers the following matters are important points of difference between sections 6 and 7. EDS TAG has been mindful of these differences when making its recommendations.

- Section 6 imparts an obligation on persons exercising functions and powers under the Act to make actual provision for the matters in that section (ie a positive obligation). Section 7 puts a decision-maker under a duty to be "on inquiry" in relation to those matters and to "hear and understand" the matter, but does not impart any positive obligation in relation to those matters.
- The reference in section 6 to "matters of national importance" suggests they have importance beyond a regional or district context.
- In the EDS TAG's experience the need to adjudicate between conflicting section 6 matters very rarely arises. Conflicts between section 7 matters arise more frequently. Such conflicts are in part due to the large conceptual differences between some section 7 matters such as "intrinsic values of ecosystems" and "the benefits to be derived from the use and development of renewable energy".
- Section 7 has been subject to a larger number of legislative insertions and deletions since its inception.

6 Recommendations

Should changes be made to give greater attention to managing issues of natural hazards with reference to the RMA issues arising from the recent Canterbury earthquakes?

The Act already contains a number of provisions relating to natural hazards. These are summarised in **Appendix 1** to this report.

The functions of local authorities establish a role for both territorial authorities and regional councils in avoiding or mitigating natural hazards.[31] The Act currently enables territorial authorities and regional councils to include provisions, including rules, in their district and regional plans respectively, relating to the avoidance or mitigation of natural hazards.[32] The High Court accepted that rules restricting land use activity on the seaward side of a building line at the southern end of the South Brighton Spit, due to the risk of coastal erosion, were not ultra vires the regional council's powers.[33]

When considering an application for a resource consent, the risk of natural hazards are able to be considered under section 104(1)(c) (which relates to any other matter the consent authority considers relevant and reasonably necessary to determine the application). However there is no *requirement* that a consent authority have regard to the risk of natural hazards when considering an application for resource consent.

In the case of subdivision consents, a consent authority may refuse to grant a subdivision consent, or may grant a subdivision consent subject to conditions, if it considers that the land in respect of which a consent is sought, or any structure on the land, is or is likely to be subject to material damage by erosion, falling debris, subsidence, slippage, or inundation from any source. However under this section consent authorities have discretion to grant subdivision consents in respect of hazard prone land. This contrasts with the position prior to the 2003 amendments which required subdivision consent not to be granted unless the consent authority was satisfied that the effects would be avoided, remedied, or mitigated.

In addition there is a duty on local authorities to keep information including records of natural hazards to the extent that the local authority considers appropriate for the effective discharge of its functions.[34]

Recommendation

Our analysis of the Act illustrates that, to an extent, the tools and processes are already available under the Act to enable information on natural hazards to be factored into planning for future development. Yet experience indicates that these tools and processes have not always translated into sound consenting decisions being made at particular locations.

There is currently no mandatory requirement that local authorities have regard to the risk of natural hazards when preparing and changing district and regional plans.

The EDS TAG considers it appropriate that local authorities are required to have "particular regard" to the risk of natural hazards in preparing and changing plans and in consenting decisions.

Therefore we propose section 7 be amended to include an additional subsection:

7 Other matters

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—

...

(x) The risk of natural hazards

In addition, it may be desirable to amend other sections of the Act directly concerned with plan-making and the resource consent decision-making process. Sections that might be considered include sections 74 and 76, which specify matters to be considered by local authorities in preparing and changing plans and sections 104 and 106 which refer to the consideration of applications and the refusal of subdivision consent in certain circumstances respectively.

The EDS TAG considers that, in addition to amendments to the Act, an analysis of the risks of natural hazards should be undertaken at a national level and a more strategic approach adopted to planning for the avoidance and mitigation of natural hazards. National guidance might take the form of a national strategy on natural hazards, a national policy statement or a national environmental standard.

Amendment to section 6 is not supported. As we have said earlier in this report, the phrase "recognise and provide" requires a positive action by decision-makers, and the extension of this obligation to managing the risk of natural hazards would be overly prescriptive.

Should changes be made to sections 6 and 7 in relation to urban issues?

Context

The Government has identified a number of problems related to urban planning.[35] These include:

Inadequate recognition of the urban environment in the RMA: *the RMA focuses on environmental effects and protecting the natural environment, with no explicit recognition of the urban environment.*

Complex planning system: *urban planning draws on several different Acts, each with its own timeframes and regulations, and there is little integration between strategies, regulations, expenditure and decision-making.*

Lack of consistency in decision-making: *the complexity of the planning system does not foster agreement between the multiple participants, or facilitate co-ordination and consistency.*

Ineffective implementation tools: *the urban planning tools we have are either inadequate or are not being used in ways that complement the broader urban planning system.*

The Government's reform of urban planning has been progressed through the formation and subsequent report of UTAG. The RMA Principles TAG is to consider UTAG's recommendations for changes to sections 6 and 7 in a broader context.

The UTAG report states:[36]

While referencing social, economic and cultural well-being, the RMA's principal focus is upon the natural and biophysical environment. According to one commentator:

> *Section 6 of the Act identifies seven matters of "national importance" of which only one, concerning the protection of historic heritage, has any direct bearing on the built environment. Section 7 of the Act identifies eleven "other matters", of which only two have a direct bearing on the built environment. These concern the maintenance and enhancement of amenity values, and of the quality of the environment. It has to be said that the RMA attaches little importance to the urban environment.*

In order to address this issue, the UTAG report made the following recommendation:[37]

That the RMA be amended to recognise the urban and built environment by:

Under matters of National Importance, covering the quality of the design and planning of the built environment

This recommendation was picked up on in the discussion document *Building Competitive Cities* which identified the following option:[38]

Amend the RMA to recognise the benefits of a quality urban environment by making specific reference to it in section 6 and/or section 7.

Recommendation

EDS TAG agrees with the Government that there is inadequate recognition of the urban environment in the Act. In particular we are concerned that, while the Act can be interpreted to allow local authorities to "plan" for the urban environment, this is not explicit in the Act. It is important there is a clear mandate for matters particularly relevant to planning for the urban environment such as patterns of development, accommodating growth, development densities, public transport systems and nodes, street layouts, and private/public realm interfaces to be taken into account in preparing and changing plans. While actual practice suggests these matters currently dominate our management approaches in urban areas, the Act requires some interpretation to support this, relying on these issues being encompassed by "The maintenance and enhancement of amenity values"(s 7(c)) and "Maintenance and enhancement of the quality of the environment"(s 7(f)).

Therefore we propose section 7 be amended to include an additional subsection:

> ***7 Other matters***
>
> *In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—*
>
> *...*
>
> *(x) The maintenance and enhancement of a quality urban and built environment*

However such an amendment in itself is insufficient to give clarity or certainty as to what outcomes for the urban and built environment should be pursued, or that they will be achieved. A national policy statement (**NPS**), national environmental standard or best practice guidelines are tools that would provide greater guidance from central government as to what outcomes for the urban and built environment should be pursued. EDS TAG would, in addition, support the use of these tools.

Amendment to section 6 is not supported. As described earlier in this report the nature of section 6 matters are predominantly natural and biophysical. The urban and built environment is fundamentally different in nature to the existing section 6 matters and amendments to section 6 would likely result in an increased need to adjudicate between conflicting section 6 matters which would in turn increase legal uncertainty and consequent litigation costs. In addition, the phrase "recognise and provide" requires a positive action by decision-makers, and the extension of this obligation to maintaining and enhancing a quality urban and built environment would be overly prescriptive.

We note UTAG recommended a NPS on the built environment be promulgated, alongside amendment to section 6. Amendment to section 6 is not required in order to provide a mandate for the promulgation of a NPS.[39] The National Policy Statement for Renewable Electricity Generation and National Policy Statement for Freshwater Management are examples of NPSs promulgated on matters that are not section 6 matters.

Should changes be made to sections 6 and 7 in relation to infrastructure issues?

Context

The Government has identified a number of problems related to current processes used to design, plan and deliver infrastructure. These include:[40]

> **Lack of national clarity and consistency of objectives, direction and standards:** *this creates uncertainty and risk for infrastructure providers seeking to invest or operate infrastructure in different parts of the country.*
>
> **Mixed access to designations:** *designations under the RMA provide a wider range of powers and protections for infrastructure providers than is available under a resource consent. However, access to these powers and protections is inconsistent, there is a risk that it may be abused, and it may not reflect future infrastructure needs.*
>
> **Complex and inflexible approval processes:** *infrastructure projects often involve significant investment costs, including complex and costly design. Current approval processes increase risk, uncertainty and cost for providers.*
>
> **Lack of robust and integrated decision-making:** *current decision-making processes are not always perceived to be legitimate or fair, undermining public acceptance and confidence in both the decisions and their consequences.*
>
> **Inefficient and inadequate land acquisition processes:** *the Public Works Act (PWA) provides a process for land to be acquired for public works. Potential problems have been identified with the adequacy of compensation and the efficiency of processes.*

The Government's reform of infrastructure processes has been progressed through the formation and subsequent report of ITAG. The RMA Principles TAG is to consider ITAG's recommendations for changes to sections 6 and 7 in a broader context.

ITAG's recommendations include:[41]

> *That section 6 of the RMA be amended to add an additional clause which states: "The development and operation of regionally and nationally significant infrastructure."*

This recommendation was picked up on in the discussion document *Building Competitive Cities* in which the Government identified the following option:[42]

> *Amending sections 6 or 7 of the RMA to explicitly refer to the importance of infrastructure and the benefits that derive from it.*

Recommendation

EDS TAG has considered amending section 6 or 7 to add a clause referencing development and operation of regionally and nationally significant infrastructure. Amendment to section 6 or 7 is not supported for the following reasons:

- The current procedure for processing matters[43] that are or are part of a proposal of national significance has enabled significant infrastructure projects to be consented within a reasonable timeframe. The New Zealand Transport Agency's applications for resource consents and notices of requirement for the Waterview Connection, lodged on 20 August 2010 and decided by the Board of Inquiry on 29 June 2011, are a recent example. In EDS TAG's experience few significant infrastructure projects are declined consent. EDS TAG questions the extent to which the current procedure under the Act for processing significant infrastructure projects, especially proposals of national significance, is indeed "complex and inflexible".
- The other problems identified by the Government (lack of national clarity and consistency of objectives, direction and standards, mixed access to designations; inefficient and inadequate land acquisition processes; and lack of robust and integrated decision-making) cannot possibly be solved by amending sections 6 or 7.
- This report earlier described that in passing the Act the Government had moved from planning for activities to regulating their effects and that the Government's focus was on externalities (the effects of activities on the receiving environment), rather than attempting to direct or provide for economic or social outcomes. Referencing particular investment decisions and developments in section 6 runs counter to this underlying approach of the Act.
- As noted above, conflicts between section 6 matters are rare. However, adding a clause referencing development and operation of regionally and nationally significant infrastructure is likely to change this. The need to adjudicate between conflicting section 6 matters should be avoided as it would increase legal uncertainty and consequent litigation costs.

Should changes be made to enable the incorporation of the Soil Conservation and Rivers Control Act 1941, River Boards Act 1908 and the Land Drainage Act 1908?

EDS TAG is uncertain of the Government's reasons for considering incorporating the Soil Conservation and Rivers Control Act 1941, River Boards Act 1908 and the Land Drainage Act 1908 in section 6 or 7. We have, however, considered whether there are worthwhile elements of these Acts worth incorporating.

Soil Conservation and Rivers Control Act 1941

Section 10 states the objects of the Soil Conservation and Rivers Control Act 1941 Act:

> ***10 Objects of Act***
>
> *The objects of this Act are—*
>
> *(a) The promotion of soil conservation:*
>
> *(b) The prevention and mitigation of soil erosion:*
>
> *(c) The prevention of damage by floods:*
>
> *(d) The utilisation of lands in such a manner as will tend towards the attainment of the said objects.*

The Act sets up catchment areas and provides for regulation of activities within them. Section 10A of the Act provides that "Notwithstanding section 10 of this Act, nothing in this Act shall derogate from the provisions of sections 176 to 182 of the Harbours Act 1950 or the Resource Management Act 1991".

River Boards Act 1908

The River Boards Act 1908 is described in the Act as "An Act to consolidate certain enactments of the General Assembly relating to the constitution of River Boards and the construction of river works". Section 86 provides that "Nothing in this Act shall authorise any River Board to commence or construct any river works or place any pile or other structure in, on, over, through, or across tidal lands or tidal water without complying with the Resource Management Act 1991".

Land Drainage Act 1908

The Land Drainage Act 1908 is described in the Act as "An Act to consolidate certain enactments of the General Assembly relating to the drainage of land". Section 2A provides that "Nothing in this Act shall derogate from the Resource Management Act 1991".

Recommendation

The Soil Conservation and Rivers Control Act 1941, River Boards Act 1908 and the Land Drainage Act 1908 are all subject to the RMA. EDS TAG does not consider amendment to section 6 or 7 should be made to incorporate these Acts.

Should other amendments be made to sections 6 and 7?

A broader review of sections 6 and 7, beyond the specific issues already discussed, is anticipated in the scope of work established for the RMA Principles TAG. The TAG is directed to reflect on the provisions relative to the resource management challenges facing New Zealand 20 years on from the RMA's enactment and to consider the range of issues relevant to gain a clear view of the work needed on sections 6 and 7. The RMA Principles TAG is also directed to promote consistency of interpretation through clear and modern drafting.

With reference to the second of these directions, EDS TAG considers the current wording in section 6 (with the exception of the amendment to section 6(b) described below) and section 7 is clear and that any amendment to these sections to promote consistency of interpretation should be carefully considered in order to prevent legal uncertainty and unnecessary cost.

With reference to the first of these directions, EDS TAG has considered what other amendments to sections 6 and 7 may be desirable.

Amendment to section 6(b) – Outstanding landscapes

Section 6(b) of the Act requires all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, to recognise and provide for the protection of outstanding natural features and landscapes from inappropriate subdivision, use and development.

Judicial interpretations of section 6(b) have resulted in a position where landscapes must be both outstanding and natural (ie an "outstanding natural landscape") to fall within the subsection.[44] This creates difficulties in protecting some landscapes such as Auckland's volcanic cones, North Head, and parts of Akaroa which have a cultural dimension that currently makes it difficult to identify them as an "outstanding natural landscape". Existing practice tends to rely on section 6(f) to provide a statutory mandate for the protection of these landscapes. However the definition of historic heritage does not expressly include "landscape".

It would allow this section of the Act to be interpreted with greater certainty and reflect what is actual practice if the protection afforded to landscapes under section 6(b) was extended to include landscapes that are not entirely natural, but have been identified in accordance with robust landscape assessment methodology informed by current best practice and case law as "outstanding".

Therefore EDS TAG recommends the following amendment:

> *(b) The protection of outstanding natural features and <u>outstanding</u> landscapes from inappropriate subdivision, use, and development*

EDS TAG considers this amendment necessary to remove "natural" as a prerequisite for landscape protection.

The naturalness of a landscape will continue to be one of the criteria used as a basis for assessing landscape value in accordance with best practice and case law.

Addition of a new matter to section 7 – Soil

Soil is a vital natural resource for New Zealand. Soils underpin the country's agricultural and horticulture industry. Soil also provides essential ecosystem services such as retaining nutrients, breaking down pollutants, storing carbon and moderating water flow.

Soil is already recognised in the Act through a number of provisions. The "life-supporting capacity" of soil is referenced in section 5(2)(b). Soil also falls within the definition of "natural and physical resources" in the Act. Therefore the efficient use and development of soils (section 7(b)), and any finite characteristics of soils (section 7(g)), are matters to which all persons exercising functions and powers under the Act, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to. Regional councils have the function of controlling the use of land for the purpose of soil conservation (section 30(1)(c)(i)). Soil conservation is defined in section 2 of the Act as 'avoiding, remedying, or mitigating soil erosion and maintaining the physical, chemical and biological qualities of soil'.

A number of resource management issues arise in relation to soil. Of particular concern is the loss of soil availability for production of food through the subdivision of productive rural land for urban development. The Environment Court has previously considered this issue and found that fragmentation of title where soils have high productive capacity would not constitute the sustainable or efficient use of a finite resource.[45]

We note the Town and Country Planning Act 1977, provided that "The avoidance of encroachment of urban development on, and the protection of, land having a high actual or potential value for the production of food" was a matter of national importance to be recognised and provided for, but this clause was not incorporated in any form in the Resource Management Act.[46]

While the Act already recognises soil in the various ways described, there are no provisions that require persons exercising functions and powers under it to consider soils with high actual or potential value for the production of food as an important resource.

Therefore we propose section 7 be amended to include an additional subsection:

> ***7 Other matters***
>
> *In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—*
>
> *...*
>
> *(x) The avoidance of encroachment of urban development on soil having a high actual or potential value for the production of food.*

EDS TAG considers the effect of this amendment would be to encourage planning for urban growth in areas without productive soils. However, as with other section 7 matters, this matter would be subordinate to the primary purpose of the promotion of sustainable management and a local authority may in its discretion reject it as insufficiently relevant or worthy of weight.

Retain section 7(h) – The protection of the habitat of trout and salmon

Section 7(h) of the Act requires all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, to have particular regard to "The protection of the habitat of trout and salmon". While this section is not expressly referred to within the terms of reference or scope of work of the present review, EDS TAG understands there is an opinion within the resource management community that this subsection should be removed. EDS TAG therefore considers it necessary to make a brief comment.

Water quality monitoring by New Zealand's National River Water Quality Network shows that by international standards our water quality, taken as a whole, is generally good but declining. The situation is more serious when lowland river sites, that are not comprehensively covered by the National River Water Quality Network but rather, by regional council monitoring, are considered. There, nutrient concentrations frequently exceed Australian and New Zealand Guidelines for Fresh and Marine Water Quality trigger values, water clarity does not meet the Ministry for the Environment's guidelines, and faecal bacterial levels often exceed the Ministry of Health's guidelines.[47]

EDS TAG is concerned that removing section 7(h) would severely reduce the mandate for Fish and Game New Zealand's current advocacy role under the Act. While Fish and Game New Zealand's major role is protecting the habitat of sport fish and game birds, in the EDS TAG's experience Fish and Game New Zealand's work has assisted in the protection of all in-stream values. This work has included providing advice on appropriate environmental policy, advocating for clean water and environmentally sustainable farming practices, and improving awareness of New Zealand's outstanding but threatened freshwater resources. Given the critical status of many of New Zealand's freshwater bodies, EDS TAG does not support a legislative amendment that would remove an existing statutory protection for freshwater ecosystems.

7 Summary of recommendations

Recommendation 1

Introduce a requirement that persons exercising functions and powers under the Act have particular regard to the risk of natural hazards in preparing and changing plans and in consenting decisions by amending section 7 as follows. EDS TAG does not support amending section 6 in respect to this matter.

> ***7 Other matters***
>
> *In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—*
>
> *...*
>
> *(x) The risk of natural hazards*

Recommendation 2

Consider amending sections 74 and 76, which specify matters to be considered by local authorities in preparing and changing plans, and sections 104 and 106 which refer to the consideration of applications and the refusal of subdivision consent in certain circumstances respectively to make these decision-making processes more focused in their consideration of, and response to, natural hazard risk.

Recommendation 3

Undertake an analysis of the risks of natural hazards at a national level and provide guidance in the form of a national strategy on natural hazards, a national policy statement or a national environmental standard.

Recommendation 4

Introduce a requirement that persons exercising functions and powers under the Act have particular regard to the maintenance and enhancement of a quality urban and built environment by amending section 7 as follows. EDS TAG does not support amending section 6 in respect to this matter.

> ***7 Other matters***
>
> *In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—*
>
> *...*
>
> *(x) The maintenance and enhancement of a quality urban and built environment*

Recommendation 5

Provide greater guidance as to what outcomes for the urban and built environment should be pursued through a national policy statement, national environmental standard or best practice guidelines.

Recommendation 6

EDS TAG does not support amending section 6 or 7 to add a clause referencing the development and operation of regionally and nationally significant infrastructure.

Recommendation 7

EDS TAG does not support amending section 6 or 7 to incorporate the Soil Conservation and Rivers Control Act 1941, River Boards Act 1908 or the Land Drainage Act 1908.

Recommendation 8

Amend section 6 to remove the requirement that has developed through judicial interpretation that a landscape be "natural" as a prerequisite for protection under this section:

> ***6 Matters of national importance***
>
> *In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:*
>
> *...*
>
> *(b) The protection of outstanding natural features and outstanding landscapes from inappropriate subdivision, use, and development*

Recommendation 9

Introduce a requirement that persons exercising functions and powers under the Act have particular regard to the avoidance of encroachment of urban development on soil having a high actual or potential value for the production of food by amending section 7:

> ***7 Other matters***
>
> *In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—*
>
> *...*
>
> *(x) The avoidance of encroachment of urban development on soil having a high actual or potential value for the production of food.*

Recommendation 10

Retain section 7(h) - The protection of the habitat of trout and salmon. Given the critical status of many of New Zealand's freshwater bodies, EDS TAG does not support a legislative amendment that would remove an existing statutory protection for freshwater ecosystems.

Appendix 1

Section	Subject	Summary of provision
2	Definition of natural hazard	Natural hazard is defined: Natural hazard means any atmospheric or earth or water related occurrence (including earthquake, tsunami, erosion, volcanic and geothermal activity, landslip, subsidence, sedimentation, wind, drought, fire, or flooding) the action of which adversely affects or may adversely affect human life, property, or other aspects of the environment:
3	Meaning of "effect"	The meaning of "effect" is stated: **3 Meaning of "effect"** In this Act, unless the context otherwise requires, the term effect ... includes— (a) Any positive or adverse effect; and (b) Any temporary or permanent effect; and (c) Any past, present, or future effect; and (d) Any cumulative effect which arises over time or in combination with other effects— regardless of the scale, intensity, duration, or frequency of the effect, and also includes— (e) Any potential effect of high probability; and (f) Any potential effect of low probability which has a high potential impact.
30	Functions of regional councils	It is a function of regional councils to control the use of land for the purpose of the avoidance or mitigation of natural hazards (s 30(1)(c)(iv)).
		It is a function of regional councils in respect of any coastal marine area in the region, to control (in conjunction with the Minister of Conservation) any actual or potential effects of the use, development, or protection of land, including the avoidance or mitigation of natural hazards (s30(1)(d)(v).
		It is a function of regional councils in relation to any bed of a water body, to control the introduction or planting of any plant in, on, or under that land, for the purpose of the avoiding or mitigating natural hazards (s 30(1)(g)(iv)).
31	Functions of territorial authorities	It is a function of territorial authorities to control any actual or potential effects of the use, development, or protection of land, including for the purpose of the avoidance or mitigation of natural hazards (s 31(1)(b)(i)).
35	Duty to gather information, monitor, and keep records	The information to be kept by a local authority shall include records of natural hazards to the extent that the local authority considers appropriate for the effective discharge of its functions.
62	Contents of regional policy statements	Regional policy statements must specify which local authority has responsibility for objectives, policies, and rules relating to the avoidance or mitigation of natural hazards, and states, however, that in the absence of such a direction, the regional council retains primary responsibility.
65	Preparation and change of regional plans	A regional council shall consider the desirability of preparing a regional plan whenever any specified circumstances or considerations arise or are likely to arise which include any threat from natural hazards (s65(3)(c)).
106	Subdivision consent	A consent authority may refuse to grant a subdivision consent, or may grant a subdivision consent subject to conditions, if it considers that the land in respect of which a consent is sought, or any structure on the land, is or is likely to be subject to material damage by erosion, falling debris, subsidence, slippage, or inundation from any source; or any subsequent use that is likely to be made of the land is likely to accelerate, worsen, or result in material damage to the land, other land, or structure by erosion, falling debris, subsidence, slippage, or inundation from any source.
229	Purposes of esplanade reserves and esplanade strips	Natural hazards are referred to in relation to the purposes of esplanade reserves and esplanade strips.
Schedule 4, clause 2	Matters that should be considered when preparing an assessment of effects on the environment	Subject to the provisions of any policy statement or plan, any person preparing an assessment of the effects on the environment should consider any risk to the neighbourhood, the wider community, or the environment through natural hazards.

Endnotes

1 Nick Smith "Reform tackles costs, uncertainties and delays of RMA" (press release, 3 February 2009).

2 Gerry Brownlee, Nick Smith "Changes proposed to RMA following earthquake report" (press release, 7 October 2011).

3 Alan Dormer and others *Report of the Minister for the Environment's Technical Advisory Group* (February 2009) at 62.

4 Cabinet Minute "Progress of Phase Two of the Resource Management Reforms" (21 September 2009) CAB (09) 34/6A.

5 Ministry for the Environment *Building competitive cities: Reform of the urban and infrastructure planning system. A discussion document* (October 2010).

6 Gerry Brownlee, Nick Smith "Changes proposed to RMA following earthquake report" (press release, 7 October 2011).

7 Gerry Brownlee, Nick Smith "Changes proposed to RMA following earthquake report" (press release, 7 October 2011).

8 Alan Dormer and others *Report of the Minister for the Environment's Technical Advisory Group* (February 2009) at 62.

9 Alan Dormer and others *Report of the Minister for the Environment's Technical Advisory Group* (February 2009) at 38.

10 Hill Young Cooper Ltd and Resource Management Group Ltd *Canterbury Fact Finding Project* (August 2011).

11 Gerry Brownlee, Nick Smith "Changes proposed to RMA following earthquake report" (press release, 7 October 2011).

12 See Gerry Brownlee, Nick Smith "Changes proposed to RMA following earthquake report" (press release, 7 October 2011).

13 *Mangakahia Maori Komiti v Northland Region* [1996] NZRMA 193 (PT).

14 *Unison Networks Ltd v Hastings District Council* EnvC Wellington W011/09, 23 February 2009.

15 *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC).

16 *Mangakahia Maori Komiti v Northland Region* [1996] NZRMA 193 (PT).

17 *Lee v Auckland City* [1995] NZRMA 241 (PT).

18 Report of the Review Group on the Resource Management Bill, February 1991, p 6, para 3.3.

19 The term "sustainable development" was used in the World Commission on Environment and Development's 1987 report *Our Common Future*. This report defined sustainable development as incorporating a wider range of social and economic, as well as environmental issues.

20 Hon Simon Upton (4 July 1991) 516 NZPD.

21 Simon Upton "The Stace Hammond Grace Lecture: Purpose and Principle in the Resource Management Act" (1995) 3 Waikato Law Review 17 at 40.

22 *North Shore City Council v Auckland Regional Council* [1997] NZRMA 59 (EnvC).

23 See eg *Kiwi Property Management v Hamilton City Council* (2003) 9 ELRNZ 249 (EnvC); *Federated Farmers of New Zealand Inc v Queenstown Lakes District Council* [2010] NZEnv 109.

24 *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC).

25 *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC).

26 *Bleakley v Environmental Risk Management Authority* [2001] 3 NZLR 213 at [72].

27 *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* [2000] NZRMA 59.

28 *Takamore Trustees v Kapiti Coast District Council* [2003] NZRMA 433 (HC) at 455.

29 *Quarantine Waste NZ Ltd v Waste Resources Ltd* [1994] 12 NZRMA 529 (HC) at 542.

30 *Long Bay-Okura Great Park Society Inc v North Shore City Council* EnvC Auckland A078/08, 16 July 2008 at [282].

31 Resource Management Act 1991, ss 30 and 31.

32 Resource Management Act 1991, ss 68 and 76.

33 *Francks v Canterbury Regional Council* [2005] NZRMA 97 (HC).

34 Resource Management Act 1991, s 35.

35 Ministry for the Environment *Building competitive cities: Reform of the urban and infrastructure planning system. A discussion document* (October 2010) at ix. Note in this document, the 'urban planning system' is defined as the statutory and governance frameworks that incorporate decisions by councils, central government and the private sector about urban spaces.

36 Alan Dormer and others *Report of Urban Technical Advisory Group* (July 2010) at 68.

37 Alan Dormer and others *Report of Urban Technical Advisory Group* (July 2010) at 78.

38 Ministry for the Environment *Building competitive cities: Reform of the urban and infrastructure planning system. A discussion document* (October 2010) at 20.

39 Section 45 provides that NPSs have the purpose of stating objectives and policies for matters of national significance that are relevant to achieving the purpose of the RMA. It is clear from section 45 that NPSs are not directed solely at matters of national importance specified in section 6.

40 Ministry for the Environment *Building competitive cities: Reform of the urban and infrastructure planning system. A discussion document* (October 2010) at xi.

41 Mike Foster and others *Report of Infrastructure Technical Advisory Group* (August 2010) at 24.

42 Ministry for the Environment *Building competitive cities: Reform of the urban and infrastructure planning system. A discussion document* (October 2010) at 35.

43 These matters are set out in section 141 of the Resource Management Act 1991 and include applications for resource consents, applications for changes to or cancellation of resource consent conditions, local authority plan changes or variations, requests for plan changes, requests for the preparation of regional plans, and notices of requirement.

44 *Wakatipu Environmental Society Incorporated v Queenstown Lakes District Council* [2000] NZRMA 59 (EnvC).

45 *Baker v Franklin District Council* EnvC Auckland A70/98, 19 June 1998.

46 Town and Country Planning Act 1977, s 3.

47 Land and Water Forum *Report of the Land and Water Forum: A Fresh Start for Fresh Water* (September 2010) at 15.