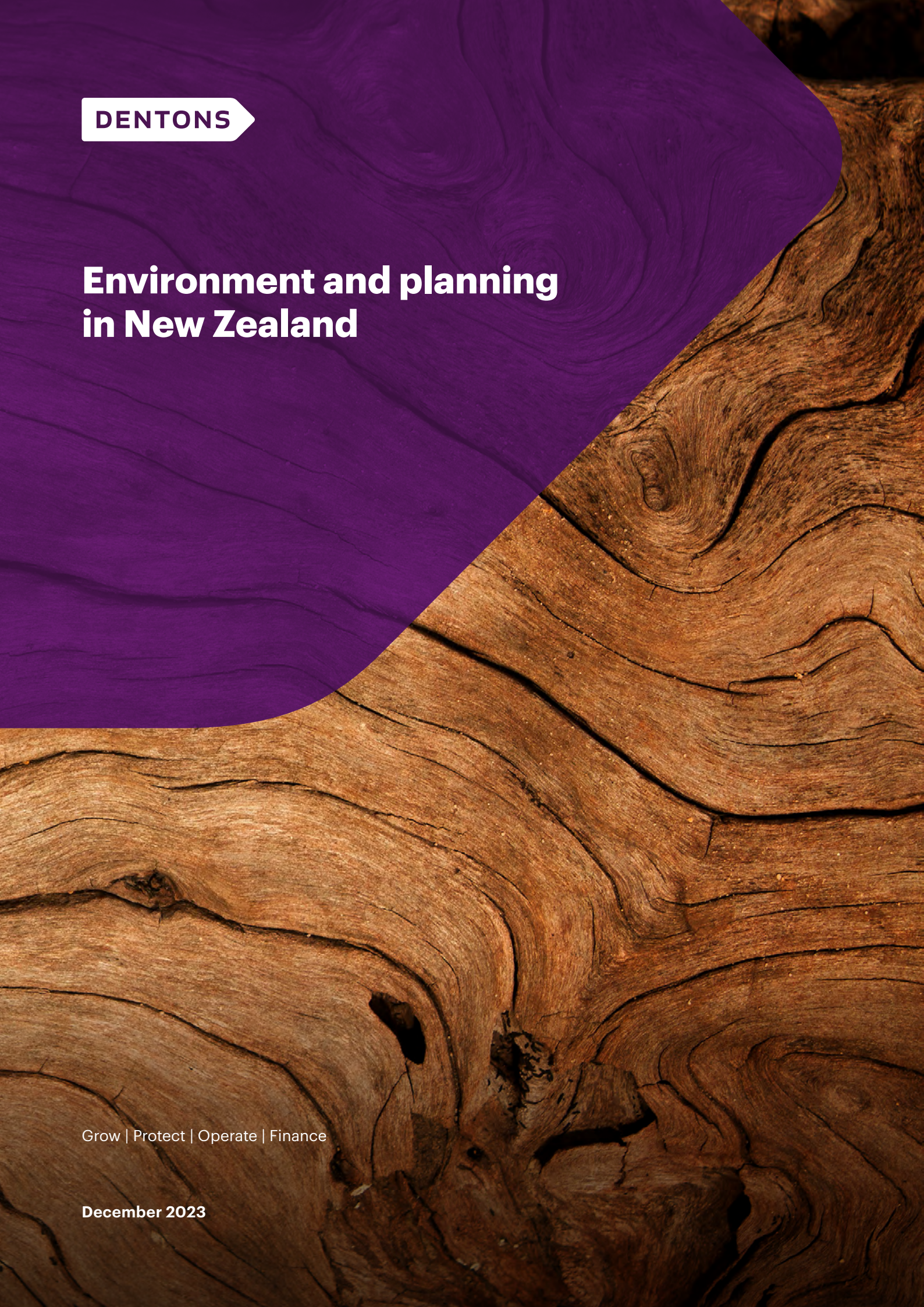
DENTONS

Environment and planning in New Zealand



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Environment and planning in New Zealand

Dentons Kensington Swan is noted for its legal team's specialist expertise in resource management issues, with particular experience in the coastal marine area and water infrastructure. Its diverse practice provides a strong offering for heritage and conservation projects, advising on Māori legal issues. The team frequently assists clients in obtaining consent applications for major infrastructure and construction projects. It also advises a range of public sector organisations, government agencies, district councils and companies from the utilities and construction sectors.

— Environment & Resource Management Asia Pacific, 2023

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Key points about environment and planning law in New Zealand

The resource management system (under the RMA) is currently in the process of reform with the recent passing of two new pieces of legislation. However, the future of the reform and new enactments is uncertain as the incoming Government in October 2023 has promised to 'wipe them from the statute books' by 2024 and make a fresh start. For the most part, the RMA remains in force.

The Emissions Trading Scheme is New Zealand's current main climate change tool. In 2019 the Government passed the Climate Change Response (Zero Carbon) Amendment Act (Carbon Zero Act) which amended New Zealand's existing climate change legislation to transition the country to a low emissions, climate-resilient economy.

Historic heritage is primarily regulated by the RMA and the Heritage New Zealand Pouhere Taonga Act 2014. Resource consents or archaeological authorities may be required where historic heritage is affected by a proposed development.

Key points about environment and planning law in New Zealand

The Resource Management Act 1991 (RMA) is the primary source of environmental law in New Zealand and sets out the framework for managing both our natural and built environment.

The RMA is mostly administered by local government through the use of resource consents (which are essentially permits authorising particular uses or activities).

Regional and district plans contain rules that govern the use of natural resources and changes to the built environment, and are administered by the relevant regional and territorial authority.

Central government drives the direction of some of the key issues addressed in regional and district plans through national policy statements and national environmental standards.

The RMA has a range of penalty and enforcement provisions. Many of these are strict liability offences. The maximum fines for offences under the RMA is NZ$600,000 for companies and NZ$300,000 for individuals (or, for individuals, a prison sentence of up to two years).

The detail

The Resource Management Act 1991

The RMA regulates the use of land, water and air in New Zealand. The purpose of the RMA is to promote the sustainable management of natural and physical resources.

Functions under the RMA are divided as follows:

- Regional councils have responsibility for the control of matters relating to water and the discharge of contaminants;
- Territorial authorities (or district councils) have the responsibility for the control, use, development and protection of land, and the control of subdivision and noise; and
- Regional and territorial authorities share the responsibility for natural hazards and hazardous substances.

There are also several unitary authorities in New Zealand which perform the roles of both regional councils and territorial authorities.

The functions under the RMA are largely administered by the relevant council through permitted activities or resource consents that are granted or declined under district and regional plans.

Planning rules

Under the RMA, regional councils also have a policy statement, which sets the basic direction for environmental management in the region.

Regional councils are also required to have regional plans which contain rules relating to issues such as:

- the use and development of the coastal marine area;
- discharges to air, land or water; and
- contaminated land.

Every territorial authority is required to have a district plan which contains objectives, policies, and rules relating to land use and subdivision activities in the district. In addition, there are various national environmental standards relating to specific matters such as telecommunications facilities, electricity transmission, land contamination, forestry, and air quality.

Activities and developments are classified into a hierarchy of activity types and this determines whether a resource consent is required for any proposed activity. District and regional plans classify activities as:

- Permitted (do not require resource consent in order to undertake the activity);
- Controlled activities (cannot be declined but conditions can be imposed to mitigate effects);
- Restricted discretionary, discretionary, and non-complying (require resource consent and, if granted, will often be subject to specific conditions to mitigate any adverse environmental effects); and
- Prohibited (cannot be consented).

Resource consents

Resource consents are required for activities that contravene a rule in a district plan, or are not provided for as a permitted activity in a regional plan.

Types of resource consents include land use consents, subdivision consents, water permits, coastal permits, and discharge permits. Resource consents contain conditions that the consent holder must comply with and may include construction conditions as well as ongoing requirements and obligations post construction. Land use consents 'run with the land' so are not required to be transferred to a new owner of the property.

Other types of consents will generally require a transfer if there is a new owner of the relevant property, often subject to Council approval. While land use consents do not generally expire, other

consents such as water, coastal and discharge permits are granted for a fixed term and require renewal.

The consenting process

This process starts with an application to the relevant authority in the form specified under the RMA (and accompanied by an assessment of environmental effects). The local authority will decide whether the owners of adjacent land should be notified of the application and/or whether public submissions should be invited and a hearing held. If an application is publicly notified this will impact on the duration and complexity of the consenting process.

The RMA and the regional and district plans provide guidance to the local authority on how to make a decision on notification and on whether to grant consent for an application. The amount of discretion that the local authority may exercise, and the legal tests an applicant must meet in order to obtain consent, will depend on the nature of the consent sought (and whether it is envisaged by the relevant planning rules). The local authority can also impose conditions on any resource consent it grants in order to address any adverse effects on the environment.

There is a right of appeal to the Environment Court for both the applicant and, where an application is notified, for submitters. There is also a right of appeal from the Environment Court's decision to the High Court but on points of law only.

Alternative consenting pathways

In addition to the process set out above, there are several alternative pathways available to obtain a resource consent:

- The direct referral process allows for the resource consent application to be decided by the Environment Court in the first instance, rather than the relevant council. This pathway effectively bypasses the council level hearing and results in a hearing before the Environment Court. The application is publicly notified and members of the public have the right to lodge submissions. This process can be used to streamline the consenting pathway for large and complex applications which would likely end up in the Environment Court on appeal after a council decision in any event. There is a right to appeal the Environment Court's decision to the High Court, but this right is limited to points of law.

- A resource consent application may also be referred to a Board of Inquiry if the Minister for the Environment decides it is a nationally significant project. All submissions on the proposal will be considered by the board and they will make a final decision on the matter. It is possible to appeal the board's decision to the High Court, however appeals are limited to points of law.

Existing use rights

The RMA provides for "existing use rights" that allow the continued use of land in a way that contravenes a rule in a district plan where that use was lawfully established before the relevant rule was put in place. In addition to showing that an activity has been lawfully established, the environmental effects of the land use must also be the same as (or similar to) what they were before the rule became operative and the land use cannot have been discontinued for a period of more than 12 months. Activities that have existing use rights are not required to obtain resource consent.

In terms of regional plan rules, activities that were permitted, or were lawfully carried on without a resource consent, but which become controlled, discretionary or non-complying activities as a result of a new rule in a regional plan, may be continued for a limited period provided that the environmental effects of the land use must also be the same as they were before the rule became operative and the land use cannot have been discontinued for a period of more than six months. An application for a resource consent must be made within six months of the rule becoming operative. Where an application for resource consent has been lodged, the activity can continue until such time as the final decision is issued.

Designations

Designations are a mechanism that allow Ministers of the Crown, local authorities, and network utility operators (who have the status of

'requiring authorities' under the RMA) to identify, acquire and develop land for a public work or infrastructure. Designations are often used for public infrastructure such as transport networks, airports, telecommunication, and electricity and education facilities.

A designation will create a 'spot zone' over a particular site within a district plan. This 'spot zone' sets out the parameters of the work to be undertaken on the site without the need for land use consent (although regional plan consents are still required) and subject to compliance with any conditions on the designations. Designations are secured by lodging a 'notice of requirement' with the relevant district council. The process for considering notices of requirement is similar to resource consent applications except that the district council makes a recommendation on the notice of requirement and the requiring authority issues the decision. Submitters have a right of appeal to the Environment Court on the decision issued by the requiring authority.

A designation also restricts third parties from carrying out work on the designated land that will prevent or hinder the project or work to which the designation relates, without first obtaining the approval of the requiring authority.

National Environment Standard for Plantation Forestry (NES-PF)

The NES- PF came into force in May 2018 and aims to manage the environmental effects of plantation forestry activities in New Zealand through one set of rules that apply to forestry activities. Regional and district councils across New Zealand are now required to apply the rules in the NES-PF in relation to plantation forests. The NES-PF prevails over district or regional plan rules except where the NES-PF specifically allows more stringent plan rules.

In addition to addressing plantation forestry activities, the NES-PF regulations address afforestation, pruning and thinning of trees and slash, earthworks associated with forestry, river crossings, forestry quarries and harvesting of logs.

Some forestry activities have been classified as permitted activities under the NES-PF meaning that a resource consent is not required for these activities (although permitted activity standards need to be met and/or management plans put in place for some activities). Other activities require resource consent which must be obtained from the relevant council.

Liability

Under the RMA, the Environment Court can require a person to do something in order to avoid, remedy, or mitigate an actual or likely adverse effect on the environment relating to any land of which the person is the owner or occupier. Therefore, if you are purchasing land that may be affected by historic contamination issues, it is important to investigate this thoroughly and, if necessary, include appropriate indemnities or warranties in the sale and purchase agreement.

Historic contamination issues may arise in purchases of land where there have been industrial activities carried out in the past. Examples could include forestry and timber processing sites, and quarries on farm land. The RMA creates many strict liability offences, which mean that it is not necessary to prove that a person intended to commit an offence, or was reckless or negligent.

There are several prosecution options available to councils in the case of contaminated land, including:

- Issuing infringement notices;
- Abatement notices and enforcement orders; and
- Criminal offences.

Infringement notices are issued for minor cases of pollution and the penalty will usually be a low level fine. The infringement fees range from NZ$300 to NZ$1,000 depending on the offence under the RMA.

An abatement notice or enforcement order will be issued by the Environment Court and will require the recipient to comply with the RMA. This means that the recipient will need to cease the activity immediately and potentially remediate the situation. These notices and orders are issued for more serious contamination and recipients have a right to appeal. Criminal offences under the RMA carry a maximum fine for individuals of NZ$300,000 plus

NZ$10,000 per day for continuing offences, and a prison term of no more than two years.

A company, if convicted of an offence, can be subject to a maximum fine of NZ$600,000 plus NZ$10,000 per day for continuing offences.

Examples of criminal offences include:

- Contravening the provisions of an enforcement order or abatement notice
- Developing land without a resource consent; and
- Taking, damming or diverting fresh inland coastal water without a resource consent.

Historic heritage

In New Zealand, heritage is primarily regulated by the RMA and the Heritage New Zealand Pouhere Taonga Act 2014 (HNZPTA).

The HNZPTA makes it unlawful for any person to modify or destroy any archaeological site without the prior authority of Heritage New Zealand. If you wish to do any work that may affect an archaeological site, you must obtain an authority from Heritage New Zealand before you begin. An archaeological site is defined as any place in New Zealand (including buildings, structures or shipwrecks) that was associated with pre-1900 human activity, where there is evidence relating to the history of New Zealand that can be investigated using archaeological methods. If a previously unknown site is uncovered during earthworks, work must stop and an archaeological authority will be required to in order to continue.

District councils or unitary authorities can include rules in their district plans which seek to protect a range of historic heritage resources. District plan rules commonly schedule and map heritage buildings and archaeological sites, and require resource consent to be obtained for activities which have an adverse impact on them.

Climate change policy in New Zealand

Internationally, New Zealand signed up to the Paris Agreement and is committed to reducing greenhouse gas emissions by 30% from 2005 levels by 2030.

In 2020, New Zealand committed to a 2050 domestic target of net zero emissions of all greenhouse gases other than biogenic methane, and a reduction of biogenic methane emissions by 24% to 47% below 2017 by 2050.

The New Zealand Emissions Trading Scheme (ETS), a cap and trade scheme, is one of the government's main tools to ensure New Zealand meets these targets. The ETS creates a financial incentive for participants to invest in technologies and practices that reduce emissions. It also encourages forest planting by allowing eligible foresters to earn New Zealand emissions units. The ETS covers some sectors (forestry, stationary energy, liquid fossil fuels, waste) but not others (agriculture is included nominally, but without any surrender obligations).

In 2020, the government made changes to the ETS by introducing, among other things, a cap on emissions so as to allow it to reduce the total emissions from the scheme, and the ability for the government to auction NZ emissions units every year.

The ETS is not the only tool used to reduce greenhouse gas emissions.

The New Zealand government published its first three emissions budgets in May 2022. Emissions budgets account for both ETS and non-ETS emissions, and used to determine New Zealand's progress in reaching its targets. These budgets are for the years 2022–2025, 2026–2030, 2031–2035, with their progress monitored by the Climate Change Commission, which was established in 2019 to advise the government on the policies needed to achieve its targets.

Legislative reform

In early 2021, the Government announced it would reform the resource management system by replacing the RMA with three new Acts:

- Natural and Built Environment Act (NBEA), as the primary replacement for the RMA, to protect and restore the environment while better enabling development.

- Spatial Planning Act (SPA), requiring the development of long-term regional spatial strategies to help coordinate and integrate decisions made under relevant legislation; and

- Climate Adaptation Act (CAA), to address complex issues associated with managed retreat, funding and financing adaptation.

This legislative reform came as a response to the Government (and wider) concern that the current system under the RMA "takes too long, costs too much and has neither adequately protected the natural environment, nor enabled housing or development where needed." (Minister David Parker 6 September 2022).

As of August 2023, the NBEA and SPA have been enacted into law. However, both have lengthy transition periods with the RMA being slowly phased out during a period of 7-10 years. During this time, different sets of rules will apply to different regions and the resource management landscape will be extensive and complex. More information on these reforms can be found in our article here.

With the recent election results in October 2023, it is clear that a change of government is on the horizon with the National Party coming in to take the reins. The National Party has made a commitment to repeal the new legislation and introduce a new fast-track consenting regime as part of its '100 day action plan.' A repeal at this stage would have little effect on the average resource user but would create uncertainty as to what the future resource management system in New Zealand will look like.

How we can help you

- Obtaining planning authorisations for large scale major infrastructure projects right through to smaller developments like single residential houses.
- Guiding you through the consenting process, from providing you with strategic advice in the early stages of your project to appearing for you in court if necessary.
- Seeking changes to regional and district plans both in terms of the zoning of properties and changes to the planning rules; or
- Conducting due diligence investigations to help you accurately assess environmental risks and your responsibilities under the RMA.

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