NEW ZEALAND COUNCIL OF TRADE UNIONS
Te Kauae Kaimahi

Submission of the
New Zealand Council of Trade Unions
Te Kauae Kaimahi

to the

Ministry for the Environment

on

Improving our resource management system
A discussion document

P O Box 6645
Wellington
April 2013

1. Introduction

1.1. This submission is made on behalf of the 36 unions affiliated to the New Zealand Council of Trade Unions Te Kauae Kaimahi (CTU). With 340,000 members, the CTU is the one of the largest democratic organisations in New Zealand.

1.2. The CTU acknowledges Te Tiriti o Waitangi as the founding document of Aotearoa New Zealand and formally acknowledges this through Te Rūnanga o Ngā Kaimahi Māori o Aotearoa (Te Rūnanga) the Māori arm of Te Kauae Kaimahi (CTU) which represents approximately 60,000 Māori workers.

1.3. The CTU supports some proposed changes (such as disaster readiness and greater Iwi engagement) but overall we believe that the proposed changes represent an attack on New Zealand's environmental protections and should be discarded. We concur with Jon Morgan's comments:[1]

> What I see in these proposals is further evidence of the Government's blinkered approach to building the economy at the expense of all else. Yes, we must have progress. But think carefully about the sacrifices being made. The damage of a hasty decision to allow a destructive development will be felt for generations to come.

1.4. Our comments on the discussion paper are high level and principle-based rather than focussed on the detail of the proposals. This reflects both the specialised and technical nature of the RMA and the extremely truncated consultation process. For similar reasons we have not commented on the consenting process other than the proposed 10-working-day time limit for non-notified consents.

1.5. The CTU objects to lack of consultation occurring in relation to these important changes and requests an extended and expanded consultation process along with an extended select committee process if legislation is proposed.

[1] Jon Morgan (2013) 'RMA overhaul won't help the environment' http://www.stuff.co.nz/dominion-post/business/farming/8453690/RMA-overhaul-won-t-help-the-environment

2. Inadequate consultation

2.1. We are disappointed by the inadequate consultation process undertaken by the Ministry for the Environment (MFE). 31 days is insufficient to engender meaningful public discussion and response.

2.2. The Resource Management Act 1991 ('the RMA') is complex and the proposed changes are extremely significant and wide-reaching.

2.3. We recommend that the consultation process is extended to 30 June 2013 and an extensive public education campaign is launched in partnership with the Environmental Defence Society ('EDS'), Forest and Bird, Fish and Game, Ecologic, Greenpeace New Zealand and WWF New Zealand ('the Environmental NGOs').

2.4. We also recommend that, if the consultation process leads to recommended legislative change (and we support some elements of law change see below), then an extended select committee hearing process should take place involving an extended timeframe (three months) for filing written submissions and the Local Government and Environment Select Committee should travel the country to hear submissions from local communities.

3. Proposals we support

Greater central government support

3.1. The paper identifies a number of areas where central government could provide guidance and support to local authorities such as:

- The development of guidelines to clarify when and how national tools (such as national policy statements, national environmental standards, 'call in' processes) would be called in; and
- The development of a new national planning template for resource management plans including standardised terms and definitions and a required format (part 3.2.1 of the consultation document).

3.2. The CTU cautiously supports these initiatives subject to proper consultation processes. As we discuss below, we do not support the elements of the proposals that will abrogate local democracy and decision-making.

Natural hazard management

3.3. The CTU supports elements of Proposal four: Better natural hazard management. It makes sense to add consideration of natural hazards to the principles section of the RMA and to include consideration of natural hazards in sub-division and land-use consent decisions. We also agree that greater national guidance and expert advice to councils around hazard management (including civil defence and emergency management planning) is useful. The lessons of Christchurch must be learned.

Effective and meaningful iwi/Māori participation

3.4. We also support Proposal five: Effective and meaningful iwi/Māori participation. In particular we support the requirement for a mechanism for iwi advice to have statutory weight in council plan making. However, we believe that iwi authorities should be given the choice of their existing framework or the new legislative framework.

Measures to prevent land banking

3.5. We support measures to allow councils to set tighter development timeframes to reduce land banking (section 3.3.10 of the discussion document) and encourage faster building on sub-divisions where the council deems it appropriate to do so.

4. Proposals we oppose

Changes to the principles of the RMA

4.1. Most significant of the changes that we oppose are the proposed changes to sections 6 and 7. We agree with the Environmental NGOs that the report of the Technical Advisory Group ('TAG') in the RMA principles is fundamentally

flawed[2] and that the proposed changes to the principles section (Proposal One: Greater national consistency and guidance) are a major backward step in relation to environmental protection.

4.2. In particular, we endorse the Environmental NGOs comments that:[3]

- There is no problem with the purpose and principles sections of the RMA, and no justification for most of the changes recommended;
- The recommendations will introduce significant uncertainty as to what the RMA is seeking to achieve, and will therefore lead to increased litigation, costs and delays for individuals, communities and businesses, and will discourage investment;
- The recommendations will lead to lower environmental standards and place New Zealand well behind international good practice;…
- The proposed new principles would fundamentally change the purpose of the RMA. While section 5 recognises the role of the RMA in enabling people and communities to provide for their economic, cultural and social wellbeing, section 6 should not extend to providing for activities which have nothing to do with environmental bottom lines;
- …Many of the proposed changes will eliminate current case law, increasing litigation and uncertainty;
- Such major changes to the purpose and principles of the RMA should only be considered after a substantial process of consultation with the public and stakeholders, taking their views into account and fully exploring the implications. It also requires bipartisan support to ensure certainty and longevity.

4.3. The discussion document states that the RMA currently sets up "an approach to decision-making that does not effectively reflect contemporary values" (p 6). However, 'contemporary values' are not unitary and the

[2] See the open letter from the Environmental NGOs to Hon Amy Adams (3 September 2012) http://www.eds.org.nz/content/documents/pressreleases/ENGOs%20letter%20re%20TAG%20report.pdf and the Report of the Environmental Defence Society Technical Advisory Group on the review of Sections 6 and 7 of the Resource Management Act 1991 http://www.eds.org.nz/content/documents/pressreleases/EDS%20TAG%20Report%20Document_COL%20FINAL.pdf

[3] Open letter from the Environmental NGOs to Hon Amy Adams (3 September 2012) para 4.

change to the purpose section reflects and reinforces one particular value set. We agree with the EDS that:[4]

> New Zealanders' appreciation of their environment as well as their social and economic aspirations have not changed significantly in the last twenty two years since the RMA was enacted. The assertion to the contrary is being used to infiltrate economic development priorities to the detriment of environmental outcomes.

4.4. The economic development issues is most prominent in relation to urban areas. The TAG report quotes Professor Hunt with approval as follows:[5]

> S. 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. S. 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.

4.5. As the TAG report notes 86% of New Zealanders live in cities and the built environment is extremely important for a number of other reasons and the RMA does not currently deal well with the built environment.[6] The Report of the Urban Technical Advisory Group (UTAG) provides some useful proposals to address this:[7]

> Options for remedying the failure of the RMA to explicitly address the urban and built environment should include:
>
> a. introducing the quality of the design and planning of the built environment; as a matter of National Importance
>
> b. modifying the definition of Environment to specifically include the built environment;
>
> c. extending the definition of amenity values so that it addresses the quality of the urban and built environment to a greater extent.

[4] Environmental Defence Society (2013) 'Initial response to "Improving our resource management system' p 1.
[5] Report of the Minister for the Environment's Resource Management Act 1991 Principles Technical Advisory Group (February 2012) p 18.
[6] Ibid. p 48.
[7] Report of the Minister for the Environment's Urban Technical Advisory Group (July 2010) para 265. http://www.mfe.govt.nz/rma/reform/phase-two/urban-tag-report.pdf

4.6. These changes have not been picked up in the consultation document. To the contrary under the proposed principles, a decision about the built environment that does not include one of the particular 'special cases' requiring consideration[8] would be required to consider the following matters:

- The benefits of the efficient use and development of natural and physical resources;
- The impacts of climate change;
- The effective functioning of the built environment including the availability of land for urban expansion, use and development;
- The risks and impacts of natural hazards; and
- The efficient provision of infrastructure.

4.7. From a decision-making perspective this is a land development charter without consideration of the environmental or social costs of development. We do not believe it is an answer to say that environmental considerations are encompassed in section 5 of the RMA.

4.8. We agree with the concerns raised by Jon Morgan in the Dominion Post:[9]

> Consideration of the "benefits" of a project or scheme using our natural resources would remain in the new act. Removed would be references to the "costs", meaning possible harm to the environment.
>
> A clause refers to the "importance and value of historic heritage". Fine sentiments, but removed is "and its protection from inappropriate subdivision and development". In other words, big business, it's your lucky day.
>
> In another change, the word "significant" is added so only "significant aquatic habitats" have to be considered, when before it was not mentioned.

[8] Such as preservation and access to coastal environments, wetlands, lakes and rivers, protection of specified outstanding natural features and landscapes, specified areas of significant indigenous vegetation or habitats of indigenous fauna, areas of Māori customary title or cultural significance, historic heritage or significant aquatic habitats.

[9] Jon Morgan (2013) 'RMA overhaul won't help the environment' http://www.stuff.co.nz/dominion-post/business/farming/8453690/RMA-overhaul-won-t-help-the-environment

> There's no definition of what "significant" means. It could mean that only these "significant" waterways have to be considered if a factory or local body wastewater discharge is planned, not all waterways, as is the case now.
>
> Removed from the new act would be "the maintenance and enhancement of amenity values" as something to be considered. I take this to mean that recreational use will no longer matter. That's swimming, canoeing, a quiet walk with the dog - not important.
>
> Also going are "maintenance and enhancement of the quality of the environment". If ever a phrase summed up the meaning of the act, this does.
>
> And so it goes on. The act is being emasculated.
>
> But the biggest and most profound change is the addition of one word - "specified". It comes in Section 6, where it talks about protecting only "specified outstanding natural features and landscapes". It's not in the current act. All outstanding natural features and landscapes are protected there.
>
> So what does specified mean? There's some debate about this. There's no definition in the proposals, or a method for arriving at a definition, or allowance for a schedule of these specified features.
>
> At the moment, the only natural features that have "specified" protection under the law are those parts of rivers that are subject to Water Conservation Orders.
>
> Does this mean that the revised RMA will protect only these 16 stretches of water? That it's open slather on the rest of the country's waterways? I can't believe it. But that's the way it looks, and it's the way environmental groups are reading it.

4.9. We would add the removal of the requirement to maintain and enhance public access to bodies of water (section 6(d)) to this list. The CTU submits that the proposed wording changes to current sections 6(b), 6(c), 6(d), 6(f), 7(c) and 7(d)) should not proceed.

4.10. The CTU recommends that the current format of sections 6 and 7 remains essentially unchanged. The case has not been made for wholesale disruption of the existing system and as EDS notes the TAG report misleadingly and selectively quotes existing case law to back their position.

4.11. If the decision is made to create an amalgamated 'principles' section then the CTU recommends that:

- Existing sections 7(aa) the ethic of stewardship; 7(c) the maintenance and enhancement of amenity values, 7(d) the intrinsic value of ecosystems, 7(f) maintenance and enhancement of the quality of the environment; and 7(g) any finite characteristic of natural and physical resources should be incorporated in the new section 6.
- Per para 4.9 the wording of existing sections 6(b), 6(c), 6(d), 6(f), 7(c) and 7(d)) should remain unchanged.
- The recommendations of the UTAG discussed at 5.5 above should be implemented.

Proposed methods section

4.12. We note the proposal to implement a new section 7 methods that sets out the duties of decision makers to act in a timely, understandable and collaborative manner. We support the enactment of these principles (perhaps as a new section 7A).

4.13. We note that proposed sections 7(c) and (e) are substantive matters rather than procedural ones. They should not be included in proposed section 7 (or we submit in the RMA at all).

4.14. We do not support the proposed section 7(e). We agree with the comments of the Environmental NGOs that:[10]

> The recommended section 7(e) would require decision-makers to "achieve an appropriate balance between public and private interests in the use of land". The report lists a handful of rules that allegedly interfere with private property rights to an extent that has no corresponding environmental benefit. However, no references are given for these rules and it is unclear how common such practice actually is, or whether the rules are in fact proportional in the particular circumstances in which they apply. We believe no weight can be placed on what appears to be a conclusion based on some bullet points in the report that seem to be nothing more than an

[10] Open letter from the Environmental NGOs to Hon Amy Adams (3 September 2012) para 51.

> eccentric and personal interpretation of some uncited planning documents and/or case law.

4.15. The case has not been made. We therefore submit that section 7(e) ought to be removed from any proposed legislation.

Abrogation of local democracy

4.16. Proposed changes allowing the Minister for the Environment to specify outcomes to be achieved by council plans or to directly amend existing plans are concerning (as are the existing powers in section 25A). There is little detail in the discussion document but we share the Environment Defence Society's concern that:[11]

> [T]his would render any consultation cursory, removing the rights of communities to participate in resource management decisions, and would result in a significant transfer of power from local government to the Executive.

4.17. We strongly support the proposal in the discussion document that the RMA should contain clear guidance and limits on how and when the Minister might use this power.

4.18. We share the concerns of Local Government New Zealand in relation to the creation of a new body or Crown entity:[12]

> [T]he proposed alternative Board of Inquiry or Crown body that would decide on some planning and consent matters needs to be treated with caution. Local democracy sits at the heart of the RMA, allowing communities and their local elected representatives to make the decisions that best serve and enhance the well-being of their communities.

Urban sprawl

4.19. Underlying a number of the proposed changes appears to be a desire to meet increased housing demand through faster and easier consenting allowing subdivision and re-zoning of land (see the comments at p 24 of

[11] Environmental Defence Society (2013) 'Initial response to "Improving our resource management system' p 3.
[12] Local Government New Zealand (28 March 2013) 'RMA reforms must balance efficiency and effectiveness with local democracy' media release.

discussion document). An example is the proposed amendment to the principles to specifically recognise urban expansion (proposed section 6(k)).

4.20. The CTU agrees that rising housing costs are a significant problem, particularly for low and middle income families. However, we do not agree that the only solution is to attempt to add to the supply of land. We urge the Government to consider measures to change incentives for land owners such as the introduction of a capital gains tax on rental properties and restricting land ownership by owners who are not normally resident in New Zealand.

5. International implications

5.1. New Zealand is party to a number of international commerce agreements and is currently one of the countries negotiating the Trans Pacific Partnership Agreement (TPPA). Existing provisions in some of those agreements, and proposals in the TPPA add to our concerns about the proposed RMA changes. We give one example from the TPPA.

5.2. According to leaked text, and standard text the US has insisted on in other agreements, the Investment provisions proposed in the TPPA will require each party to provide “Minimum Standards of Treatment” to overseas investors. The interpretation of this has varied in dispute panel hearing cases (a problem in its own right), but it has been taken to imply, inter alia, that overseas investors are entitled to a “stable and predictable regulatory environment.” This provision has been used to successfully challenge a variety of regulatory changes, including changes in environmental and health law, regulations and administration that foreign investors claim have impacted adversely on their commercial investment, irrespective of how damaging their operations or how justified the new measure may be.

5.3. The ultimate effect of the “Minimum Standards of Treatment” terms is that if future governments or local authorities wish to strengthen environmental protections, either by restoring the effectiveness of the RMA or by using delegated powers under it, they could be subject to extensive and prolonged legal disputes seeking many millions of dollars in compensation and interest

under the TPPA and, to a lesser extent, similar agreements New Zealand has entered into since the Act was laid down in the early 1990s.

5.4. Further, the proposed Investment chapter will require protection against "creeping expropriation" (indirect expropriation) which is interpreted to mean the substantial loss of asset value or profitability of an investment as a result of government action. That action could include, for example, stronger environmental protections or changes in planning requirements.

5.5. The concerns about these provisions are heightened by the proposed availability in the TPPA of Investor State Dispute Settlement provisions, which allow individual investors (such as international corporations) to sue governments over these matters. They can challenge laws, regulations, administrative decisions and court decisions. The hearings are held before private international dispute tribunals, normally with no public access (or even notification), nor necessarily publication of evidence and decisions, and without any requirement to respect decisions of other tribunals. The TPPA is particularly dangerous because it includes the US, whose corporations are notoriously litigious and may be willing to commit financial resources to litigate on a scale far outside that the New Zealand Government would consider appropriate to match for a specific issue.

5.6. The majority of the known international investment cases involve a range of natural resource activities including mining, power generation and distribution, waste disposal, environmental and health standards, requirements for environmental impact assessment, and other environmental matters.

5.7. We are therefore concerned that the proposed weakening of the RMA will be difficult or in effect impossible to reverse because of the threat that higher standards of environmental protection will lead to expensive and lengthy challenges by investors.

6. Conclusion

6.1. The RMA can be improved and some of the proposed changes will help. The most significant changes however will remove protections for the environment and throw the law into a state of flux. Some are anti-democratic.

6.2. We urge the Ministry to amend any proposed legislation in recognition of the serious concerns that we have raised.

6.3. We have read the EDS's publically available draft consultation document 'Feedback on "Improving our Resource Management System' and the submission of Dame Anne Salmond. We endorse their substantial and well-reasoned comments.