Liability Insurance Discussion Group





What will become of the RMA?

Tony Randerson QC

A discussion on what's not working and what is proposed to fix it

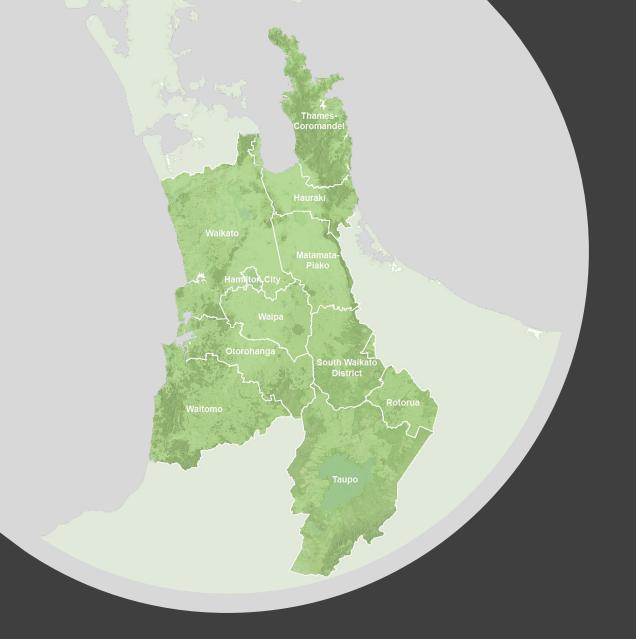
Patrick Lynch



Introduction:

- Waikato and Regional Council context
- The RMA
- What is the behaviour we are trying to change...
- ...and how...
- Some facts and figures







Waikato Region

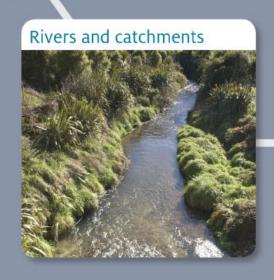
- 468 800 residents
- 50 000 businesses
- 11 territorial authorities
- Five legislated co-management iwi
- 20 000 rural 'farm' properties
- 4200 dairy farms
- 1.41 million dairy cows
- 1138 kilometres of coastline
- Extensive use of natural and physical resources

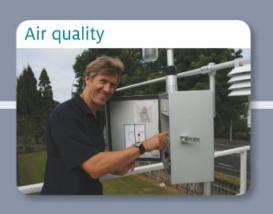
Working with others to build a healthy environment, strong economy, vibrant communities













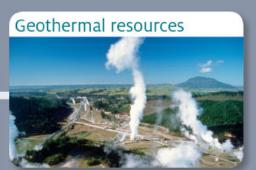
















How we see ourselves.

- We are the environmental regulator for this region.
- This is a vastly challenging (but rewarding) area of work!
 - High political and public profile
 - High expectations
 - Fantastic outcomes when getting it right
 - Huge consequences for getting it wrong
- Consistency of best practice help us overcome these challenges.





Resource Management Act 1991

The purpose of the Act is to promote sustainable management of our natural and physical resources





Resource Management Act 1991

- National Environmental Standards
- Regional Plan
- Coastal Plan
- Resource Consents









Did they have an avoidable system failure?









Do they have infrastructure that is not fit for purpose?

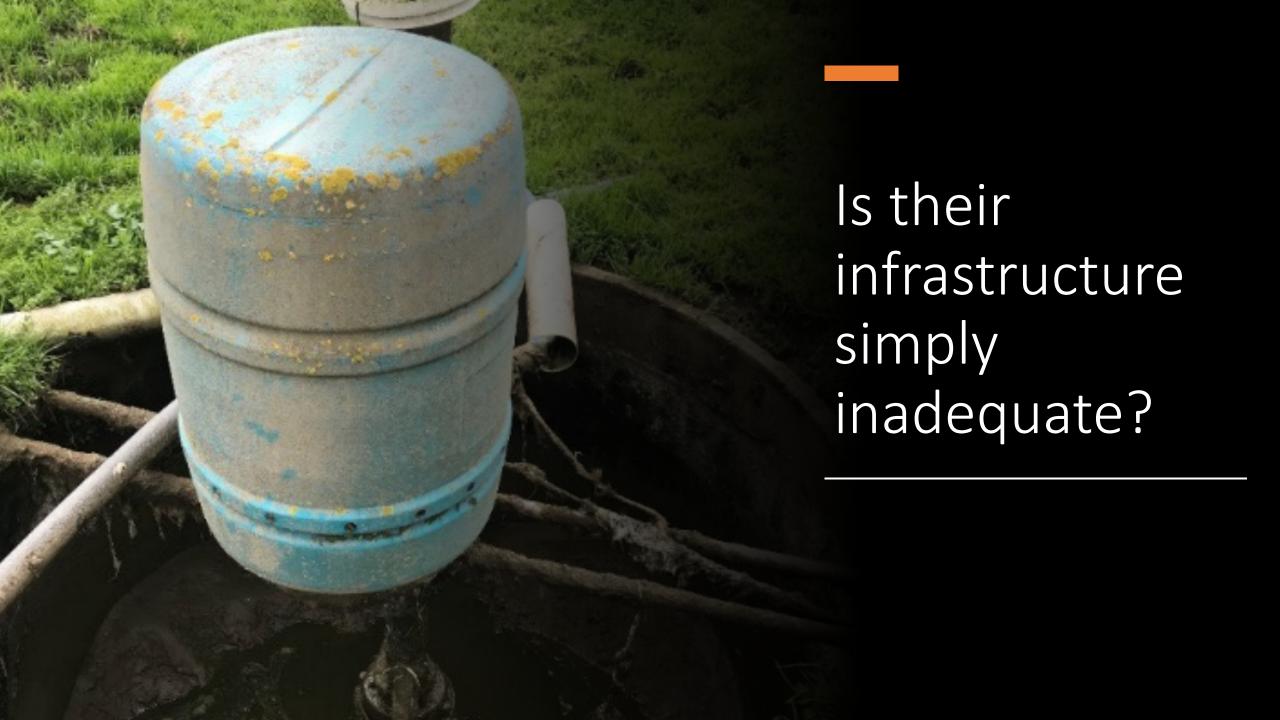


Do they want to destroy habitat for profit?











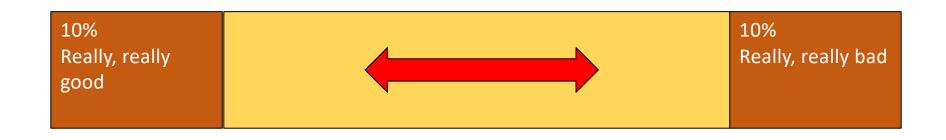
Were they just trying to save a few bucks?





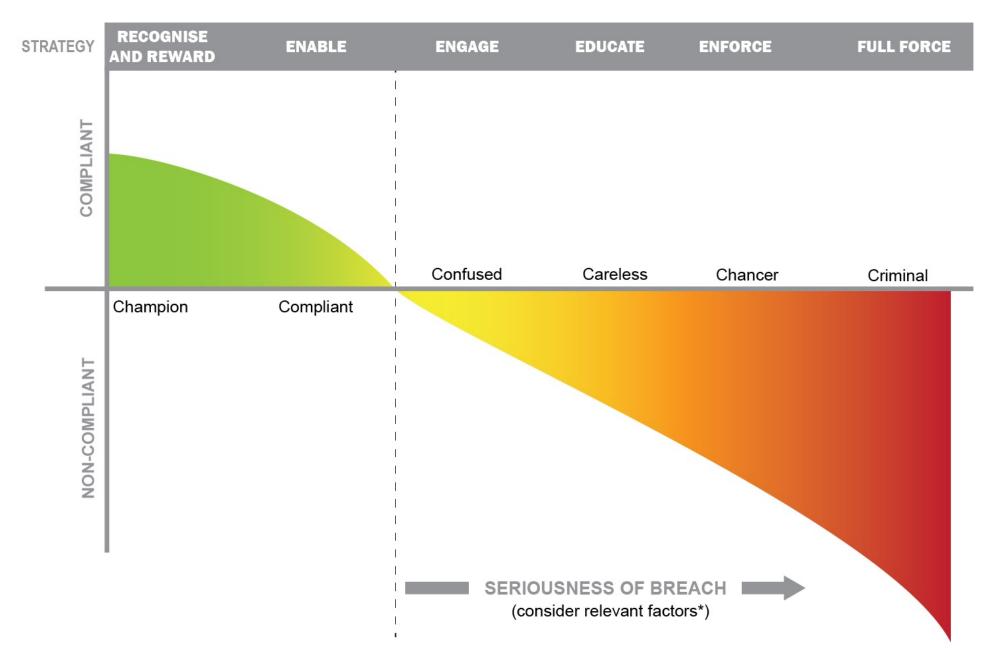


The 10-80-10 rule of regulatory behaviour change



STRATEGIC COMPLIANCE WITH THE RMA





RMA – Prosecutions by WRC – the last 10 years.

•	Dairy effluent	49
•	Intensive farming (pig/chicken)	6
•	Objectionable odour	3
•	Industrial discharges	8
•	Unlawful earthworks	12
•	Disturbing wetland / bed of river	7
•	Sewage	4
•	Tyre (burning /dump)	3
•	Forestry	1
•	Water take	1
•	Agrichemical to air	1
•	Fill in flood plain	1
•	Stock in exclusion zone	1



RMA – Prosecutions by WRC – the last 10 years.

Number of parties convicted
126

• Number of convictions entered 344

• Fines imposed \$3.7m

Average length of court case
350 days

• 'Success' rate 96%

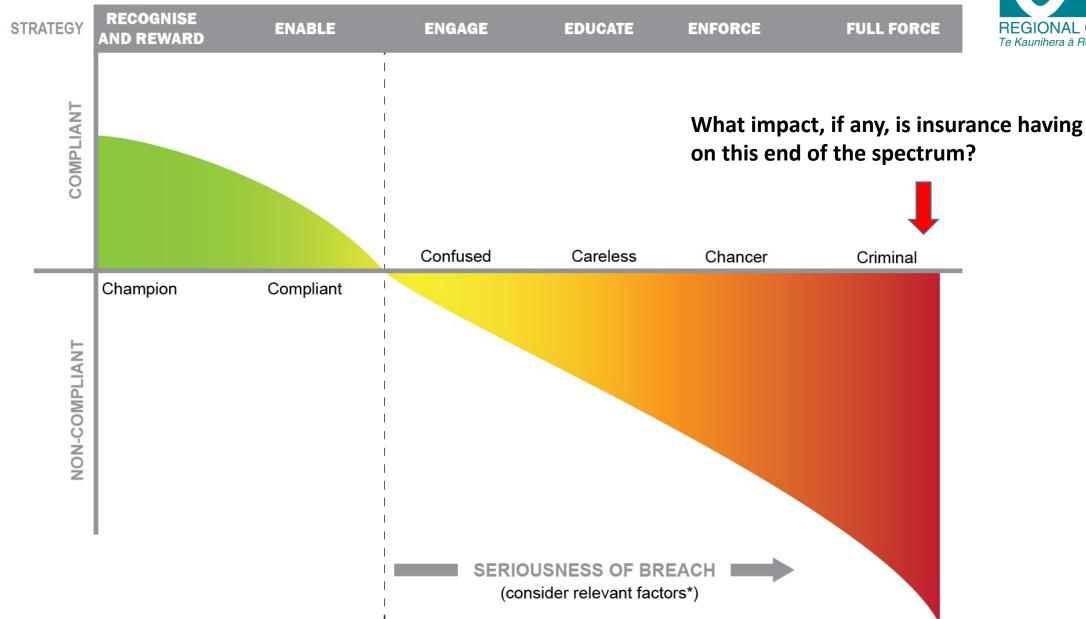


Visible Enforcement

Lesser penalties Formal directives Informal directives Warnings **Working with industry Inspections Media strategies** Workshops **Partnership** Education **Awards Training programmes Codes of practise Activity guides Advice**

STRATEGIC COMPLIANCE WITH THE RMA





Our Aim

To bring about positive behaviour change and positive environmental outcomes



HE TAIAO MAURIORA HEALTHY ENVIRONMENT

HE ÕHANGA PAKARI STRONG ECONOMY

HE HAPORI HIHIRI VIBRANT COMMUNITIES

Additional resources:

https://www.waikatoregion.govt.nz/...enforcement/Enforcement-policy/

https://www.waikatoregion.govt.nz/.../Investigation.../Basic-investigative- skills-for-local-government/

https://www.mfe.govt.nz/publications/rma/best-practice-guidelines-compliance-monitoring-and-enforcement-under-resource

REPORT OF THE RESOURCE MANAGEMENT REVIEW PANEL: JUNE 2020



Address to NZILA/ICNZ Seminar

Hon Tony Randerson QC 4 August 2021

Outline

- Main recommendations of the Resource Management Review Panel on legislative reform.
- Proposed Strategic Planning Act.
- Proposed Natural and Built Environments Act.
- Proposed Climate Adaptation Act.
- Some implications for the insurance industry.
- Sequencing and timing of legislative process.
- Overview of key provisions of the Exposure Draft.

Overview of Key Features

- Repeal the RMA and replace it with a new Act to be called the Natural and Built Environments Act(NBA).
- New legislation to be called the Strategic Planning Act(SPA).
- New discrete legislation to be called the Climate Adaptation Act (CAA).
- Importance of viewing these as a *comprehensive package* to improve the resource management system.

Strategic Planning Act - Overview

- Strategic and high level.
- Sets long term strategies to address location and timing of key infrastructure projects.
- Identifies areas suitable for development and areas not suitable or requiring protection.
- Expressed on maps through regional spatial strategies.

- Provides a means of integrating land use planning with the Local Government Act, Land Transport Management Act and the Climate Change Response Act.
- Developed by a partnership of central and local government with mana whenua and input from key stakeholders.
- Provides a platform to develop implementation agreements, including indicative funding and investment as well as who would provide funding and when.
- Plans developed under the NBA would have to be consistent with regional spatial strategies under the SPA.

NBA Overview

- Replaces the RMA as the regulatory statute controlling land use activities and the coastal marine area.
- Cabinet has accepted that the use and development of the natural and built environments should be enabled subject to standards/limits to protect the natural environment.

NBA Features

- Focus on wellbeing (broadly defined to include social, economic, cultural and environmental wellbeing).
- Sustainable use of resources to provide for present and future generations.
- Integrated management of natural and built environments.
- Increased focus on central Government direction through a National Planning Framework (NPF).
- Reducing the number of regional and district plans from over 100 to 14.
- Streamlining consent processes including appeals.

Climate Adaptation Act - Overview

- Discrete legislation with a much narrower focus than the SPA and NBA.
- Empowers local authorities to manage retreat from areas subject to inundation from the sea or fresh water flooding.
- Deals with complex issues such as risk, insurance and compensation.
- Sets up mechanisms for central and local government to fund necessary adaptation measures.

Climate Change

- Although reducing greenhouse gas emissions has been identified as an important policy since at least the 1990s, New Zealand has not developed comprehensive policy tools to support this goal.
- The principal mechanism relied upon is the CCRA and the Emissions Trading Scheme. Since amendments made to the RMA in 2004, this legislation is limited in its approach to climate change mitigation (ss70A and 104E RMA). Recent amendments aim to remove some of these limitations, but the Report recommends a more comprehensive approach that would *complement* the CCRA and the Emissions Trading Scheme.
- This should be developed at the national level and targeted to address issues in which emissions pricing policies are unlikely to be effective.

- A regulatory approach through the NBA should be designed so that it does not require a case by case assessment of the emissions impacts of an activity in individual resource consent applications.
- This can be achieved through national direction, strategic spatial planning and through combined plans.

Adaptation

- The Report concludes that a more proactive approach to the management of risk from climate change and natural hazards is required.
- The Report recommends that the same mechanisms be used to address adaptation measures: national direction, regional spatial strategies and combined plans.
- However, the Report recognises that specific discrete legislation is required to deal with the complex issues arising where managed retreat becomes necessary in the face of inundation from rising sea levels or to deal with the effects of flooding in flood-prone areas.

- Recent issues have arisen in places such as Matata in the Bay of Plenty and along sections of coastline in the Hawke's Bay. Similar issues have also arisen in dealing with the red zone in Christchurch.
- Amongst other things, this new legislation should empower local authorities to deal with managed retreat, clarify issues relating to risk and insurance; deal with options for compensation; and set up mechanisms for central and local government to fund necessary adaptation measures.
- The Report recommends that legislation now to be called **The Climate Adaptation Act** should be introduced.

Regional spatial strategies developed under the proposed Strategic Planning Act should be used to address at a strategic level:

- Climate change mitigation, informed by the emissions reduction plan under the CCRA.
- Climate change adaptation and natural hazard risk reduction, informed by the national adaptation plan under the CCRA.

Managed retreat

- The Panel's report identifies a range of complex issues affecting homeowners, local authorities and insurers about how to deal with rising sea levels affecting coastal areas as well as loss and damage from other natural hazards such as flooding as recently experienced in Canterbury and the West Coast.
- Experts have no hesitation in attributing the extreme weather events we have been experiencing to global warming with much heavier rainfall in consequence.

- Where coastal defences such as seawalls are not feasible, the point will come where homes become uninhabitable and homeowners will be forced to leave and live elsewhere.
- The inevitability of sea level rise means there is nothing unforeseen or sudden about it and insurers are likely to be unwilling to cover loss from this source (as reported in a recent Listener quoting Tim Grafton).

- Until that point is reached, insurers may require higher premiums or an increase in the policy excess.
- Property values will reduce and homes may become valueless.
- Mortgagees will lose their security in the land and buildings.
- Will landowners be entitled to compensation, on what basis and from whom?
- Could local authorities be liable if they decide not to maintain services such as water, sewerage and roading in areas subject to inundation and, would they be covered for this?

- Local authorities with a small rating bases may be unable to compensate homeowners meaning that an equitable basis for sharing responsibility with central Government would be necessary.
- What responsibility should a homeowner bear who acquires a property or builds a home with knowledge of the risks?
- All of which led the Panel to the view that discrete legislation was necessary to deal with the complex legal and political issues likely to arise.
- No doubt insurers will wish to have a key role in the shaping of the new legislation.

Other implication for insurers

- Directors' liability cover increased fines are recommended for breach of duty under the NBA.
- Cover for fines the Panel recommends that it be unlawful to provide an indemnity against fines (as currently forbidden by section 29 of the Work and Safety at Work Act 2015).

Sequencing and timing of legislative process

July 2020

Review Panel reported to Parliament

December

2020

Cabinet adopted the Panel's report in substance

February 2020 A Ministerial Oversight Group is established to oversee the reform process

July 2021

The Government released an Exposure Draft with an accompanying Parliamentary Paper. The Exposure Draft contains a relatively small number of key provisions of the NBA for submission to the Select Committee for the Environment

4 August 2021 Submissions on the Exposure Draft close

Early 2022

The Government intends to introduce a Bill with the full NBA provisions and a Bill for the SPA

Early 2022

The Government intends to release core policy for the CAA for consultation along with consultation on the National Adaptation Plan under the CCRA with a view to a Bill in early 2023.

October/ November 2023 The Government's aim is to enact all the reform legislation by the end of the current Parliamentary term.

Exposure Draft

- Covers only a limited number of the key provisions of the NBA:
 - purpose and related definitions
 - National Planning Framework
 - natural and built environment plans

Purpose of the NBA

Clause 5

- Subclause 1 provides for a two-fold purpose:
 - (a) Enabling Oranga o te Taiao to be upheld (broadly the health of the natural environment and its intrinsic relationship with iwi and hapu); and
 - (b) Enabling the use of the environment to support the wellbeing of present generations without compromising future generations.

- Subclause 2 provides that, to achieve the purpose of the Act:
- (a) Environmental limits must be complied with;
- (b) Beneficial outcomes for the environment must be promoted; and
- (c) Adverse effects on the environment must be avoided, remedied or mitigated

"Environment" includes the natural and built environment

Treaty clause

Clause 6

 Adopts the Panel's recommendation to require those administering the NBA to give effect to the principles of Te Tiriti (compare "take into account" under the RMA)

Environmental limits

Clause 7

- Adopts the Panel's recommendation for mandatory limits that must be complied with to protect key elements of the natural environment.
- Limits must be prescribed in the National Planning Framework (NPF) or in plans made by local authorities

Environmental outcomes

Clause 8

- The Panel recommended a list of outcomes that were to be provided for covering a range of issues including the natural and built environment, rural areas, historic heritage, tikanga Maori, natural hazards and climate change
- Under the RMA there was a recognised hierarchy of priorities of these outcomes (eg matters of national importance had greater weight than others) but the Exposure Draft adopts the Panel's recommendation that the stated outcomes be unweighted with conflict being resolved by Ministerial direction under the NPF
- The list of outcomes has been refined to some extent but follows the Panel's recommendations in broad terms

Implementation principles

- The Exposure Draft departs significantly from the Panel's recommendation to state at the commencement of the NBA (in the equivalent of the present Part 2 RMA) a series of principles to be adopted in the administration of the Act along with a number of Ministerial duties. These principles and duties were designed to provide clarity and greater certainty about the more broadly-based outcomes identified.
- The Exposure Draft modifies these provisions to an extent and now includes them largely under the Part dealing with the NPF. This critical part of the new legislation will require further consideration in the Select Committee process.

National Planning Framework (NPF)

- The Exposure Draft requires the Minister to prepare and maintain the NPF (under the RMA there was no mandatory requirement for national directions other than for the National Coastal Policy Statement).
- The purpose of the NPF is to provide "integrated direction" on matters of national significance or where national consistency is desirable.
- The NPF is to be implemented by regulations made by Order in Council (which are defined as secondary legislation for the purposes of the Legislation Act 2019).
- This is another area where further work will be needed.

Natural and Built Environment Plans

- The Exposure Draft adopts the Panel's recommendation that there be a combined plan (regional and district) for each region prepared by a planning committee.
- The Panel's recommendation for combined plans will result in a drastic reduction of the number of plans and is the single greatest means recommended to improve efficiency in planning processes.
- It is therefore critical that the reform process should reach clear conclusions on such things as the composition and functions of planning committees.
- The legal relationship between plans made by local authorities under the NBA and regional spatial strategies under the SPA is also critical (the Panel recommended plans under the NBA must be "consistent" with regional spatial strategy prepared under the SPA).

Liability Insurance Discussion Group



