

# New Zealand Law Society

## SUBMISSION ON RESOURCE MANAGEMENT (SIMPLIFYING AND STREAMLINING) AMENDMENT BILL

### Introduction

- 1 Lawyers have daily experience working with the Resource Management Act 1991. Practitioners represent applicants, submitters, local authorities and other agencies.
- 2 The Society is therefore in a unique position to comment on the proposals contained in this Bill.
- 3 The key features of the RMA which should not be eroded are the statutory purpose of sustainable management and public participation in decision-making.
- 4 Simplifying and streamlining are admirable objectives and are fully supported by the Society. It follows that amendments which introduce complexity or uncertainty should be avoided. Such amendments are necessarily fertile sources of costly and time consuming litigation.
- 5 This submission reviews the Bill in the light of these principles.

### General Principles

- 6 The Resource Management Act 1991 brought together a large number of pieces of legislation with the aim of providing more workable, coherent environmental law. Arising out of any environmental law there will always be a tension between providing for the protection of environmental values while recognising the rights of the owners and occupiers of property, and others utilising natural resources, to use them as they may wish. This tension was highlighted in *Falkner v Gisborne District Council*, High Court, Gisborne, AP1/95, where the Court stated (referring to a Court of Appeal judgment in *Ideal Laundry Co Limited v Petone Borough Council* [1957] NZLR 1038 in relation to the Town & Country Planning Act 1953):

*“The Act prescribes a comprehensive, interrelated system of rules, plans, policy statements and procedures, all guided by the touchstone of sustainable management of resources. The whole thrust of the regime is the regulation and control of the use of land, sea, and air. ... It is a necessary implication of such a regime that common law property rights pertaining to the use of land or sea are to be subject to it.”*

- 7 That tension inevitably leads on the one hand to ongoing complaints from businesses that environmental laws obstruct business and cause unreasonable costs and delays, while on the other hand some environmental groups seek wider and greater rights of participation and control.
- 8 The General Policy Statement in the Explanatory Note to the 2005 Bill asserted that “the changes focus on improving the quality of decisions and processes by increasing certainty and reducing delays, costs, and incorrect use of processes, while ensuring appropriate public participation and the meeting of environmental objectives”. The General Policy Statement in the Explanatory Note to the 2009 Bill asserts that “the changes focus on improving the quality and certainty of decisions, and reducing delays and costs by simplifying procedures and rationalising appeal processes, while ensuring penalties are sufficient to discourage inappropriate practices.” The Society applauded the intentions behind the 2005 statement and, now, the 2009 statement. As the Society stated in 2005, however, a recurring concern, in considering a number of the proposals in the Bill, is that, contrary to the intent of the legislation, “delays” and “costs” would increase, without necessarily improving the quality of decisions, or the meeting of environmental objectives.
9. In addition, a number of the proposed changes to processes are too directive, will cause undue burdens to local government, and potentially will reduce the effectiveness of local government decision-making.

#### **Clause 4 - Interpretation**

10. For ease of reference, all terms requiring definition should be contained in s2 of the Act.
11. In particular, the definitions in proposed ss43AA, 43AAB and 43AAC should be included in s2. This follows the convention that terms are defined at the beginning of the statute, making the legislation more accessible and user

friendly. The sole exception should be where in a particular section a term has a special meaning.

**Clause 5 - Act to bind the Crown**

12. Making the Crown liable to enforcement action, including prosecution under the Act, is supported.

**Clauses 6 - 15**

13. The amendments to ss9, 11, 12, 13, 14, 15, 16 and 17 to provide for national environmental standards are welcomed as they clarify the function and effect of national environmental standards.

**Clause 10 - Restrictions on use of coastal marine area**

14. The words “rule in a regional coastal plan and in any relevant proposed regional coastal plan” are to be substituted by “national environmental standard, a rule in a regional coastal plan or a proposed regional coastal plan” in ss12(1) and 12(2). It is unclear why “or” replaces “and”.
15. It is also unclear why the term “regional rule” introduced by the amendments to ss13, 14 and 15 is not used.
16. The effect of the proposed wording appears to be that as long as a proposal accords with any one of a national environmental standard, a rule in a regional coastal plan or proposed regional coastal plan, then a coastal activity is permitted, which appears to be contrary to the intent of the clause.

***Recommendation***

17. That the Committee reconsider the drafting of the amendments to s12.

**Clause 18 – New section 22 substituted - Duty to give certain information**

18. The additional power to require a person to supply a date of birth is welcome as such information is essential for prosecution purposes.

### **Clause 20 - Functions of Minister of Conservation**

19. The Society supports the Minister of Conservation relinquishing the role of consent authority on applications for coastal permits which are restricted coastal activities as this will assist in simplifying and streamlining Resource Management Act processes.
20. A further change would assist in simplifying and streamlining Resource Management Act processes.
21. The primary purpose of establishing restricted coastal activities was to enable the Minister of Conservation to act as the consent authority. With the removal of the Minister as consent authority, the class of restricted coastal activities is redundant. Regional Councils should simply process applications in the ordinary way.

### ***Recommendation***

22. That the class of “restricted coastal activities” be abolished.

### **Clause 24 - Administrative Charges**

23. The proposed amendments appear to have omitted phrases or words which, if included, would make more sense grammatically.

### ***Recommendation***

24. That the following words be inserted
  - (a) The phrase “where more than one” after “and” in the first line of the proposed paragraph (ab), and
  - (b) The word “of” at the end of the phrase “any 1 or more” in each of the amendments to s36(1)(b), s36(1)(cb) and s36(1)(d).

**Clause 25 – New section 36AA inserted – Local authority to adopt policy on discounting administrative charges for failure to meet consent processing deadlines**

25. This provision will require local authorities to adopt a policy for discounting administrative charges where a consent application is not processed within statutory timeframes and the responsibility of that failure rests with the local authority.
26. This provision is supported to the extent that it provides an incentive for Councils to act in a timely manner and adequately resource the consent authority functions.
27. However, timeframes imposed on Councils need to be based on a realistic appraisal of the time actually required to process consent applications.
28. The failure to achieve timelines is not always caused by Councils being dilatory.
29. Applicants have as long as they like to prepare and present consent applications. For more complex applications there is a substantial gestation period.
30. In contrast, Councils and, where applicable, potential submitters have very limited time to review, analyse and respond to consent applications. While many are simple, others are not. They require expert input, often from overcommitted staff and consultants. Proper understanding, analysis and auditing of consent applications is necessary for the purpose of the Act to be achieved through effective public participation and informed decision-making.
31. In general, this Bill does not adjust timeframes.
32. Further research should be required in this respect. Speed is no substitute for quality in resource management decision-making.

***Recommendation***

33. That the commencement of this provision be deferred pending a review of statutory timeframes.

**Clauses 30 – 32**

34. The proposed new sections, the amendment to existing sections and the unamended provisions of ss39-42 of the Act now present a complex and jumbled suite of provisions. They are difficult to follow and understand.

***Recommendation***

35. That for the sake of clarity, ss39-42 of the Act need to be rewritten and reordered, with the rules set out clearly and precisely.

**Clause 30 – New sections 41BA and 41BA inserted**

36. In the proposed new s41BA(1) the report should be “on the application” and not limited to information provided by an applicant or a submitter.
37. The obtaining of reports should not be conditional upon the applicant’s approval. The decision-making process should be independent of the applicant, not driven by the applicant. The purpose of the Act is more important than any applicant’s wishes.

**Clause 32 – New section 41D inserted – Information and advice at hearings**

38. The proposed new section 41D is confused. The heading relates to information and advice at hearings. Subsection (1) is unexceptional. However, subsections (2), (3) and (4) clearly relate to prehearing requests.
39. The proposed new section 41D also seems to cut across, in part, s41C currently in the Act.
40. This lack of clarity underlines the point that the hearings provisions need to be redrafted as a coherent code.

**Clause 36 – Secretary for the Environment to exercise functions of Authority**

41. Under the proposed new s141AA and following sections it is clear that the proposed Environmental Protection Authority is to have different functions from the Ministry for the Environment. Clause 36 will effectively and undesirably result in the Secretary of

the Environment both advising and making recommendations or decisions on which the Secretary has advised.

***Recommendation***

42. That consideration be given to deferring the provisions relating to the Environmental Protection Authority until it is established.

**Clause 37 – New sections 43AA and 43AAC inserted**

43. In the proposed new s43AA there is an error in the definition of regional plan: an operative regional plan is not approved by the Minister but by the regional council.

***Recommendation***

44. That the definition of “regional plan” be corrected by replacing the phrase “approved by the Minister” with “approved by the council” or “approved under Schedule 1”.

**Clause 40 – New sections 44 and 44A substituted**

45. The proposed new s44 will give the Minister powers to amend national environmental standards at the Minister’s own initiative without any public process if the amendment “has no more than minor effect; or ... corrects errors or makes similar technical alterations”.
46. The correction of errors and the making of technical alterations may be significant.

***Recommendation***

47. That the power be limited in a manner similar to that in clause 16(2) of the First Schedule to the Act; namely, to make alterations of minor effect or to correct minor errors.

**Clause 44 – Conduct of hearing**

48. It is not clear why s50(3) should be amended to give the Minister the right to be heard without having gone through the processes all other submitters must follow.

**Clause 47 – Consideration of recommendations and approval of statement**

49. The Minister will have power to make changes to the proposed national policy statement as he or she thinks fit. This is a very broad power, and is not expressed as being subject to any constraint or guidance, such as “to achieve sustainable management.” The Minister’s power should be constrained by the process which has preceded the board reporting to him or her. The power should be constrained to giving effect in whole or in part to the board’s recommendations.

***Recommendation***

50. That the Minister’s powers of amendment be limited to giving effect wholly or partly to the board’s recommendations.

**Clause 48 – Local authority recognition of national policy statements**

51. Section 55 will require local authorities to amend policy statements and plans to give effect to national policy statements. The Society anticipates that, however the amendments are phrased, in practice there will be disputes as to what is or is not required. In general this process is believed to be unnecessary. Because of the hierarchy of national, regional and district instruments, the various documents can sit alongside one another, without amendment, as their priority is readily determined.
52. Local authorities should be required to amend their resource management documents only where there is a specific requirement in a national policy statement to review and amend regional and district instruments to give effect to national policies at regional and local levels.

***Recommendation***

53. That amendment of regional policy statements, regional plans and district plans be required only where mandated expressly by the national policy statement.

**Clauses 49-51**

54. In these provisions, and elsewhere, the phrase “or the effects of trade competition” is introduced to the text of the Act. The meaning of this phrase is uncertain and it adds nothing of value. It opens the door to unnecessary and additional time-consuming and costly arguments about its meaning and application.

***Recommendation***

55. That the phrase “or the effect of trade competition” be removed wherever it appears in the Bill.

**Clause 53 – New sections 77A and 77B substituted**

56. Given the proposal to abolish the category of non-complying activities, it appears to be an oversight to include reference to such activities in the proposed new s77A(2)(e).

**Clause 59 – New heading and sections 86A and 86C inserted**

57. The proposed new ss86A-86C are complex and complexity breeds litigation. For example, what is to be exempt under s86A(2)(a) invites legal challenge.
58. The delayed legal effect of rules can notoriously defeat resource management objectives and policies. Such outcomes do not achieve the purpose of the Act and bring the planning process into disrepute.
59. To avoid such outcomes, Councils will undoubtedly apply to the Environment Court for exemption from s86A(1). That will be a significant undertaking and the Court will be required to ascertain who are the interested parties entitled to be heard on such an application. Such litigation is unnecessary and should be avoided. In addition, the right to apply to the Environment Court is only meaningful if it can be undertaken before the plan change is notified. If the application to the Court has to be served, or otherwise publicly made available, that in itself can stimulate conduct which will render proposed rules nugatory.

60. Further, s86A(1) is presumably intended to apply to the earliest occurring of the situations set out in s86A(1)(a), (b) and (c). This requires clarification.

***Recommendation***

61. That rules, like other plan provisions, have legal effect on notification, unless the local authority resolves otherwise.

**Clause 60 - New sections 87A to 87G**

62. The proposed new ss87C, 87D and 87E will enable resource consent applications to go directly to the Environment Court.
63. There are some practical difficulties with this proposal. First, 10 working days is an unrealistic timeframe for the Council to make the necessary assessment and determination. This is because any application that might justify going direct to the Environment Court is likely to have been many months in planning, to be complex, and involve issues on which a Council may require external expert advice.
64. Secondly, there are no criteria which guide the decision as to which case should go to the Environment Court.
65. Thirdly, apart from the Council and the applicant, no one else has any right to be involved in this decision-making process.
66. Fourthly, s87E does not provide for the local authority to participate in the hearing process and perform the reporting and advisory functions normally performed by council staff and consultants at a local authority hearing. As the local authority remains the consent authority, it is important that its involvement is explicitly provided for. Further, the report to be produced under s87D(3) is most unlikely to be as comprehensive and useful as a report provided under s42A for a normal council level hearing.
67. Most importantly, the value of the first instance hearing is lost. In many cases that go on to the Environment Court, the number of issues and participants are reduced by the Council hearing. This benefit will be lost. Council hearings are local, and will be readily accessible to individuals and community groups who would never contemplate

appearing in the relative formality of the Environment Court. Such hearings give applicants and Council an opportunity of engaging the community on the relevant resource management issues.

68. Finally, it is often predicted that cases will go to the Environment Court and they do not. A well conducted first instance hearing and a comprehensive professional decision can avoid resort to the Court.
69. The use of these provisions is likely to result in cases going to the Court, which would not have gone there, on a multiplicity of issues, which should not burden the Court.

***Recommendation***

70. That these provisions not proceed. If they do proceed, further thought is required on how the process should be conducted, having regard to the issues raised above.

**Clause 64 – New section 92 substituted – Further information may be requested**

**Clause 65 – Responses to request**

**Clause 66 - New section 92AB inserted – Report may be required**

**Clause 67 – Responses to notification**

71. These provisions relate to requests for information and obtaining reports where a hearing is not held.
72. The obtaining of reports when a hearing is held is now dealt with under the proposed new ss41BA and 41BB. However, there does not seem to be any provision for requesting information from the applicant in other circumstances.
73. Information requests slow down resource management processes and the procedure is subject to abuse. However, it must be recognised that applications are often deficient and fail to provide adequate information. The ability under the present s92 to request information has been a useful tool ensuring that an application is complete, enabling informed decisions to be made on notification, that potential submitters have access to adequate information about the proposal, and providing essential information for decision-making on the substantive application.

74. It is essential that the general power to request additional information from the applicant be retained. In the long run everybody benefits, with time and cost being saved, if information is provided at an early stage.

***Recommendation***

75. That the general ability in s92 to request information from an applicant in all circumstances be retained.

**Clause 68 – New sections 93 to 94AAE substituted**

76. The current provisions for notification and service of applications are intended to be replaced. The presumption in favour of notification is to be removed.
77. The Society does not support these changes.
78. The current statutory provisions are the subject of well established case law. The Ministry for the Environment website, <http://www.mfe.govt.nz/publications/rma/annual-survey/time-series.html>, indicates that over the last 10 years the percentage of resource consents publicly notified varied between just 4 and 6 %. This establishes that a statistically small percentage of applications are notified, and the proposed changes appear to be a response to a perception that the percentage is too high. The applications that are notified are generally those where the proposals have greater significance in terms of the sustainable management of resources.
79. The number and frequency of successful applications for judicial review on notification decisions may be argued to indicate that too few, rather than too many, applications are being publicly notified. Removing the presumption will not improve the situation.
80. Public participation is an important element in protecting the environment and also ensuring that those potentially affected by proposals are made aware of them and have a right to raise their concerns. People's rights and interests are affected by resource management decision-making. There are larger public and environmental interests beyond the aspirations of individual applicants. Public participation is the key to achieving fully informed and quality decisions.

81. The amendments undermine public participation and risk undermining the quality of decision-making.
82. Furthermore, the test in s94AA(a) of “adverse effects beyond their immediate environment will be more than minor” is uncertain and unworkable. The words “immediate environment” are not capable of easy practicable application and invite challenge and litigation. If the present proposals are retained (contrary to the principal submission) the words “beyond the immediate environment” should be removed.

***Recommendation***

83. That the amendments not proceed.

**Clause 76 – New section 103A inserted - Time limits for hearings adjourned on completion**

84. The proposed new s103A proposes that a hearing be concluded within 10 working days of the applicant’s right of reply being exercised. While the present ability to adjourn rather than close a hearing can be abused (effectively extending the time to issue a decision) the proposal is flawed. The proposed s103A constraint can be readily circumvented, for instance, by adjourning a hearing on the basis that the right of reply has not been completely exercised.
85. This constraint is undesirable. It is not necessarily effective nor helpful in achieving good decisions.
86. It is often desirable for those hearing an application to have the ability to call for further evidence or further submissions, for instance when consideration of evidence and submissions raises concerns that have not been adequately covered during a hearing. In more complex cases an interim decision may be issued, perhaps to allow for submissions on conditions if an application is to be granted. The present position enables first instance decisions to be as complete and comprehensive as possible. Such decisions are less likely to be appealed, or appealed in their entirety. This often works to the applicant’s advantage, in that gaps or weaknesses in the case can be remedied and save the applicant having to start the whole process again or appeal to the Environment Court.

***Recommendation***

87. That this provision not proceed. Where decisions are unreasonably delayed by abuse of the power to adjourn hearings, a more effective remedy may be provided by the proposed s36AA provision for discounting charges (noting that the Society has recommended that this provision be deferred until after statutory timeframes are reviewed).

**Clause 82 – New section 117 substituted – Application to carry out restricted coastal activity**

88. The special provision for restricted coastal activities is now redundant.

***Recommendation***

89. That proposed new s117 not proceed or be amended having regard to the submission in clause 20 above (paragraphs 21-26). Alternatively, as a consequence of the removal of the Minister of Conservation's involvement in restricted coastal activities, the rationale of having this separate consent category might be considered in phase 2 of the reform process.

**Clause 93 – New sections 141AA to 141AAI inserted**

90. Under the proposed new s141AAC there is a risk of applicants capturing the process by declining the commissioning of a report that they disagree with, and arguing the Authority has all the information it needs. This could potentially compromise the quality of the decision-making process, result in litigation over the issue, cause delays, and so may not achieve the purposes of the Act.
91. In respect of the proposed new ss141AAD and 141AAI it is noted that whereas there is a tight timeframe for all other parties, the Minister has no time limit for making decisions, which has the potential to cause delays. In general, experience indicates that Ministers do not make quick decisions, and if complexity is raised as the reason why there should be no time limit then the same argument applies to time limits applying to all parties.

***Recommendation***

92. That the proposals should be considered further in the light of the above submission.

**Clause 99 – Minister to appoint board of inquiry**

93. Rather than specifying that an Environment Court Judge must chair a board of inquiry, a person who meets the prerequisites for appointment as an Environment Court Judge (set out in s249) may sit in this capacity. The present proposals will reduce the availability of Judges to sit in the Environment Court.

***Recommendation***

94. That the proposed new s146(3)(b) be amended to allow for a board of inquiry to be chaired by a person eligible for appointment as an Environment Court Judge.

**Clause 101 - Conduct of inquiry**

95. As currently drafted the amendment to s147 makes cross-examination available at the discretion of the board of inquiry. That is unsatisfactory, as the board of inquiry will be the only hearing on the merits. Cross-examination is essential and should not be at the discretion of the board.

***Recommendation***

96. That the proposed new s147(7)(a)(ii) be altered to read “the board shall permit cross-examination; and”.

**Clause 104 – Appeals on questions of law**

97. In principle, leapfrogging of Courts is not desirable. There is no compelling reason why the ordinary appeal process should not apply.

**Clause 108 – Notice of requirement by local authority**

98. Empowering local territorial authorities to make the decisions on notices of requirement for designations (rather than requiring authorities) is desirable and welcome.

**Clause 130 – Appointment of Environment Judges and alternate Environment Judges**

99. The Society has consistently championed measures to assist the Environment Court improve its efficiency, including the introduction of case management, provision for recording of evidence, mediation, and the use of expert witnesses. It supports proposals allowing for an increase in the number of Environment Court Judges.

**Clause 131 – Representation at proceedings**

100. In the replacement of s274, the Attorney-General becomes the sole representative of the public interest.
101. Under the previous legislation, the Minister of Works and Development represented the public interest and also the interests of all government departments. The Crown, through the Minister, already has standing. It is unlikely the Attorney-General will enter appearances to represent the public interest in the general run of cases or represent some competing element of public interest where the Minister takes part. Further, the Crown does not have a monopoly in representing or protecting public interest considerations. That is recognised by the words “a relevant aspect of the public interest” in the present s274(1)(d) and the proposed new s274(1)(c). Nonetheless, there will be elements of public interest which ought to be considered.
102. The ability of persons genuinely representing a relevant aspect of the public interest to be heard should be retained.
103. The reduction of time to 15 working days for giving notice under s274 is supported.

***Recommendation***

104. That the provision be amended having regard to the Society’s submission.

**Clause 132 – New section 280A inserted – Application to extend scope of appeal**

105. This provision, and the associated amendment to the First Schedule are opposed.

106. There must be ability to appeal plan provisions on merits. The First Schedule process is controlled by Councils, and policy statement and plan proposals and decisions are often driven by the personal and political agendas of councillors. The Court is the first and only opportunity for independent and expert oversight and review. Questions of pure law arise rarely in policy statement and plan preparation and they are almost invariably closely associated with matters of fact and judgment.
107. Councils can and do get it wrong. Furthermore, plan development is a complex and challenging task. Mistakes inevitably occur. It is important that there be an opportunity to put matters right through the appeal processes. Most policy statement and plan appeals are resolved by consent, which illustrates the value of the appeal process in correcting, modifying and refining policy statement and plan proposals.
108. The outcome of the proposals will be twofold. First, there will be a lot of inventive attempts to try to extract a question of law from Council decisions in respect of which parties are aggrieved.
109. Secondly, there will be a flood of applications for leave. Such applications will be substantial, costly and time consuming. In addition, whether leave should be granted cannot be isolated from merits of an appellant's case.
110. It is vitally important that present appeal rights be retained as plans affect people, property and the environment on a significant and far-reaching scale.
111. The problem with appeals delaying the completion of the planning process is likely to become less pronounced with "second generation" plans, and the general process of updating plans by discrete plan changes, rather than wholesale review.

**Clause 133 – Section 284A repealed**

**Clause 134 – Section 285 substituted**

112. These provisions restore the power to order security for costs and strengthen the Court's power to award costs. The Society opposed the removal in 2003 of the power to order security for costs.

113. The amendments will help in deterring frivolous and vexatious appeals, and therefore supports them. Parties who have genuine and well-prepared cases to present to the Environment Court have little to fear if the amendments are enacted.

**Clause 139: New Part 11A – Act not to be used to oppose trade competitors**

114. The introduction of further disincentives to the resource management process being distorted for trade competition reasons is supported.
115. The provisions might be more effective if they also applied to the directors and managers of trade competitors.
116. It may be appropriate to consider allowing for applications to strike out proceedings if they appear to be motivated more by any competitive interests than by proper resource management considerations. If a declaration is obtained under ss308G(4) and 308H(3) then it extends the period for commencing a claim to 16 years. The ordinary limitation period for claims is 6 years, or 12 in cases of fraud.

***Recommendation***

117. That Part 11A be amended having regard to the Society's submission, or possibly deferred for further consideration in the course of phase 2 of the reform process.

**Clause 141 - Penalties**

118. A review of the penalties is timely. The maximum fines are capped at \$200,000.00, a figure that has stood since 1991. The level of fines imposed has been a fraction of the maximum available.
119. If the fines are increased, it is noted that there is no increase in the available term of imprisonment or in the daily fine. This seems to be anomalous.
120. Section 339 is to be amended to enable the Court on conviction to direct a review of conditions of consent, and in many cases that may be a useful provision. However, many offences occur because of breaches of permitted activity rules and, where an offence is the result of a contravention of conditions of consent, there may actually be

nothing wrong with the consent conditions. The provisions might usefully give the Court power to suspend or revoke a consent.

### ***Recommendations***

- 121. That consideration be given to increasing the length of the term of imprisonment and the amount of daily fine where the offence is continuing.
- 122. That consideration be given to empowering the Court, on conviction, to revoke or suspend a resource consent.

### **Clauses 147 and 152 - Non-Complying Activities**

- 123. The abolition of non-complying activities is a substantial change which at the very least requires further consideration and might more appropriately be dealt with in stage 2 of the Government's reforms. There are currently too many resource consent categories, but the Society does not support the current proposal.
- 124. Non-complying activities have value in three respects. First, they are an effective tool in giving effect to and implementing objectives and policies in plans. If a proposal is a discretionary activity, the objectives and policies of a plan are but only one matter, which the consent authority is required to take into account and have no priority over other considerations. The value of the plan may accordingly be diminished, if not lost, if the category of non-complying activities is abolished.
- 125. Secondly, the Environment Court has been vigilant in ensuring that a special case is made out for consent to be granted to a non-complying activity. This has had the benefit of providing certainty to potential applicants, local authorities and submitters and their advisers. People have known where they stood. They can make an informed prediction about the outcome of an application for consent to a proposal with reasonable confidence. That is not so for discretionary activities, where essentially "anything goes". Converting non-complying activities into discretionary activities will result in more contentious consent applications simply because there is no certainty in respect of the decision-making parameters.
- 126. Thirdly, the non-complying activity category can be an appropriate tool for managing the unforeseeable. In preparing plans, not every conceivable activity can be anticipated

and managed. A generic non-complying rule can avoid surprises which, in land use situations, might qualify under s9 as permitted activities.

127. The effects of abolition will be to impose significant costs on local authorities, and their communities, in rewriting plans to try to manage the abolition of this category of activity.

***Recommendation***

128. That the class of non-complying activities be retained pending further review of the proposals.

**Clause 148 – Amendments to Schedule 1 of the principal Act**

129. The provision for further submissions is removed from the First Schedule. While further submissions do extend the process and removing them may avoid vexatious further submissions, the proposals significantly curb opportunities for people with legitimate concerns and rights to protect to be heard, with relatively little time saved. The Society views this proposal as a major fault in the proposals. The tensions inherent in making resource management decisions were highlighted in paragraph 7 above, and the Act provides a statutory framework under which property rights and the right to enjoy environmental amenities may be affected positively or negatively. The touchstone is sustainable management under s5, but the fundamental assumption under the Act has always been that those whose rights may be affected should have a right to seek to influence the plans, policies, and decisions that may affect them, and the Society supports this philosophy and the constitutional principles inherent in that right of participation. Further submissions, at the very least by those who can demonstrate an interest greater than that of the public generally, are a fundamental means of ensuring that people who are affected or interested have the opportunity of being heard and to influence those making decisions on the content of plans and policies or on resource consent applications. In addition, further submissions are a basic aspect of public participation in the planning process.
130. Submissions on plans can affect people and their environment, and major changes of zoning, major infrastructural proposals, and limitations on the rights and amenities of others can be advanced through the submission process. The Society anticipates that many examples will be provided in other submissions, and therefore does not specify

examples here. It is fundamental that others have the opportunity to respond to proposals that will or may affect them (whether adversely or positively) before decisions are made. Full participation provides some assurance of better and balanced decision-making. Denying such participation would have a negative impact on society, leading to resentment at best and an unhappy grievance culture at worst.

131. Local authorities need to prepare summaries of submissions for their own use, and for their decision-making. Clause 8 of Schedule 1 as proposed will leave the rights and interests of people and groups at the mercy of local authority decision-making.
132. For the conscientious local authority, the burden of identifying those who might be adversely affected will be significant. So will the process of conferring with them. It is simpler to have a process for further submissions.

***Recommendation***

133. That the right to make further submissions should be retained.

**Clause 161 – Outstanding applications for resource consent where further information requested**

134. The purpose or meaning of this provision is unclear, and there is concern that it does not provide any right of objection or other recourse.

**John Marshall QC**  
**President**  
8 April 2009