

The Resource Management Act-How we got it and what changes are being made to it

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Introduction

The Resource Management Act contains a mixture of constitutional issues, environmental policy and economic questions. These involve hard choices about the future direction of New Zealand. The character of these choices tend to recur in New Zealand's history and the form in which they are before us now contains echoes of the "Thing Big" debate from a generation ago. Governments strive to produce economic growth and wealth so that people can have jobs and economic security. In New Zealand these issues become more strident and fraught at times of economic adversity, such as those we have been undergoing in the last few years, as a result of the global financial meltdown. As so often is the case, when confronted with problems New Zealand resorts to frenetic legislative activity, drastically changing its regulatory frameworks in order to produce the desired result. Yet almost always the performance does not produce the outcome wished for and we hardly ever measure the effects of our policy changes to see whether their objects have been achieved.

As far as I can see no comprehensive empirical research has been undertaken to find out what the effects of the Resource Management Act have been in fact, so that remedies can be introduced to deal with proved and demonstrated problems. As so often has been the case in the life of our public policy we proceed on the basis of assertion, pressure group activity and anecdote before throwing all our toys out of the cot in order to produce a new regime that it is asserted will perform better. So certain are governments in New Zealand that they know the right answer that they legislate with a high degree of prescription to produce their outcomes but the design of such legislation is often too hurried, too lacking in coherence and so replete with internal contradictions that it soon has to be amended. I note that the Resource Management Act itself is now more than twice the length that it was when first enacted. The result has been lost coherence. The present proposals will comprise major amendments, rather than a new Act.

The National Development Act

The "Think Big" economic philosophy and the late seventies and early 1980s produced a legal instrument for its implementation called the National Development Act 1979. That Act caused a major political reaction based on the unconstitutionality of the measure- it proposed to suspend the operations of a number of major statutes and provide consents for major projects that were to be granted in the end by Ministers. This was a major political initiative designed to provide fast track approvals of energy related projects so as to reduce New Zealand's dependence on foreign oil. Essentially the legislation meant that objections and due process around the procedures for receiving statutory approvals for development projects could be swept aside by use of the provisions in the Act. The Bill as introduced provided for 28 Acts of Parliament to be suspended by Cabinet for any national development project. It elevated ministerial decision above

the law passed by Parliament. The circumstances in which the provisions of the Bill could be triggered were very broad. It included virtually any project for investment in New Zealand that involved construction work of any kind. Further, the Bill removed almost entirely the role of the courts in ruling the government's decisions for national development against the law. The Bill provided that the validity of any Order in Council made under it could not be challenged or called into question in any court. So the Bill was also an affront to the rule of law. The programme became known as "Think Big." The result of the law would be minimal protection for the environment. The six or so projects the Government contemplated were also expensive and involved a lot of government borrowing. As things turned out the Act was hardly used.

The Bill was part of a pattern of legislation promoted by the Muldoon administration that included the Remuneration Act, the Fishing Industry (Union Coverage) Bill, the Commerce Amendment Act Bill and the fiscal regulator proposals, the last of which was abandoned. All those measures had one feature in common. These measures gave Cabinet power to override Acts of Parliament by Order in Council, that is to say by Cabinet decision. And this was defended essentially on the basis that delays caused by the existing laws were intolerable. No other real defence was offered. Parliament was being asked to sign a blank cheque. I wrote a memorandum to Caucus setting out the various options available to the Labour Opposition. There was a body of opinion in the Labour Caucus that thought such a measure could be a helpful aid to development, but it was my view and the view of the majority, that it should be vigorously opposed and it was. We mounted a full-court parliamentary press against it, to borrow a metaphor from basketball. It was an unconstitutional Bill and should be resisted.

The parliamentary battle involved the use of a lot of urgency and the House sitting through the night on several occasions. We spoke down to the closure motion being accepted by the Speaker on every occasion the Bill was debated. The Committee of the Whole House stage lasted nineteen hours and there were 47 divisions. We moved ten amendments to the Bill. On December 7 1979 the House sat continuously without a meal break from 9 am until early into the next morning. In the Committee of the Whole House stage I moved an amendment to the effect that any order-in-council made granting final approval different from the recommendations of the Planning Tribunal would be of no effect unless it was affirmed by a resolution of Parliament. Three National MPs voted for my amendment: Dr Ian Shearer, Michael Minogue and Marilyn Waring.

In the debate on the Bill upon introduction I said:¹

¹ (5 October 1979) 426 NZPD 3361.

“The Bill is oppressive, unjust, and thoroughly bad. To me it seems to be a deliberate, conscious, and cunning act to keep the courts out and retain decisions in the hands of the Minister. The application of the Bill is far too broad. Clause 4 provides that almost anything can be brought within the ambit of the legislation. The provisions are like those of the Remuneration Act. The Bill provides for government by fiat, and government by regulation without parliamentary control. Members have not had adequate answers about why such extraordinarily powers should be considered necessary.”

It was a Bill based on the Machiavellian principle that the end justifies the means. It was Draconian. At the Select Committee there were 367 submissions, fewer than five of which were in favour of it. Big changes were made to the Bill. In the report-back debate I said:²

The heat was so intense that the Government was forced to back off. The fundamental protections of our Constitution are indeed political, and it was a political pressure that prevented a perversion on this occasion. Therefore we can be grateful, that the amended Bill is no longer evil, although it is still bad.

I observed in the third reading debate that what had occurred over the National Development Bill made the case for parliamentary reform and that “if Parliament is not reformed soon, it must surely die.”³ Well it has not died and we have not seen anything as obnoxious as the National Development Bill in this latest attempt to provide an engine for economic growth.

Part of the “Think Big” programme connected with the National Development Act was the development of energy projects. The Clutha River had capacity to generate hydro-electricity and in 1977 the National Government decided it wanted to build a high dam at Clyde in Central Otago. A lot of productive orchard land would be flooded. The Government applied for a water right for the dam. The Otago Water Board recommended that consent for a high dam be declined but that a low dam be built instead. In December 1977 the National Water and Soil Conservation Authority decided to grant the right for a high dam. Land owners and others objected. Attempts were made to review that decision in the High Court but it did not succeed. In 1980 the judgment of the Planning Tribunal was given in favour of the right but with the two District Court Judges voting against it. The other members were not legally qualified. The objectors appealed to the High Court as they were entitled to do on a point of law and the High Court held that the Planning Tribunal had made an error of law in refusing to consider the end use to which the electricity generated was to be put. The intended end use was in fact the aluminium smelter at Aramoana, the economics of which were highly dubious. It needed a lot of electric power, hence the high dam rather than a low dam.

² (5 December 1979) 427 NZPD 4488.

³ (12 December 1979) 428 NZPD 4746.

The matter was sent back to the Planning Tribunal so the law could be correctly applied to the facts.

But the Government could see the writing on the wall – it would lose. So instead on 27 May 1982 it announced it was introducing special legislation to overcome the problem. The trouble was that due to defections in its own ranks it did not have the numbers to carry the legislation through the House. So in July 1982 it entered into agreement with the Social Credit Political League who had two MPs, that they would support the legislation. The agreement was to the effect that the Government would not intervene in the process of objection and appeal but that if the process did not secure the water right it would be granted by legislation supported by Social Credit. On 19 August 1982 after the Crown had finally returned to the Planning Tribunal, the Tribunal unanimously ruled against granting the water right. The essence of the decision was simple: no smelter, no dam. There was no evidence put before the Tribunal by the Government that a smelter would be built or was likely to be built. The Government had engaged in extensive works without having obtained the water right. More than \$80 million had been spent. The conduct of the government was an affront to the rule of law.

The special legislation retrospectively and adversely affected the rights of people who were given those rights by Parliament and who had relied on them. The Government had voluntarily submitted itself to the legal process when other avenues were open to it. The Government was in effect saying it was above the law when it found it inconvenient. The special legislation effectively repealed the Water and Soil Conservation Act 1967 in respect to New Zealand's greatest water resource – the Clutha. Much later in 1990 it was found the cost of the dam had gone up by 44 per cent because work to rectify landslide instability had to be done. In 1990 the Government had to pay Electricorp, as it then was, to take over the dam in its incomplete state and finish it. No adequate preparatory work had been done and the problems could easily have been anticipated had it been.

The National Development Act caused the Resource Management Act

The contrapuntal harmonies of New Zealand politics under the first-past-the post electoral system have to be understood in order to appreciate the origins of the Resource Management Act. Nothing comprehensive would have been attempted but for the National Party's "Think Big" policies of the early 1980s and its legal leitmotif, the National Development Act. The label "Think Big" may have had its origins in the name of a racehorse, and the National Party Minister of Racing may have been its author! The developers and the government involved in the "Think Big" strategy had found that the myriad of laws under which consents of one sort or another were required was a serious obstacle to achieving anything quickly. The National Development Act was designed to provide a fast track and normal procedures would be suspended. The Labour Party in Opposition promised to repeal it, and this was done in

1986. Having accomplished the repeal we were faced still with the policy problem of what to put in its place-how to make sense of the many statutes and procedures governing the issuing of consents.

The Ministry of Works is part of this story. It was one of the old line departments and had been a prime mover over the years in carrying out construction for the government. It was expert in planning and building dams and good at defending its bureaucratic territory. It exhibited serious conflicts of policy interest in the very structure of the Department. The Fourth Labour Government abolished the Ministry as a department of state. We turned a construction segment into an SOE. The Ministry contained two important divisions to do with environmental question and resource issues – the Town and Country Planning Division and the Water and Soil Division. Both of these were transferred to the Ministry of the Environment. All of this freed up funds that I was able to procure as Minister for the Environment to fund the Resource Management Law Reform project, (“RMLR” as it was known.). The whole exercise cost more than \$8 million and we had spent \$5.5 million by October 1990. It was a well-funded law reform project with funds spent on communications and extensive consultations.

The reform process required the development of proposals and extensive public consultation upon them. Prolonged public consultation was expensive and difficult but it has the signal advantage of preventing placing items in the final package that would cause massive public resistance. It also brings to early attention proposals that may have difficulty working in the real world. It was a zero based policy approach. We took nothing for granted and worked everything through from scratch. We published a professionally produced newsletter *Viewfinder* containing information and discussion about the reform exercise and providing opportunities for participation in the process. During the life of the project 32 substantial working papers were published and made available.⁴ The first phase of the process ended in August 1988 with the publication of a discussion paper ‘Directions for Change’ which discussed why the reform was needed, what the objectives should be, what the role of government should be, what form the law should take, the integration

⁴ See Fundamental Issues in Resource Management (Resource Management Law Reform Working Paper No. 2) Wellington: Ministry for the Environment (July 1988); and Public Submissions in Response to People, Environment and Decision Making (Resource Management Law Reform Working Paper No. 32) Wellington: Ministry for the Environment (April 1989). Included in the topics dealt with by these working papers were analysis of existing statutes; the Treaty of Waitangi; implementing the sustainability objective; coastal legislation; geothermal energy; Maori value systems and perspectives; enforcement and compliance issues; national policy matters; public participation; compensation; objectives; users-group working papers; town and country planning legislation and procedures; the management of pollution and hazardous substances; the Clean Air Act; the Petroleum Act; the Mining Act; Waitangi Tribunal findings; the various roles of the Crown; the role of information in resource management; natural hazards; decision-making processes and structures; public participation in policy formation and development consents; impact assessment in resource management; resource management disputes (Part A – the role of the courts and tribunals; Part B – mediation).

of consents with a one-stop-shop approach, the Treaty of Waitangi and Maori issues, the decision-making process and the instruments and mechanisms that should be used to implement the policy. Four models were developed and submitters were invited to choose between them.

The first involved a single Resource Management Act operated principally by regional government, although some matters could be delegated to territorial government. Resource allocation decisions under this approach would then be dealt with by a different Act administered by central government. The second model also envisaged a single act, but anticipated territorial local government having direct responsibility for land-related resources management. The third model involved a single Act with split functions as in model 2, but with coastal management dealt with centrally by the Department of Conservation and minerals dealt with centrally by the Ministry of Energy. The fourth model envisaged four separate pieces of legislation: water, soil and air resource management administered by territorial local government; coastal legislation administered by the Department of Conservation; and minerals legislation administered by the Ministry of Energy.

Extensive consultation proceeded on this document, and public meetings were held all over New Zealand, together with extensive working meetings with interested and affected groups. Seminars were provided for the media. Despite the fact that the process was so open and the consultation so extensive, RMLR never became a highly controversial political issue. The process was so open, it allowed early public buy-in with no surprises. The political opposition (which like the Government was divided on the principal issues) could clearly see the strength of public opinion. The opposition from conservative rural communities was therefore never coordinated or given a political spearhead in the way the conservation movement was. It was a holistic reform that concerned matters of considerable complexity, often dealt with by professionals but not widely known by the general public. Planners, lawyers, local government staff, environmentalists, engineers, mining companies, Maori groups and public servants were the main people to show an interest. And while that interest was intense and tended to be expert, it was limited in extent. RMLR lacked the essential ingredients of political sex appeal outside the growing environmental sector. This was no bad thing. Big changes could be made, and the defence of adequate notice and public consultation was available and could be relied upon.

The Bill was massive – 314 pages. As befitted a project of this complexity, it was accompanied by an unusually detailed explanatory note and an extensive information kit, but it was written in plain English and attempted to eschew the complexity and prolixity that often accompanies legal drafting. A specially enlarged Select Committee of Parliament was set up to hear submissions on it. The Bill set out to rectify a number of problems:

- There was no consistent set of resource management objectives;
- There were arbitrary differences in management of land, air, and water;
- There were too many agencies involved, with overlapping responsibilities and insufficient accountability;
- Consent procedures were unnecessarily costly and there were undue delays;
- Pollution laws were ad hoc and did not recognise the physical connections between land, air and water;
- In some respects there was insufficient flexibility and too much prescription with a focus on activities rather than results;
- Maori interests and the Treaty of Waitangi were frequently overlooked;
- Monitoring of existing law was uneven and enforcement difficult.

The explanatory note to the Bill said this about its purpose:⁵

The objective of this Bill is to integrate the laws relating to resource management, and to set up a resource management system that promotes sustainable management of natural and physical resources. This Bill integrates existing laws by bringing together the management of land, including land subdivision, water and soil, minerals and energy resources, the coast, air, and pollution control including noise control. It sets out the rights and responsibilities of individuals, and territorial, regional and central government. The central concept of sustainable management in this Bill encompasses the themes of use, development and protection. The Bill sets up a system of policy and plan preparation and administration which allows the balancing of a wide range of interests and values, The Bill allows the needs of the present generation to be met without compromising the ability of future generations to meet their own needs.

The Select Committee was inundated with submissions from the public and interest groups; more than 1400 were received. Many of them were heard; the hearings took months. The Bill was not reported back to the House by the Select Committee until August 1990, and a general election was due in October. There simply was not time to pass the Bill before Parliament stopped in September. But the Bill was well advanced; the Select Committee had made extensive amendments to it as a result of submissions. The Bill was read a second time and had reached the Committee of the Whole House stage before Parliament went into recess. There was some political manoeuvring about which party should bear the responsibility for not having passed the Bill. The National Party opposition was not prepared to cooperate in its passage by keeping the parliamentary time taken to reasonable proportions. It said that the Bill needed change. The government sought to blame the

⁵ Resource Management Bill 1989, as reported by the Select Committee, 4th Schedule (1990), explanatory note at i.

opposition for holding up a carefully worked out and much needed reform.

In the general election Labour was defeated and the National Party formed the new government. The new Minister for the Environment, the Hon Simon Upton supported the general thrust of the RMLR project. He quickly appointed a group of five experts to review the Bill and make recommendations relating to it, as National had pledged at the election. The group published a 62-page discussion paper and received 160 submissions.⁶ Its 186-page review was published in February 1991, making quite a number of detailed drafting amendment recommendations together with some policy changes, but supporting the general thrust of the changes. The report was basically a vote of confidence in the Bill, which is hardly surprising given the extensive process by which we developed the policy. There were few views on the questions involved that remained uncanvassed in New Zealand. The development of policy through an open-textured process of public consultation can provide robust proposals that will survive because they have been thought through and because interested groups and experts see their advantages and constitute a body of opinion in favour of the changes. After some further changes from the National Government, the Bill was finally enacted in July 1991, with a commencement date of October 1, 1991.

A project of this scope faced many formidable policy issues. Some were highly technical, such as esplanade reserves and the application of the Act to the conservation estate land. Some were highly political, for example, landowner veto over access for mining. Indeed, the whole issue of mining and minerals was fraught both technically and politically. Mining legislation historically gave mining a preferred position. How to reduce that but treat the industry fairly was not a simple issue. Splitting the issues out into a separate statute was done by the National government after the Bill left my custody and I would not have done that. Coastal management gave rise to a series of problems and there were both divergent views and special interests. Local authorities wanted control, but so did the Department of Conservation. This was resolved in favour of the Department of Conservation in the end.

The Shift to Sustainable Development

What was happening in New Zealand in the 1970s and 1980s reflected broader international developments. In the wake of decolonisation, international discussions moved to the need for “development” to bring the previously colonised third world out of

⁶ Review Group on the Resource Management Bill (A.P. Randerson, Chair) Discussion Paper on the Resource Management Bill (Wellington, December, 1990).

poverty. At the same time, the environmental impact of industrial development in first world countries was becoming all too clear. A series of international conferences and agreements were concluded in these decades to grapple with these issues. Central among them was the World Commission on Environmental and Development, chaired by Norwegian Prime Minister Gro Harlem Brundtland.⁷ The Commission's report, issued in 1987, introduced the concept of "sustainable development" into the international mainstream.⁸

As defined in the Brundtland Report, "sustainable development" is "development that meets the needs of the present without compromising the ability of future generations to meet their own needs".⁹ It contains two key concepts: the concept of needs; and the idea of limitations.¹⁰ Rather than viewing "development" and "environment" as competing values, one to be sacrificed to the other, the Brundtland Report approached the two as inseparable – needs could only be met within the limitations of the environment:

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.¹¹

It thus provided a framework within which to promote economic and social advancement in ways that would avoid environmental degradation and over-exploitation.

The Brundtland Report formed the foundation for the groundbreaking "Earth Summit" held in Rio de Janeiro in 1992.¹² Principle 4 of the Rio Declaration declared that "[i]n order to achieve sustainable development, environmental protection shall constitute

⁷ Established by the United Nations Secretary-General in 1983 in accordance with *Process of Preparation for the Environmental Perspective to the year 2000 and Beyond* GA Res 38/161, A/Res/38/161 (1983).

⁸ World Commission on Environment and Development, *Our Common Future*, (Oxford University Press, Oxford, 1987) ("Brundtland Report"); For a discussion of the origins and impacts of the Brundtland Report see Drexhage & Murphy *Sustainable Development: From Brundtland to Rio 2012* (United Nations, 2010).

⁹ *Brundtland Report*, above, at Chapter 2, paragraph 1.

¹⁰ *Above*

¹¹ *Above*, at Chapter 1, paragraph 40.

¹² United Nations Conference on Environment and Development, held at Rio de Janeiro, 3-14 June 1992.

an integral part of the development process and cannot be considered in isolation from it”.¹³

25 years on the concept of sustainable development remains a central paradigm of development. Its importance has been repeatedly reaffirmed by the members of the United Nations, including New Zealand – most recently at the “Rio + 20” conference held in Rio in 2012.¹⁴ Although its precise definition varies, it retains at its heart the key concept of development within the capacity of the environment.¹⁵

That concept, under the label “sustainable management”, forms the central principle behind the Resource Management Act.¹⁶ The conceptual basis for the approach to management adopted in the Resource Management Act was the Brundtland Report.¹⁷ Although the RMA went through considerable redrafting and review prior to its enactment, that foundation principle of “sustainable management” remained intact.¹⁸ Section 5(1) provides:

The purpose of this Act is to promote the sustainable management of natural and physical resources.¹⁹

The system of management established in the Resource Management Act is founded in the purpose and principles of Part 2, which sets out the “framework against which all the functions, powers and duties of the Act are to be exercised for the purpose of giving effect to the Act”.²⁰ Part 2 has accordingly been described as

¹³ U.N. Conference on Environment and Development (UNCED) *Rio Declaration on Environment and Development* A/CONF.151/26 (vol I) (1992); reprinted in 31 ILM 874 (1992).

¹⁴ United Nations Conference on Sustainable Development *The Future We Want* GA Res 66/288, A/Res/66/288 (2012).

¹⁵ See, for example, the Royal Society of New Zealand publications *The Sustainable Carrying Capacity of New Zealand* (March 2013) and *Constraints to New Zealand's Sustainable Well-being* (March 2013) <<http://www.royalsociety.org.nz/expert-advice/information-papers/>> and the references therein. See, also, the discussion of varying definitions of the sustainability principle in *Environmental and Resource Management Law Online* (online loose-leaf ed, LexisNexis) (“*LexisNexis Resource Management Law Online*”) at [3.8].

¹⁶ Resource Management Act, section 5(1): Note that the term “sustainable management” rather than “sustainable development” was deliberately chosen because the broad meaning of the latter term had been used to include matters such as social inequality and wealth distribution: *Report of the Review Group on the Resource Management Bill*, 11 February 1991 at [3.3].

¹⁷ See, for example, the discussion of the “Genesis of the RMA” in *LexisNexis Resource Management Law Online*, above, at [3.2-3.3].

¹⁸ For a useful summary of the development of this part of the Resource Management Act see Hon S D Upton “Purpose and Principle in the Resource Management Act” (1995) 3 Wai L Rev 17.

¹⁹ Resource Management Act Section 5(1).

²⁰ *Brookers Resource Management* (Looseleaf ed, Thomson Reuters) (“*Brookers*”

the “engine room” of the RMA.²¹ It guides the functions of councils in their planning and policy decisions and guides decisions as to whether to grant or refuse consent applications.

Part 2 consists of four provisions – sections 5 to 8. “Section 5 sets out the purpose of the Act. Sections 6, 7 and 8 are principles of varying importance intended to give guidance to the way in which the purpose is to be achieved.”²² These sections were prepared through a lengthy process of analysis, public consultation and Parliamentary debate.²³ The structure and drafting of Part 2 was the subject of intricate academic analysis and discussion following its adoption.²⁴ However, the Courts have noted the “deliberate openness of the language” of Part 2 and the importance of taking a broad “purposive approach” to its interpretation in light of its role in the Act.²⁵

What do I think now?

I always knew that the entire RMLR exercise was at the outer limits of the attainable in law reform projects because its range was so comprehensive and ambitious. That it was enacted at all was something of a miracle and it put New Zealand at the head of the international race to attain sustainability, but sadly we have now fallen far behind. Our environmental laws have many gaps. It is my belief we are in the course of losing our clean green image as a result of government policies, which will in my view damage the economic interests of this country deeply, as it will damage the well-being of those who live here. The purpose of the Act was to provide

Resource Management”) at [A5.02(1)].

²¹ *Auckland City Council v John Woolley Trust* [2008] NZRMA 260 at [47].

²² Peter Salmon *Environmental Law - Resource Management Act 1991* (Looseleaf ed., Brookers) (“*Salmon’s Resource Management Act*”) at [RMPt2.01].

²³ See, for example, the comment that “[t]he government made unprecedented efforts to involve the community in the [RMA] law reform exercise” (BV Harris “Sustainable Management as an Express Purpose of Environmental Legislation: the New Zealand Attempt” (1993) 8 Otago LR 51). For a summary of the process for the development of the Act see, for example, *LexisNexis Resource Management Online*, above n 34, at [3.2]-[3.3] and J McLean “New Zealand’s Resource Management Act 1991: Process with Purpose?” (1992) Otago LR 538 at 538-539. Note that sections 6 and 7 have been further amended over time.

²⁴ See, for example, the competing analyses in: DE Fisher “The Resource Management Legislation of 1991: a Juridical Analysis of Its Objectives” in *Resource Management* (Brooker and Friend Ltd, Wellington, 1991) Vol. 1A, at 1–30; BV Harris, above n 42; B Pardy “Sustainability: An Ecological Definition for the Resource Management Act 1991” (1993) 15 NZULR 351; J McLean, above n 42; IH Williams “The Resource Management Act 1991: Well Meant But Hardly Done” (2000) 9 Otago LR 673.

²⁵ See, for example: *Auckland Regional Council v North Shore City Council* [1995] 3 NZLR 18 at 19 (CA); *NZ Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC); *North Shore City Council v Auckland Regional Council* (1996) ELRNZ 305.

proper protection for the environment to ensure fairness to future generations. It was not a question of balancing the environment against development; rather it was to ensure that development was sustainable and that meant providing basic protection for ecology.

I think successive governments, both National and Labour-led, failed the Resource Management Act by not providing enough central government guidance on vital matters. The Act has always contained ample scope for such measures through national policy statements and the power to provide environmental standards by regulation set out in Part 5 of the Act "Standards, policy statements and plans." As at May 2013 only three national policy statements have been made, electricity transmission in 2008, renewable electricity in 2011 and freshwater management also in 2011. Five sets of National Environmental Standards have been promulgated. I have never been able to understand why more action was not taken. Much of the policy negligence stems from the attitude "leave it to the market" but one cannot leave the environment to the market, because on many occasions the market does not ensure that the polluter pays. The problem of externalities is the central problem of environmental economics and the nature of the New Zealand political system means that vested interests such as Federated Farmers and big business are able to influence policy outcomes in their favour at the expense of the public interest.

The development lobby in New Zealand has spent energy and money convincing governments that the Resource Management Act is the problem, although there is an absence of empirical evidence or research that such is the case. A series of soft policy processes, not driven by data but by anecdote and impression has been the order of the day and it still is. There have been many reviews and reports on the Act over the years, too many to mention specifically, but there has never been a full evidence-based research carried out on the performance of the Act and this remains an enormous handicap to getting it right. Quick and dirty reviews have been the method by which things have proceeded. The three year parliamentary term has much to answer for in this respect. The policy is driven by prejudice and anecdote. And what is not said is that the environmental underpinnings are being deliberately undermined.

Amendments to the Act have come from the National Government in the series of changes it has advanced since it was elected in 2008. By two major sets of changes they have proposed they are trying to turn the Resource Management Act into something like the National Development Act, which led to the birth of the Resource Management Act in the first place. It appears the Government wishes to convert the Resource Management Act into an economic

development act.²⁶ There have been copious amounts of political spin in all of this and very little objective hard-headed analysis. There is no doubt that the processes of the Act can be improved. Indeed, the quality of the policy work coming out of the Ministry for the Environment has become steadily worse over the years. The problem definition has been fudged. The proper approach is “it’s the Environment, stupid.” It is one thing to say New Zealanders are fed up with bureaucratic processes and they are costing jobs. It is another to say we need to reduce the protection for the environment, but that is what is going on.

The notion abroad that development is wrongly being held up by “Greenies” seems to me to be unproven and lacking any empirical research to back it. Rather the situation is that well-financed interests have been successful in creating an atmosphere of belief that their interests are more important than the public interest. When it comes to the environment and the unique features of New Zealand I do not accept that reasoning. The proof of the fact that the balance of the Act is not right and already tipped too far in favour of development lies in the undoubted fact that almost all environmental indicators in New Zealand have become worse in the 22 years since we have had the Act, not better. Poor water quality results from three major types of pollutants: pathogens, sediment and nutrients, nitrogen and phosphorus being the nutrients doing the most damage in New Zealand. The largest source of nitrogen is the urine of livestock.²⁷ We now have didymo (rock snot) and giardia in our rivers as well. Destruction of biodiversity continues apace. Declining populations of native animals continues. Climate change seems to be on hold as far as New Zealand is concerned. Iconic species are not being adequately protected. Polluting, extractive industries are being encouraged. Budget cuts adversely affect the capacity of all environmental agencies to do their jobs properly and one gets the impression the present Government is rather comfortable about this given their views on economic development.

Much more attention needs to be paid to the precautionary principle that decision makers must take into account – the need for caution in managing adverse effects where there is scientific and technical uncertainty about those effects. One of the most damning pieces of evidence lies in the fact that in the 22 years since the Resource Management Act, New Zealand lacks a set of national environmental indicators. It also lacks a set of environmental standards. The OECD Environmental Performance done in 2012

²⁶ Dr Jan Wright Parliamentary Commissioner for the Environment, Media Release 2 March 2013. See also her submission to the Local Government and Environment Committee on the Resource Management Reform Bill.

²⁷ Parliamentary Commissioner for the Environment *Water Quality in New Zealand: Understanding the science* (March 2012).

Reviews indicate New Zealand is lagging behind. The OECD also made specific recommendations:

- accelerate the establishment of national environmental standards (e.g. for freshwater, waste and contaminated land) and national policy statements (e.g. on coastal waters and freshwater);
- review systems for charging users for waste and waste water services, identifying opportunities to strengthen economic incentives for resource conservation and efficiency;
- reinforce the commitment to outcome-oriented environmental policies, ensuring that information and data needed to assess policy effectiveness and efficiency are regularly collected and analysed;
- strengthen monitoring of air and water quality, and waste generation and treatment, assuring baseline consistency of methods used at local level to facilitate data aggregation and periodic reporting of key environmental indicators at national level;
- assure the effectiveness of voluntary agreements, requiring clear environmental performance targets, regular reporting and third-party auditing.

A further problem lies in the deficiencies of New Zealand local government. Local government was given big new powers under the Resource Management Act. Their responsibilities were much wider than under the Town and Country Planning Act 1977 and the Regional Councils were given big new responsibilities. Local government was barely up to the tasks and frankly did not do as well as it should have done. Central government did not help by resolutely refusing to provide national policy statements and not using its power to regulate to provide uniform standards in areas where these were needed. When I did the review of the local government structures in Wellington in 2012 my panel found a plethora of complicated and interlocking plans of great complexity generated by each separate local authority. We recommended a single plan for the region under the Resource Management Act, replacing the multitude of separate plans in existence.²⁸ I believe that is the approach that should be adopted for all of New Zealand. The region needs to be the key not the individual district councils who often lack the capacity to carry out their obligations in a proper professional manner. This means that there is a need as well to put more coherence and order into local government in New Zealand given the developments that have occurred with the super-city in Auckland and the lessons they have for the rest of the country. In the area of planning Auckland is achieving major accomplishments so long as they can stick to the task.

A further problem with the Resource Management Act has been the legislative cut-and-fill approach to amendments. It has been much amended over more than 20 years and the shape and coherence of it has

²⁸ Wellington Region Local Government Review Panel *Future Wellington – Proud Prosperous and Resilient* (October 2012) at 98.

been lost to a degree. This approach to legislative reform is very unsound, but it is popular with governments. It means major statutes are never reviewed from top to bottom but are fiddled with constantly. Why does Government intervene constantly? Because they can intervene and when they do so, they are often responding to special interests or their own political ideology. Many of the problems of the Act are bound up with the way in New Zealand we make law generally. Fiddle, fiddle, fiddle.

The Economic Issues

At the bottom the spring for the changes to the Resources Management Act that are being promoted lies in an economic philosophy-one based on the pragmatic view that if environmental restrictions are eased the economy will benefit, jobs will be generated and New Zealand will be better off. I think this view overlooks the long term. It does seem clear that the current efforts to reform the Resource Mangement Act are based on the same economic ideas that drove "Think Big" in the 1980s. Pardon my scepticism if I say I do not see how they can work.

A series of papers have been published presenting the proposed policies dealing with the environmental reforms. All of them suggest more of a public relations approach than an analytical approach. The source paper appears to be the Business Growth Agenda-Building Natural Resources, Progress Reports "Building Natural Resources" made public in in December 2012. To the extent that the new environmental policy is surrounded by any economic analysis this report contains it. The Business Growth Agenda itself has a number of other facets besides natural resources. Theses are:

- export markets
- innovation
- skilled and safe workplaces
- capital markets.

The paper argued that New Zealand's abundant natural resources make up an important part of New Zealand's economic advantage. It says there is a commitment on the part of the Government to use natural resources productively to propduce economic growth, within sustainable limits because "successfully managing the interaction between the economy and environment is of cirtical importance..."²⁹ The document is at pains to emphasise the importance of the environment at a general level. But it makes it clear that the way to achieve sustained economic growth is from our natural resources. The goal is to raise the ratio of exports to GDP to 40 per cent by 2025. The areas emphasised in the papers are:

- increasing value from our freshwater assets while improving water

²⁹ Ministry of Innovation and Employment, *Business Growth Agenda :Building Natural Resources: Progress Report* (Wellington , 2012) at 5.

- quality;
- more efficient land use and resource use;
- healthy functioning of ecosystems and advancing biodiversity;
- making the most of our abundant energy and minerals potential, including oil, gas and coal;
- realising greater value from marine and aquaculture resources;
- harnessing the productive potential of Maori resources;
- transitioning to a low-emissions economy.

The promise is that we can have increased economic growth and a sustainable environment that is protected. But it seems more likely that if the stated goals are to be achieved existing environmental protections have to be significantly relaxed. And that is what the other papers that have been published make clear. On the evidence available so far the commitment to maintain the integrity of the environment seems suspect.

The Resource Management Act Reforms

At the time I wrote this paper the final shape of the Government's environmental reforms were not available in legislative form. But a legal opinion I wrote for the New Zealand Fish and Game Council has been published and makes it clear in analytical terms the direction of the changes that are proposed to Part 2 of the Act, the engine room of the Act that drives all the decisions that are made under it. Many of the proposed process changes will deliver improvements and they will have only limited impacts on environmental protection. The proposed changes to Part 2, however, will significantly and seriously undermine the environmental protection under the RMA. These changes are largely unnecessary and they will lead to greater uncertainty and increased costs in application and interpretation of the RMA.

Here is a summary of what I said in that opinion released on September 10, 2013. The opinion is long and analytical. It is closely reasoned and has been made available for anyone who want to read it on the Resource Management Law Association's website.

This report has been prepared at the request of the New Zealand Fish and Game Council in response to the Government's announced proposals to amend the Resource Management Act 1991 and reform freshwater management. It analyses the nature, extent and implications of those proposals for the protection of New Zealand's natural environment and its recreational enjoyment by all New Zealanders.

I have concluded that the environmental protection offered by the Act will be weakened by the passage of the Government's proposed changes. No amount of assertion or assurances given can alter that

analytical fact. Further, the journey to finding out the precise consequences of the changes will be long, expensive and uncertain.

The Resource Management Act represented a deliberate shift on the part of New Zealanders away from economic advancement at any cost towards long-term economic and environmental sustainability. It expressly acknowledged that the state of the natural environment and New Zealand's economic development were inextricably linked. It was enacted with broad political support after years of public consultation. The Government's proposals fundamentally erode that commitment to sustainability.

The Government's proposals will rewrite the principles at the very heart of the Act. Sections 6 and 7 set out the signposts by which decision-makers can achieve the Act's purpose of "sustainable management". The Government's proposals will replace those provisions with a single list of competing considerations, under which principles protecting the natural environment and its recreational enjoyment will be consistently weakened, and principles promoting development will be consistently strengthened. Two decades of case-law built up in relation to the interpretation of the Act will be rendered redundant.

Those changes will reduce the level of legal protection for the natural environment and recreational opportunities by:

- Reducing the relative importance placed on environmental protection principles and increasing the relative importance placed on development principles.
- Limiting the outstanding natural landscapes that receive protection under the Act.
- Significantly reducing the level of protection given to the habitats of trout and salmon.
- Deleting any reference to the "ethics of stewardship", "amenity values", the "quality of the environment", and the "intrinsic value of ecosystems".
- Emphasising the benefits to be gained from the "use and development" of resources (without considering associated costs).
- Emphasising the benefits of urban development and infrastructure.
- Prioritising the rights of land-owners over the rights of the public to enjoy a clean natural environment.

These changes have been justified by reference to assumptions and perceptions that are not supported by empirical evidence or analysis. They are unnecessary and will inevitably lead to uncertainty and increased costs. They were objected to by 99% of public submitters. It is simply not enough to dismiss those concerns – from experts, councils, iwi, individuals, and environmental organisations – as "howls of outrage from some of those that have

made a nice industry from the very complexity we are seeking to address”, as the Government has done.

These changes will be accompanied by a series of process changes. Many of these will be helpful and cut through the increasing complexities of the planning and resource consent system. Others, however, have the potential to significantly restrict the ability of ordinary New Zealanders to have their say about the environmental and recreational impact of development in their country and their communities.

The Government’s related freshwater reforms signal much needed action to address the system of freshwater management in New Zealand. There is no question that the current state of our freshwater falls below the expectations of New Zealanders and that change is needed. But the Government’s proposals contain no commitment that the existing state of New Zealand’s rivers, lakes and streams will not be allowed to decline further. The emphasis on “minimum bottom lines” and “overall water quality” leaves it open for some water bodies to be further polluted in the future as a calculated cost of doing business. Much of the detail of these proposals remains to be developed. Without careful attention there is a real risk that they will deliver a framework that will see worse – not better – outcomes for New Zealand’s lakes, rivers and streams.

New Zealand’s natural environment is at the core of our national identity. It is intertwined with our social, cultural and economic prospects – and those of future generations. The risks involved to the integrity of New Zealand’s natural environment, already under serious pressure, are palpable.

The protections for the New Zealand environment offered by the Resource Management Act have been progressively whittled away over time. The Government’s latest proposals erode those protections further – most seriously by amending the decision-making principles at the very heart of the Act itself. They are a major step backwards for environmental protection in New Zealand, and for the continued recreational enjoyment of the environment by all New Zealanders.

It is my recommendation that the New Zealand Fish and Game Council urge the Government to make no changes to the decision making principles in sections 6 and 7, except for an addition to recognise the importance of the management of significant risks from natural hazards. Such a step would, I consider, address the most serious weakness in the Government’s proposals and help to reduce the level of concern that they have raised.