

Identifying ‘directly affected’ persons:

An analysis of Schedule 1 Clause 5A of the Resource Management Act 1991 and its wider implications

Introduction

The Resource Legislation Amendment Act 2017 introduced clause 5A into schedule 1, which deals with the preparation, change and review of policy statements and plans.¹ Clause 5A(2) states ‘the local authority may give limited notification [on a proposed change or variation], but only if it is able to identify all the persons directly affected’.² The rationale behind this amendment is to reduce hearing time, costs, appeals and uncertainty in plan changes where there is an ‘identifiable’ group of directly affected persons.³ It was contended that full public notification can be a disproportionate and inefficient requirement in certain situations where the plan change is ‘minor, small-scale and discrete’.⁴ Examples of intended situations were altering zoning to new property boundaries and spot zoning, while areas used by the general public would still require public notification.⁵

The select committee in their report referenced concerns with the amendment as raised in the submissions. These were summarised to be: the challenge involved in identifying affected parties, the need to consider reverse sensitivities, and the need to consider any adverse effects on the environment.⁶ This last concern will be the primary focus of this essay. I argue that the difficulty involved in assessing adverse effects on the environment will hinder local authorities’ abilities to identify individual groups for notification. Further, despite the intention of the select committee that clause 5A should only be applicable to small scale plan changes with ‘minor’ effects, this may not always be the case as the legislation itself is not that clear or restrictive. Accordingly, there is the possibility that local authorities could use clause 5A in situations beyond those originally intended, or alternatively could misjudge the potential affects and serve limited notification for a plan change that is in reality ‘more than minor’. This later concern is a real risk, particularly as

¹ Resource Management Act 1991

² Resource Management Act 1991, Schedule 1 Clause 5A

³ Ministry for the Environment, *Resource Legislation Amendments 2017 – Fact Sheet 4*, at 3.

⁴ Ibid

⁵ Ibid

⁶ Resource Legislation Amendment Bill Commentary, at 28

seemingly minor changes that alter the type of activities allowed on the land can create future cumulative impacts. This essay also considers the wider implications of limited notification - including the loss of public participation, the conflict between the public interest and private rights, and the diminishing role of community groups and non-profit organisations - in order to give context to, and emphasise, the broader importance of what may seem like a minor amendment.

‘Directly affected persons’

The first difficulty that arises with the amendment is the use of the undefined and therefore uncertain term: ‘directly affected persons’. The select committee felt it was not appropriate to include a definition of ‘directly affected’ in clause 5A, despite it being a critical phrase. The reason was the terminology is already used under the existing clause 5 and has been decided on a case by case basis. While this ‘flexible’ interpretation will help the section to remain responsive to a variation of environmental issues and ‘direct effects’ that might arise, conversely it may create more uncertainty, with greater discretion falling in the hands of the local authority and courts.

The complication involved in identifying ‘directly affected persons’ was highlighted in *Milne v Northland Regional Council*.⁷ The Northland Regional Council was notifying part I of the Proposed Regional Water and Soil Plan, which dealt with discharges and land management for land disturbances alongside banks of water bodies and the coast.⁸ Mr Milne owned a property adjacent to a sandy beach on the east coast of Northland and contended that he should have been notified as a ‘directly affected person’.⁹ However, the Environment Court stated that Parliament did not intend for provisions that were wide and generally applicable throughout the region to require individual notification of all landowners and occupiers,¹⁰ and that due to a lack in technological capacity the Council was not required to notify Mr Milne as a ‘directly affected person’.¹¹

In this case, a number of factors appeared to impact the ‘directly affected’ test. For example, technology played an important role, and (depending on the types of effects

⁷ *Milne v Northland Regional Council* EnvC A086/04

⁸ *Ibid* at [10]

⁹ *Ibid* at [16]

¹⁰ *Ibid* at [33]

¹¹ *Ibid* at [20]

involved) lack of technology may always hinder a council's ability to identify all affected persons. Ultimately, the Court concluded that who was 'directly affected' depended on the regional council's opinion.¹² However, this can be a complex evaluation to undertake. Counsel for the Northland RC outlined that plan changes and variations will have different impacts on different people, giving examples of a new restraint being applied, being free of an old restraint, or freedoms for some causing adverse effects for others.¹³ It was discussed how drawing the line between persons directly affected, generally affected or indirectly affected by a plan change is not straightforward, and a huge range of possibilities was apparent along a spectrum from no-one being impacted to everyone living in the region being impacted.¹⁴ Given such difficulties and complexities, the regional council is ultimately left with the discretion, in which even a landowner in the area encompassed in the plan may be held not to be 'directly affected'. The effect of non-notification is to lock persons or groups out of the whole decision-making process, but such decisions can be relatively arbitrary especially once the uncertain and complex nature of environmental issues is taken into account, as I discuss below.

The nature of environmental issues

They require prediction, are complex, and may only be fully understood ex post

The future effects on the environment from activities will always create some level of uncertainty. The Court in *Clifford Bay Marine Farms Ltd v Marlborough DC* considered the definition and difficulties with determining 'environmental effects'¹⁵ and, citing *Waring v Tasman District Council*, the Court outlined how all future environmental effects are 'potential' rather than 'actual' by definition, as they have not yet occurred.¹⁶ Judge Jackson stated that evidence in the Environment Court rarely concerns certainties, but rather outlines a range of prospective impacts varying in probability.¹⁷ Decision-makers are therefore called upon to make predictions.

¹² Ibid at [27]

¹³ Ibid at [24]

¹⁴ Ibid at [25]

¹⁵ *Clifford Bay Marine Farms Ltd v Marlborough District Council* EnvC C131/2003

¹⁶ Ibid at [50]; *Waring v Tasman District Council* C115/03 at [31].

¹⁷ Ibid at [51]

In requiring the local authority to identify the group or groups of affected persons under clause 5A, an assessment of the possible impacts of the plan change would need to be made. This carries the implication that environmental impacts are identifiable to an acceptable level of certainty, and it appears to disregard how inherently complex and unpredictable environmental responses can often be. Environmental systems which involve non-linear paradigms and dynamic interrelationships may make it impossible for predictions and indications of environmental risk to be made with enough certainty for environmental decision-makers to rely upon.¹⁸ By definition, one might argue that it would be impossible to identify with accuracy all persons affected by future environmental responses, as the response itself cannot be certain.

A good example can be found in *Marlborough District Council v New Zealand Rail Ltd*.¹⁹ *Marlborough DC v NZ Rail* concerned the operation of new, faster ferries travelling across the Cook Strait, in the Tory Channel and the inner Queen Charlotte Sound.²⁰ It was alleged that the wake from the fast ferries would cause detrimental impacts to the coastal environment, specifically in relation to increasing erosion rates on the beaches and shorelines.²¹

Experts working for NZ Rail Ltd however found evidence contradicting this belief. As reported in the case and in subsequent scientific literature, vessel wakes from ferries such as the fast ferries in the Marlborough Sounds were theoretically more likely to create beach accretion rather than beach erosion due to the shape of the waves.²² It was generally accepted that while the shoreline had been altered by the ferry wake, it had reached a new equilibrium which was no less desirable than the previous morphology.²³ The Court was therefore persuaded that if a reduction in speed was ordered, the equilibrium would then again be disrupted and further erosion was likely to occur.²⁴

Importantly, after the ferries had been operating for some time, the scientists were able to accurately assess the full impacts of the wakes which produced the opposite environmental response to the one they had originally predicted. This situation is not unique however. Many other cases have addressed errors in prediction. For example in *Meridian Energy Ltd v*

¹⁸ Royden Sommerville, *A Public Law Response to Environmental Risk*, 10 Otago L. Rev. 143, 162 (2002), at 144

¹⁹ *Marlborough District Council v New Zealand Rail Ltd* [1995] NZRMA 357

²⁰ *Ibid* at 4

²¹ *Ibid* at 4

²² *Ibid* at 34

²³ *Ibid* at 34

²⁴ *Ibid* at 49

Wellington CC the ‘West Wind Project’ confirmed that the wind turbines erected would be free of adverse audible characteristics.²⁵ Despite residents giving consent for the project on that basis, this assertion proved false and subsequent consents had to be granted that imposed limits to keep the noise within acceptable and ‘healthy’ levels.²⁶ This jurisprudence highlights a fundamental flaw inherent in environmental decision making if the authority is called on to consider the ‘certainties’ involved in an activity or plan change. If a local authority is unable to accurately predict the direct impacts of a decision, it would also be unable to notify those adversely affected, as these two factors are contingent on each other.

Modelling predictions can vary due to assumptions

A further difficulty concerns the use of modelling. Predictions in science are made on a day to day basis, often through employing and testing models. While models can be extremely useful, and often reasonably accurate, they will always involve some degree of uncertainty and - critically - on-site realities and varying conditions can lead to different results. Following *Marlborough DC vs NZ Rail*, the difficulty with regulating boat speed based on wake impact on the shoreline continued. An expert in *New Zealand Shipping v Marlborough District Council* stated that the wash rule, originating from use in Denmark to predict shoreline impact from boat wake, should not be used in New Zealand as the required assumptions will lead to a 20% uncertainty in maximum wave height error.²⁷ Despite the alteration and adoption of the rule following *NZ Shipping v Marlborough DC*, it was later discussed and discontinued for regulatory purposes in 2008 in *Tranz Rail New Zealand v Marlborough City Council*.²⁸ Adoption of models for predictive purposes will consequently depend on what margin of error and uncertainty the decision-maker is willing to accept.

Additionally, models have the capacity to produce different or conflicting results for the same issue. One of the most contentious and dynamic geomorphic subject areas is shoreline response to sea level rise, and this provides an excellent example for present purposes. The ‘Bruun rule’ is the most common model used for forecasting the response of

²⁵ *Meridian Energy Ltd v Wellington CC* [2011] NZEnvC 232

²⁶ *Ibid* at [384]

²⁷ *New Zealand Shipping v Marlborough District Council* ENC Wellington W038/06, 29 May 2006, at [399]

²⁸ *Tranz Rail New Zealand v Marlborough City Council* W001/08, 22 January 2008

sandy beaches to sea level rise.²⁹ The rule states that the beach and foreshore adopt an ‘equilibrium’ profile, which is kept as the sea level rises, resulting in the translation of the profile landwards.³⁰ Despite its widespread use, the Bruun rule has not proved to be particularly accurate, with experiments around the world showing beach accretion and seaward translation in conjunction with sea level rise.³¹

Mahanga E Tu Inc v Hawkes Bay RC dealt with predictions of future shoreline retreat driven by sea level rise. The case was concerned with whether the council should permit the subdivision of shoreline properties.³² While the experts agreed that shoreline erosion was going to occur, there was debate and uncertainty surrounding the methods employed to predict the rate of erosion.³³ Differences rested on which mathematical model to use: essentially, long term predictions for the behaviour of complex natural systems at a small site proved extremely difficult to gauge.³⁴

Impacts can be delayed, accumulate and flow on to other effects

Environmental change within a system is not a standalone event; it can often trigger subsequent effects. The interconnectedness of processes and responses consequently creates difficulties for determining at which point a ‘direct’ affect will become ‘indirect’ or vice versa. The court in *Mahanaga E Tu Inc* faced a comparable situation in which the most serious adverse effects from their decision would occur in 50 to 100 years time.³⁵ Despite the risk to the current and future owners, it was decided that the development was appropriate to approve as there would be at least 20 years of property enjoyment before the erosion began.³⁶ Delayed impacts could cause groups of people to not be notified under clause 5A, despite – arguably - their ‘direct’ link to the issue.

²⁹ Woodroffe, C.D. and Murray-Wallace, C.V., (2012). ‘Sea-level rise and coastal change: the past as a guide to the future’, *Quaternary Science Reviews*, 54: 4-11.

³⁰ Bruun, P. (1988). ‘The Bruun rule of erosion by sea-level rise: a discussion on large scale two and three dimensional usages’, *Journal of Coastal Research*, 4: 627-648.

³¹ Dean, R.G., (1991). ‘Equilibrium beach profiles: characteristics and applications’, *Journal of Coastal Research*, 7(1): 53-84.

³² *Mahanga E Tu Inc v Hawkes Bay RC* [2014] NZEnvC 83

³³ *Ibid* at [26]

³⁴ *Ibid* at [35]

³⁵ *Ibid* at [16]

³⁶ *Ibid* at [38]

Focusing on those ‘directly affected’ also blocks out and disregards the interests of those who may be adversely affected indirectly from flow on effects. If building closer to an eroding shoreline is permitted, it is plausible that future residents may then adopt mitigation techniques such as building additional protective structures. Traditional coastal protection methods like sea walls, groynes and piers have however been found in some cases to actually promote erosion. Groynes limit sediment supply downdrift of the structure which causes erosion to that part of the beach, and rip currents have been noted to have formed from alterations to beach morphology causing safety issues as well as erosional processes.³⁷ In these situations, groups locked out by clause 5A would not be able to submit or appeal a decision that has the potential to heavily impact their property or their surrounding environment.

Environmental change can be irreversible

Under-regulation by local authorities runs the risk of allowing activities that may cause significant, long-term and / or irreversible environmental impacts.³⁸ While not all environment change is irreversible, some adaptations will forever alter the environment. Understanding, as best as possible, the consequences of a plan change would therefore seem imperative. Further, long-term effects may extend the group of ‘directly affected’ beyond the present group to future persons who, in one way or another, may become affected. The threat of an irreversible change to the environment makes any confined definition of ‘directly affected persons’ troubling, due to the infinite existence of the impact.

Unfortunately, there is often no clear distinction between reversible and irreversible change, providing yet another layer of uncertainty in environmental decision-making. Once again *NZ Rail Ltd v Marlborough DC* provides a good example. Notwithstanding the level of agreement between the experts and decision-makers following *NZ Rail Ltd v Marlborough DC*, uncertainty still exists as to whether the new state is reversible or not. Kirk and Single have argued that the new equilibrium is reversible as the condition would persist only as long

³⁷ Phillips, M.R. and Jones, A.L., (2006). ‘Erosion and tourism infrastructure in the coastal zone: Problems, consequences and management’, *Tourism Management*, 27(3): 517-524.

³⁸ Royden Sommerville, *A Public Law Response to Environmental Risk*, above n 18, at 157

as the causative sea state lasts.³⁹ Parnell however believes that the changes caused by the wave energy might never return to the same state as existed prior to the initial ferry activity.⁴⁰ This type of uncertainty, concerning the reversibility of impacts, is yet another reason to err on the side of caution when deciding who is ‘directly’ affected. However, there are more fundamental difficulties with clause 5A, as I discuss below.

Wider Implications

Public interests v private rights

The new amendment raises fundamental philosophical questions in relation to the RMA, and brings into play the conflict between public good and private rights. Public good was protected pre-amendment as local authorities were required to give full public notification for all plan changes and variations. However, clause 5A endorses a situation where the interests of those directly related to a plan change are weighed above general the public. Although public participation is an important theme in the RMA⁴¹, it has been slowly legislated away over the years in favour of the protection of private rights, lowering costs, and an attempt to increase the speed of decisions.⁴²

An example of this tension can be found in *Falkner v Gisborne DC*.⁴³ In *Falkner*, it was argued that the local authority had a duty to protect the land from encroachments by the sea, or alternatively that the landowners themselves had a right to protect their land.⁴⁴ The Court however was not willing to impose such a duty or accept such a right, stating ‘the Act is simply not about the vindication of personal property rights, but about the sustainable management of resources’.⁴⁵ Barker J further outlined that the governing philosophy of sustainability does not require private property rights to be weighed more heavily than environmental protection and the public interest.⁴⁶ Given the importance of the public interest in resource management decision-making, it would seem counterproductive to continue to

³⁹ Parnell, K.E. and Kofoed-Hansen, H., (2001). ‘Wakes from large high-speed ferries in confined coastal waters: Management approaches with examples from New Zealand and Denmark’, *Coastal Management*, 29(3): 217-237, at 232.

⁴⁰ *Ibid* at 232.

⁴¹ *Milne v Northland Regional Council*, above n 7, at [17]

⁴² Ministry for the Environment, *Resource Legislation Amendments 2017 – Fact Sheet 4*, at 3

⁴³ *Falkner v Gisborne DC* [1995] NZRMA 462

⁴⁴ *Ibid* at 18

⁴⁵ *Ibid* at 31

⁴⁶ *Ibid* at 31

introduce amendments which limit public participation – but that is exactly the effect of clause 5A.

Furthermore, in *'The Ambivalence of Property'* Gray outlined how one's private property right is not absolute, rather 'property is instead a legal term used to describe the concentration of power over things as resources'.⁴⁷ He explained that 'social property' can exist in a person's 'resource', which would outweigh the value of the private property claim.⁴⁸ For example, a landowner may not be able to build a skyscraper on that land because his neighbours have the ability to prevent certain activities on neighbouring land.⁴⁹ If we consider this factor in the context of clause 5A, Gray's argument as to the social nature of property helps justify the need for full public notification. A plan change, even on a small scale, could have the impact of changing the type of activity permitted on that land. A change that would lift a covenant or alter the public's social property interest in that land would arguably be a direct adverse effect.

The importance of public participation

Newhook J in *Milne v Northland Regional Council* stated that the Court was very conscious of public participation being an important theme in the RMA.⁵⁰ However, many amendments to the RMA have whittled down the role the public is able to play in submitting on and participating in decision-making.⁵¹ By incorporating the local community and wider public in decision-making that might impose risks on the environment, the local authority is not only giving effect to a core philosophy of the RMA, but is also taking a pragmatic approach.⁵² Public participation can give insight into how the overall community feels about an issue, and the acceptability of risks. For example, risks might be tolerated by the local community if social and economic benefits stemming from the project flow to them.⁵³ Conversely, the community could value taking a precautionary approach towards protecting the environment over any financial or social benefit they might otherwise gain. A local authority could not feasibly be expected to develop policies and performance standards for dealing with complex

⁴⁷ Kevin Gray, 'The Ambivalence of Property', in Kirkby, J., O'Keefe, P and Timberlake L. (eds) *The Earthscan Reader in Sustainable Development*, Earthscan 1995, at 223

⁴⁸ *Ibid* at 223

⁴⁹ *Ibid* at 224

⁵⁰ *Milne v Northland Regional Council*, above n 7, at [17]

⁵¹ *Sutton v Canterbury Regional Council* [2015] NZHC 313 (2015) 18 ELRNZ 774 [2015] NZRMA 93, at [24]

⁵² Royden Sommerville, *A Public Law Response to Environmental Risk*, above n 18, at 153

⁵³ *Ibid* at 153

and uncertain environmental risk issues by themselves because risk-assessment is a multi-dimensional process.⁵⁴ Often, better decision can be made by including the public.

Limited notification undermines this core theme. Elias CJ in *Westfield v North Shore City Council* emphasised the importance of public participation, stating '[t]he decision not to notify an application is an exception to the general policy of the Act that better substantive decision-making results from public participation'.⁵⁵ Elias CJ additionally discussed that limitation of public notification and participation is a rights-based issue, with the principles of natural justice as affirmed in s 27 of the New Zealand Bill of Rights Act 1990 being applicable in these situations.⁵⁶ Toogood J explained that public notification is linked to sustainable management through allowing the decision-maker to have access to all relevant information by giving those potentially affected the right to be heard.⁵⁷ Gendall J was very cautious in *Sutton v Canterbury Regional Council* on whether to allow non-notification as he recognised the higher consequences involved of excluding the public from the decision-making process.⁵⁸ These judgements reflect the concern with limiting public participation as it plays such a beneficial role in the decision-making process.

Exclusion of community and non-profit groups

As only persons who have submitted are able to appeal the local authority's decision,⁵⁹ another important implication of clause 5A will be the exclusion of NGO's from the entire decision-making process. Elias CJ in *Northcote Mainstreet Inc v Northshore City Council* in her dissent addressed the problem of locking community groups out of the appeals process as they play an important role in advocating for the community.⁶⁰ These groups might be able to collectively represent multiple persons in the community, reducing overall submissions, as well as providing services that certain communities might not otherwise have access to.

⁵⁴ Ibid

⁵⁵ *Westfield (New Zealand) Ltd v Northshore City Council* [2005] NZSC 17, (2005) 11 ELRNZ 346, [2005] 2 NZLR 597, [2005] NZRMA 337, at [25] per Elias CJ

⁵⁶ Ibid at [27] per Elias CJ

⁵⁷ *Associated Churches of Christ Church Extension and Property Trust Board v Auckland Council* [2014] NZHC 3405 at [56]

⁵⁸ *Sutton v Canterbury Regional Council* above n 51, at [49]

⁵⁹ Resource Management Act 1991, Schedule 1 Clause 14

⁶⁰ *Northcote Mainstreet Inc v Northshore City Council* [2006] NZRMA, at [182] per Elias CJ

A comparison can therefore be brought between the wording of ‘directly affected person’ in clause 5A and that in *Northcote Mainstreet* where the community group had to prove it was an ‘adversely affected person’ as per section 94 of the RMA (as it was at the time).⁶¹ Blanchard J felt that widening the interpretation to include NGO’s would pose great difficulties to local authorities in identifying who was an ‘adversely affected person’.⁶² Due to a balance needing to be struck between protecting the rights of interested parties and ensuring administrative efficiency, it was held that community bodies such as Northcote Mainstreet were not to be considered persons ‘adversely affected’.⁶³ Clause 5A attempts to strike a balance in the need to improve cost and efficiency, but would unfortunately have the consequence of locking important community groups out of the appeal process.

Conclusion

Following amendments to the RMA in 2009, clause 5A in schedule 1 was introduced in order to reduce costs and increase efficiency in the plan change process. However in order to identify ‘directly affected persons’, local authorities must have a sound and relatively certain understanding of the potential adverse effects of the plan change. This is often not possible due to the nature of environmental issues. Environmental impacts are often complex, can be cumulative, and may be irreversible; assessment requires prediction, and may be based on model assumptions, with certainty only appearing *ex post*. Accordingly, great caution is needed in deciding to exclude persons from the decision-making process. Limited notification serves to undermine the important philosophical underpinning of public participation, and will further limit the role that community groups and NGO’s can play in resource management decision-making. Fundamentally however it seems counterproductive to require decisions to be made about uncertain environmental issues before the public even have a chance to participate. The very nature of environmental issues necessitates wide public participation in the plan making process, which should be protected foremost over the desire for reduced costs and speed.

⁶¹ Resource Management Act 1991, section 94

⁶² *Northcote Mainstreet Inc v Northshore City Council* [2006] NZRMA, at [198] per Blanchard J

⁶³ *Ibid* at [199] per Blanchard J

