The Resource Management Act: Origins, Context and Intentions

Lindsay Gow[1], Resource Management Law Association Conference, Dunedin, 25 September 2014

Part 1: Origins and Context

The RMA was the result of a number of policy, governance and resource and management issues and events. These led to the development of the Resource Management Law Reform process (RMLR) in 1988. The principal issues as I saw them were:

A growing awareness of environmental and resource issues

The origins of this go back well into the early part of the 20th Century, and indeed even earlier, with the creation of national parks and reserves. New Zealand's leading role in soil conservation in the 1930s was also a notable contributor. But the big development initiatives in the post World War II era, especially hydro-electric developments, started to result in raised public awareness and reaction. One of the first examples of this was the Aratiatia Dam (near Taupo on the Waikato River) where public pressure resulted in a compromise. This resulted in an agreement to turn the Aratiatia rapids on and off twice a day – rather than have them de-watered permanently. This "instant rapids" effect still happens today.

It was probably the proposal to raise Lake Manapouri that garnered the greatest interest and reaction, and put environmental issues very much in centre stage. Native forest logging issues and proposals also resulted in a huge public and community reaction. And then there was the reaction to the "Think Big" projects of the early eighties, which resulted in the abandonment of one of the proposals - for an Aluminum Smelter at Aramoana near Dunedin. There was also the Clyde Dam saga where, after a series of different decisions, a final Planning Tribunal decision to decline it was overturned by legislation.

A notable positive measure that started reinforcing the importance of environmental values was the Water and Soil Conservation Amendment Act, 1981, which allowed protection through Water Conservation Orders for what were called "wild and scenic rivers". This legislation dealt with rivers outside National Parks – which already effectively had protection. It prefaced a more comprehensive approach in the mid 1980s to identifying and categorising river and water values. Since then, 11 rivers (three in the North Island and eight rivers in the South Island) have had National Water Conservation Orders on parts of their waters. Under the RMA (which continued with Water Conservation Orders), another three rivers have been protected – one in the North island and two in the South Island.

---

[1] Lindsay was Deputy Secretary, Policy, Ministry for the Environment, through the RMA's development, enactment and the initial years of its operation

The advent of the Commission for the Environment started a process that brought key environmental issues and concerns into the heart of the Government and its policy making. The Commission had an environmental impact assessment role for government projects, but it also provided a bold and, as seen at the time, an often controversial voice on environmental issues and problems. It used reason and evidence to advance its arguments and gradually some of the issues and problems it put forward took root, and led in part to eventual changes in government administration. These, in turn, led to the RMA.

A major, world wide phenomenon that set the scene for bold, integrated thinking about resources and society was the UN's significant 1987 report *Our Common Future,* known as the Brundtland Report after Gro Harlem Brundtland, ex PM of Norway, and the chair of the Commission that wrote it. One of its seminal findings was:

> *"Failures to manage the environment and to sustain development threaten to overwhelm all countries. Environment and development are not separate challenges; they are inexorably linked. Development cannot subsist upon a deteriorating environmental resource base; the environment cannot be protected when growth leaves out of account the costs of environmental destruction. These problems cannot be treated separately by fragmented institutions and policies. They are linked in a complex system of cause and effect."*[2]

National development

The "Think Big" energy projects led to concerns by the Government that planning permissions and water right approvals, not to mention many other legislative requirements, might stymie the urgency with which they wanted to advance these projects. Accordingly, a forerunner concept to the RMA, the National Development Act, was enacted in 1979. It provided for "fast track" procedures for major developments and this involved the suspension of the effects of a number of major statutes – some 18 in all.

The National Development Act provided for the Planning Tribunal to undertake inquiries into the proposals, receiving submissions from affected local authorities, industry and the public. But its recommendations to the Government could be confirmed, modified or overturned by an Order In Council process. Despite requirements to explain deviations from the Tribunal's recommendations and to lay the proposals before Parliament, the Act's provisions were deemed by many to be unacceptable, if not unconstitutional.

---

[2] *Chapter 1, para 40 of "Our Common Future"*

Maori issues

The 1980s was the decade of the flowering of the Maori renaissance, a nation-wide political, social and cultural awakening of the place and traditions of Maori values and practices, and grievances since colonial times. Maori entering the professions, the urban middle class, and becoming much more politically active drove the renaissance. Growing Pakeha interest and supporting research accompanied this activism.

The result was a wide recognition of the Treaty Waitangi and its place in our constitutional arrangements. References to the principles of the Treaty made their way into legislation and resulted in a new and wider look at Maori ideas, interests and expectations.

The benefit to the RMA was the integrated way Maori view the environment – a big change from the more reductionist approach characterised by much of the practice, legislation and governance structures of the time. And with this came changing Pakeha insights into issues such as water quality.

When I lived in Hamilton in the 1950s, the Waikato River was basically a drain. This was deemed acceptable if not normal by the Pakeha decision makers of the time. They were mostly immune to and completely disconnected from what Maori thought about the state of the river.

DoC, MfE and the PCE

The incoming 1984 Labour Government promised and delivered comprehensive changes to environment and conservation policy and operations. After a public review, it established a dedicated Department of Conservation (which had responsibilities only for natural resource and ecological conservation and management); it abolished the Lands and Survey Department and the Forest Service (both of which previously had conservation but also development functions); and it established an environmental policy agency in the Ministry for the Environment, and an environmental ombudsman in the Office of the Parliamentary Commissioner for the Environment.

By any standards, these were radical changes for the time. They put environment, resource and conservation issues in the centre of the political and public agenda.

Planning and water and soil reviews

Helped by the growing environmental awareness and, I think, helped by the integrated consenting experience of the National Development Act, there were a number of proposals to review the then current suite of environmental and resource laws.

Tony Hearn, QC, was commissioned to review the Town and Country Planning Act; and the Ministry of Works and Development initiated work on reviewing the Water and Soil legislation. Pollution management and air quality were also issues under consideration. DoC's new, focused role was applied to some 30% or more of New Zealand's land area, and work was done to decide which forest and other lands should be protected or used for production. The Ministry for the Environment inherited (from its predecessor the Commission for the Environment) and did further work (which was one of my responsibilities) on what became known as the review of resource statutes.

The new right

1984 prefaced an unbelievable swing by the traditionally leftist Labour Government into a radical adventure into new right politics. The Treasury led this intellectually from within the public service, and attempted to massively change the country's economic, social and governance institutions and practices.

The policies promoted then are still espoused by parties like ACT. They assume a radically minimalist role for government and a preference for resolving resource and property issues by way of the tort of nuisance.

The Treasury was one of the major forces affecting the RMLR work. It had some clear ideas on the best means of resource and, particularly, water allocation. In the world of the new right, some of the more extreme Treasury officials were adamant that only private property rights should form the basis of all resource allocation. And they had supporters in the Cabinet like Roger Douglas.

In the event, the issues raised by Treaty legislation, and judicial interpretations on the Treaty and its principles (Lord Cooke's seminal judgements spring to mind), led to an acceptance that Maori interests could not be reduced to European style property rights. To the Treasury acolytes, this was a market failure that should be corrected, but eventually they accepted that "common property" resources such as water and air and coastal waters needed a coherent management framework. Strange as it may seem, this contributed to the strong environmental dimensions evident today in the RMA.

Geoffrey Palmer, David Caygill and Simon Upton

Without these three Ministers, there would be no RMA in its current form.

Geoffrey Palmer (now Sir Geoffrey) has already given you his detailed and informed views on the origins and changes to the RMA[3]. Suffice it for me to say that his penchant for and long interest law reform, fuelled by his experiences with the National Development Act, led to him deciding very quickly that a major resource law reform was needed. Further, he decided that it deserved careful,

[3] Sir Geoffrey Palmer Q.C. "The Resource Management Act – How we got it and what changes are being made to it", RMLA Conference, New Plymouth, 27 Sept 2013

evidence based thought, public involvement and a progressive stage-by-stage process.
I recall when in our first briefing of the new Environment Minister in 1987, we tabled the work on resource use statutes. Geoffrey quickly took a strong interest and, two hours later and after an intense but productive interrogation by him, we left with instructions to start on this immediately.

Geoffrey, assisted by Philip Woollaston, then Associate Minister, took a direct and personal interest in the management and development of what became the Resource Management Law Reform and then the Resource Management Bill.

David Caygill was the moderate and thoughtful assistant to Roger Douglas, who became Minister of Finance when Roger Douglas resigned. His practical approach and knowledge of planning legislation resulted in him moderating some of the more extreme Treasury ideas.

Geoffrey Palmer introduced the RMA Bill to the House in 1990. But it did not progress and was still before the House when the Government changed in November 1990.

Simon Upton was appointed Environment Minister under the new National Government. He came into power with a brief effectively to dismember the RMA. Its possible demise was an election issue (a status the RMA still holds).

Simon agreed to establish an informed Review Group to examine the RM Bill and its provisions. And he listened closely to the Group's findings, and worked with us to modify and, in my opinion, improve what became the RMA. Like Sir Geoffrey, Simon was not the remote Minister who left everything to officials. He took an intense and detailed interest in the whole package and in the eventual legislation.

Simon Upton's fingerprints are still reflected in RMA provisions and procedures such as the use of the term *sustainable management* and its definition in S2 (sustainable management is intended to achieve sustainable development); the protection of the habitat of trout and salmon (suggested by Guy Salmon as a surrogate for water quality); the provisions for privately initiated plan changes (S 73(2)); and the presumption that district plans do not have to regulate (S 76 (1) unless this is deemed desirable to fulfill one of the provisions in S 76 (1) (a) and (b). Rightly in my view, Simon saw rules not as an inevitable requirement, but as a means (and not necessarily the only or best means) to achieve or help achieve clearly defined outcomes.

Local government reform

The natural resource provisions in the RMA could not have succeeded without major changes to local government, especially the creation of regional authorities based on catchment boundaries. There was, coincident with the RMLR process, a parallel local government reform. I was part of the Officials Group providing advice on that. I championed the creation of regional

authorities and consider they have been and still are a most effective means of discharging integrated resource management responsibilities.

Part 2: Intentions and Results of the RMA

The following are my recollections of some of the major intentions behind the 1991 RMA, together with my observations about the results I think were delivered over the last 22 years.

Sustainable resource development from integrated and sustainable management

The RMA was intended to:

- Stimulate more ecosystem based analysis and management, resulting in increasing and sustained quality of natural and especially indigenous resources;

- Integrate land and water (all fresh water, lake and river beds, wetlands, and ground water) and their resource quality, conservation and allocation into the one framework (which was an extension of the water and soil approach already developed under the water and soil legislation);

- Protect outstanding natural features and landscapes, and historic heritage;

- Include all pollution management issues into the catchment based management approach;

- Include air quality management into the RMA;

- Extend water jurisdiction to include the coastal environment and marine water and the sea bed.

Results:

- There has been progressively more ecosystem based research, policy and management, especially related whole catchment thinking and including biodiversity. But initially much research and related policy application took on and maintained the familiar reductionist forms where land and water components were divided up;

- There have been noticeable changes and significant initial improvements in water quality, with raw sewage and raw industrial discharges eliminated;

- Water allocation and point source discharges into water have been systematically improved and most managed successfully;

- Air quality has been tackled systematically and gradually improved, although trade offs between maintaining problem sources of air pollution (like wood fires and motor vehicle exhausts in urban areas), and employing more stringent controls, still cause problems;

- Coastal water quality and coastal environmental management has a much higher public profile and marine water quality is noticeably improving - helped by abolishing raw sewage inflows, controlling boat effluent and, especially, controlling industrial discharges;

- Unfortunately, there are continuing poor and inadequate results in relation to the big water quality problem: nutrient and pathogen inflows into both fresh and marine waters. These come principally from both urban and farming (especially dairy farming) non-point (general run off) sources.

Regional and local decisions, clear plans and justified rules

The RMA was intended to:

- Devolve decisions to the appropriate communities who are directly affected by the consequences of those decisions and who have the incentives and information to make good resource decisions;

- Ensure that plans, and especially rules, were based on clear outcomes (called environmental results in the RMA), related evidence and reasoned analysis, not to mention community involvement and support;

- Ensure regulatory rules were only used where these were best applied, rather than just because they were an easy means to claim problems would be solved.

Results:

Devolved decisions were taken up enthusiastically to the point where national decisions on policy statements and standards were vigourously resisted. In some cases, devolution has resulted in local interests having an unacceptable dominance, leading to poor decisions; in other cases political differences and inertia have led to insufficient change.

On balance, and despite probably rather too detailed specifications for plan thinking and making, too many plans didn't consistently show they were based on clear outcomes and related evidence and reasoned analysis. And such plans had little overall coherence and comprised often disconnected provisions.

In my view, one of the contributing problems here was the decision to allow existing District Planning Schemes under the Town and Country Planning Act to be rolled unchanged into the new regime. Reviews would come later – much

later as it often happened. This resulted in far too many rules that were not reassessed and/or removed, but simply added to under the RMA provisions.

There was a tradition under the Town and Country Planning Act for writing formulaic plans and rules, with the same types of rules appearing all over the country. This had an absurd edge: I recall for example the fascinating provision for whaling stations in the then Putaruru Borough District Planning Scheme!

Too many district plans became far too complicated and caused, together with notification requirements, a major backlash against the legislation. Looking back, a simpler, more zero based approach to re-developing plans would have been desirable.

Further, the RMA was designed more for natural resource management rather than urban planning where highly modified landscapes predominate. There should have been and still should be distinguishing and probably somewhat different sets of principles for urban planning and design.

Regional plans have fared better, helped I think by the absence of any statutory predecessor plans or traditions. Regional Plans were designed to enable better management of the default restrictions (S 63). Therefore there was usually a clear purpose for them and they tended to be much better reasoned documents than many district plans. Nevertheless, they were an experiment and on reflection I think they started off being too fractured with sometimes too many discrete plans for particular problems. Over time they have aggregated into more comprehensive and coherent documents.

Regional policy statements were designed to be the big, integrating mechanism. The RMA provides consistent requirements for those developing regional and district plans to, respectively, have regard to and give effect to policy statements. It is difficult to know how effective these requirements have been, and there are no doubt differing views about their usefulness and/or effectiveness. It would be interesting to see whether there are discernable differences in outcomes between authorities that have combined district and regional functions (Nelson, Tasman, Marlborough, Gisborne and now Auckland) and those that don't.

A big problem with plans is that rules are not by any means necessarily the first or best means of achieving outcomes. But they are relatively easy to produce, and politicians like them because they appear to be costless. By contrast, economic instruments (like subsidies and incentives, or charges for resource use) present a very different picture to politicians and voters.

More effects based plans and rules and fewer standardised rules and requirements

Effects based plans and rules were designed to encourage a logical consideration about outcomes, policies and then methods. The idea was that rules should target the adverse effects of resource development rather than be constructed to encompass all sorts of restrictions that didn't target the problem effects and, worse, created adverse side effects and new problems.

Results:

Again, rather than start anew, district plan effects based rules were too often added to or merged with what was already there. In some cases some very complicated and difficult to understand systems of rules evolved. The jurisprudence dealt better, though sometimes narrowly, with effects and built a large body of case law that is still evolving.

On balance, the effects based approach worked in my view, and helped push for better, more targeted rules, but was not without its problems.

Joint decision making and faster, "one stop shop" decisions; and call-in procedures for nationally significant proposals

This was intended to emulate the "one stop shop" provisions in the National Development Act. In the case of call-ins, it provided a means to change the level of decision making so as to enable wider, national considerations.

Results:

The uptake and use of this was variable but joint decision-making (of regional and district authorities) was widely adopted where appropriate. Timeliness of decisions was and always is a big issue. This probably why the current provisions under the EPA regime (Part 6AA) have strict time frame requirements for referrals to Boards of Inquiry.

Reflecting Maori values and interests

The RMA was intended to:

- Identify and protect customary rights;
- Take into account the values and interests of Maori including through reflecting the principles of the Treaty of Waitangi in decisions;
- Provide ways and means for Maori interests to be represented in the development of plans and consent applications.

Results:

Maori participation has definitely improved and increased, though there is a continual backlash against this.

Ideas like transfer of powers and co-governance have had little up take.

There is still a way to go to realise the intentions of the RMA, which were both bold for their time and probably somewhat ahead of their time.

Limiting trade competition

In the context of its libertarian economic origins, there was a strong view that while environmental regulation might be acceptable because of market failure, any attempt to promote or control trade competition was well outside its brief. And so provisions were included, and have since been endlessly it seems added and amended, to achieve this result.

Results:

The continuous changes to the trade competition provisions suggest they haven't worked, or worked well enough. There are numerous examples of trade competitors suddenly becoming environmental advocates and/or using all manner of approaches to limit a potential competitor's proposal.

Open public participation with no restrictions on standing.

At the time of enactment, this was new to town and country planning and was strongly demanded by community and public groups.

Results:

The experience with open participation seems to have two sides: development proponents often dislike it; and communities take the opposite view. There was an initial fear that roving gangs of objectors from far away would plague local proceedings. This hasn't happened and I suspect that there is not much difference between open and more limited participation rights.

But clearly participation, especially in major urban situations, has come to be regarded by many proponents as a sure fire means of stopping, delaying or severely changing development proposals. And this has led to seemingly endless legislative and practice changes.

Publically accessible, judicially decided declaration and enforcement procedures

This was new at the time, and demanded by those who felt local authorities didn't act fairly when making determinations on plan interpretation and enforcement.

Results:

These provisions have worked well. This has been helped by the incisive, dispassionate and often speedy action of the Environment Court.

National Policy Statements and National Environmental Standards

These were provided to ensure that "environmental bottom lines", as Simon Upton called them, could be specified where necessary and set boundaries below which adverse effects would not be permitted. National Policy Statements were and still are a device to set out nationally significant policy issues and to have these reflected through the hierarchy of policy statements and plans.

Results:

As mentioned above, there was initial resistance by the newly created regional councils to having national standards imposed on them. They wanted the opportunity to do their own thing first. And there is a plausible argument here: nationally imposed standards tend to be "one size fits all" and to work in a country as diverse as New Zealand, strict all embracing standards may lead to perverse outcomes.

Initially both MfE and regional authorities worked together to develop standards that were then applied by regions and changed and modified as needed. The only policy statement that was promulgated was the mandatory coastal one.

Much criticism was heaped on MfE for not racing to develop standards faster. Of course the critics all wanted their type of standard imposed on everyone else. My view is that there was a big learning curve here. And maybe the learning has taken longer than it should have, but early promulgation of national standards may well have resulted in major problems in practice.

In the event both policy statements and standards have since been written. They deal with both setting restrictions and requirements for environmental domains like fresh water management, air quality, drinking water sources, soil contaminants and, strangely perhaps in an environmental statute, standards for managing electricity transmission and telecommunications facilities. Looking at the background work and options to the standard on ecological flows and water levels shows just how complex and difficult this sort of work is.

The National Policy Statement on Fresh Water Management 2011 was changed to include specified low level environmental bottom lines – but the statement hastens to say that these are not the standards to be achieved: they are the levels below which quality measures must not fall, but there are still exemption provisions. Of course this type of policy statement is only the beginning of a process of translation and implementation through regional authority measures; and it is expected to take up to another ten years or more before it has full effect.

It would be interesting to know whether such NPS outcomes would have been achieved in most areas without them being promulgated in an NPS. There are differing views on this. One notable commentator, Sir Geoffrey Palmer, is of the view that there has not been enough central government guidance on vital matters[4]

Concluding thoughts

The RMA is now 22 years on. It still maintains the same basic structure and approach as it did in 1991. Of course there have been many amendments. In my opinion there have been too many piece meal changes responding to one off issues, and this has led to a weighty and somewhat cumbersome legislative package.

Was the RMA worth it? That's impossible to answer definitively. But I think that, as this discourse shows, it has many positive attributes. The RMA has delivered on improving our environment – imperfectly and insufficiently perhaps – but I think without it the fractured legislative environmental landscape it replaced (some 59 statutes) would have resulted in far less progress and a lot more bureaucratic churn for the critics to lambast.

Where to from here? I think it's time for a thorough review – not initially of the RMA's current procedures and processes, but of the environmental issues we now face and what role regulatory intervention like the RMA should play to achieve some clear and well specified outcomes.

We face some big issues like climate change and pathways to renewable energy, not to mention sustaining our indigenous biodiversity, our primary sector production, and developing more liveable, efficient (especially in terms of energy and transport) and higher quality urban environments.

Of course these are not just environmental questions; they are sustainable development ones. And this big issue of New Zealand's sustainable future, and questions about and responses to it, and outcomes and results deriving from it, ideally should be used to set this country's social, economic and environmental future. Within this, the place of a new RMA - or whatever is best placed to achieve RMA type regulatory purposes - should be crafted.

Having been part of the strategy and planning systems of New Zealand for well over 40 years, unfortunately my experience tells me this country won't address the big sustainable development issues in any strategic, coherent way. Past institutions that tried this sort of thing – the National Development Council of the late 60s and the Planning Council of the 70s - and who did some very good work, ended up being mostly ignored. Sadly, New Zealanders think and act together only in adversity and for big environmental issues by then it's too late.

---

[4] Sir Geoffrey Palmer: "Reform: A Memoir", p 428

But that's not to say we shouldn't try widening the horizons within which the RMA is viewed before we make changes to it. We had wide horizons back in the RMLR days when the law was crafted. It's time to do it again.

Acknowledgements

I had the overall responsibility for what became the RMA during its development, enactment and initial operation. But the amazing effort and thought and hard work that contributed to it was the product of many people. Among those people, I would like to acknowledge the leadership and dedication of:

- Denise Church (who led the Core Group that was responsible for the RMLR), and with her, Core Group members Joan Allin, Cathryn Ashley-Jones and Shane Jones

Two people who took up the challenge of leadership through the latter part of and the post RMLR process, and without whom there would be no RMA:

- Dennis Bush-King
- Craig Lawson.