Ruminations on the problems with the Resource Management Act

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Keynote address to the Local Government Environmental Compliance Conference

2 – 3 November 2015
Heritage Hotel, Auckland

Why New Zealand has a Resource Management Act

It may be useful at the beginning to recall the forces that led to the Resource Management Act in the first place and the aims that were conceived for the project. The answer lies in the political history of the 1980's and the early 1990's. The Resource Management Act Law Reform Project was the most massive law reform effort that New Zealand had ever undertaken up until that time. The purpose was to provide a single system to promote "sustainable management of all national and human resources".[1]

The international inspiration for this project was the report of the Commission on Environment and Development, known as the Brundtland Report. It pioneered the concept of sustainability that received international acceptance at the Earth's Summit in Rio de Janeiro in 1992. The immediate domestic reason why a large law reform effort of this type was undertaken flowed from the "Think Big" policy of the National Development Act 1979. That Act promoted a fast track for big development projects. It was a statute of considerable constitutional dubiety and led to a wave of political opposition based essentially on environmental and constitutional factors.

It was environmental because the fast track for large developments could easily result in adverse environmental effects and constitutional because the statute removed the checks and balances contained in many statutes and allowed ministerial decisions to predominate. Had it not been for the

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[1] Resource Management Act 1991,section 5. See Geoffrey Palmer "The Making of the Resource Management Act" in *Environment –the International* Challenge (Victoria University Press, Wellington, 1995) at 145-174. Geoffrey Palmer "The Resource Management Act-How we got it and what changes are being made to it" in Trevor Daya-Winterbottom(ed) *Resource Management Act-Theory and Practice* 2014 (Resource Management Law Association, Auckland 2014) at 22.There are a number of legal texts upon the Act that are useful to practitioners but they do not discuss the policy but rather describe the law, see Derek Nolan(ed) *Environmental and Resource Management Law (*5th ed., LexisNexis, Wellington, 2015). For more on the policy see Klaus Bosselman,David Grinlinton and Prue Taylor(eds) *Environmental Law for a Sustainable Society* (2nd ed., New Zealand Centre for Environmental Law, University of Auckland,2011).

National Development Act it is very unlikely that the Resource Management Act would have occurred. Such were the nature of the contrapuntal harmonies of New Zealand politics under the first-past-the-post electoral system.

The Labour government elected in 1984 was pledged to repeal the National Development Act and it did so. But that exposed a gap. The morass of laws built up over the years that dealt with the development of resources in New Zealand remained. If the National Development Act was not the answer, what was? The government received a report on the Town and Country Planning Act 1977 from a leading lawyer in Christchurch, Anthony Hearn QC but decided that a new framework was preferable. The real work did not begin until after the 1987 election, after which a number of factors made it possible to engage in the massive law reform project.

The Ministry for the Environment had been set up. It was a policy department with wide ranging responsibilities to tender advice on all aspects of environmental policy. One of the old line departments in New Zealand was the Ministry of Works and Development. It had been a prime mover over the years in carrying out construction for the government and it was an expert in planning and building dams for the generation of hydro-electricity. It was an old and big government department with a massive reach and good at defending its bureaucratic territory. The Ministry was often involved in both building big projects, providing advice, carrying out regulatory functions in relation to the construction industry, town and country planning responsibilities as well as water and soil management oversight. This was a recipe for serious conflicts of interests.

The government decided to abolish the Ministry of Works and its construction and other functions went to a commercially orientated state owned enterprise. But the two divisions of a regulatory character, the Town & Country Planning Division and the Water & Soil Division were transferred

along with their budgets, although on a downsized basis, to the Ministry for the Environment. Considerable bureaucratic upheaval was involved in these changes. But what it did permit was the freeing up of funds sufficient to carry out a properly funded law reform project on New Zealand's resource laws.

The manner in which the work was organised was novel by the methods of the time. A core group of officials from several different ministries was assembled and they worked directly under my supervision and that of my Associate Minister, Phillip Woollaston. There was developed a programme of massive public consultation and the publication of many background documents. The process ensured there was a rigorous filter on advice before it was tendered to Ministers for decisions. This made the decision-making process more orderly. There were consultation papers on the reform options available.

When the bill was introduced there was a lengthy select committee process and the bill was not passed before the 1990 election. The in-coming National Government re-examined the measure, produced a report, amended the bill in some detailed respects and passed it in 1991. It was clearly recognised at the time that the design of the legislation was going on, that the entire exercise was always at the outer limits of the attainable in a law reform project. This was simply because the project was so comprehensive and ambitious. To get it enacted at all was something of a miracle. And to get bi-partisan support for it was very important in the early years. But to make the legislation work properly after it was passed was an even greater challenge.

A good place to find the aims of the project is to examine the explanatory note for the Resource Management Bill as it was introduced into the House in 1989 before going to a select committee. The explanatory note isolated

the list of concerns that the statute was designed to remedy. They were as follows:

- There is no consistent set of resource management objectives.

- There are arbitrary differences in management of land, air and water.

- There are too many agencies involved in resource management with overlapping responsibilities and insufficient accountability.

- Consent procedures are unnecessarily complicated and costly and there are undue delays.

- Pollution laws are ad hoc and do not recognise the physical connections between land, air and water.

- In some aspects of resource management there is insufficient flexibility and too much prescription with a focus on activities rather than end results.

- Maori interests in the Treaty of Waitangi are frequently overlooked.

- Monitoring of the law is uneven.

- Enforcement is difficult.

Examining that list after 23 years of experience, it can be said with some confidence that some of those problems still remain. Many people would say that consent procedures are still unnecessarily complicated, costly and

that there are undue delays. Many would also say that monitoring of the law is uneven and enforcement is difficult. The vast majority of consents are granted quickly and without too much difficulty, the Ministry for the Environment reported in 2011 that only 0.56% of resource consents are declined. Nevertheless, procedural aspects of the legislation are cumbersome and unnecessarily prolix and figures understate the problems that face large developments.

Much of the difficulty stems from the prolific number of amending Acts that have been passed over the years. The Act occupied 382 pages of the statute book when it was passed in 1991. The April 2014 reprint had 827 pages. The September 2015 reprint has 682 pages. So at present the Act is exactly 300 pages longer than it was when it began. New Zealand exhibits a habit of passing big statutes, finding we do not like the results and then engaging in a constant series of amendments whereby the statutes lose both their principles and their coherence. There are many reasons for this tendency-a unicameral legislature, a three-year parliamentary term, a desire not to open up too many issues in the Parliament among others. What results is legislation of lower quality than is optimal. The New Zealand habit of continual legislative meddling needs to be broken. It reminds me of what the Duke of Gloucester said to Edward Gibbon, the author of the monumental eight volume work *The Decline and Fall of the Roman Empire.* "Another damned, thick, square book! Always scribble, scribble, scribble! Eh! Mr Gibbon? "[2]

The Absence of Research

In New Zealand we have a bad habit of passing large legislative schemes and never analysing whether they were effective and efficient in achieving their goals. There are many reasons for the phenomenon but none of them

[2] *The Oxford Dictionary of Quotations* (5th ed., 2001,Oxford University Press Oxford) 341:19.

convinces. Acts of Parliament are designed to produce a set of policy results into the future. Whether these will be achieved cannot be known fully at the time the law is made. Thus, efforts to compare the results that were actually achieved with those expected and desired would seem essential in any rational policy-making community. Laws are passed to make improvement and produce better outcomes. Legislation is used as an instrument to change behaviour and shape society in various ways, whether it be the economy, the environment, health, housing, education or crime.

The New Zealand approach, however, seems to be to continue legislating in quantity with little attempt to see what actually happened, until something goes sufficiently wrong to require hurried legislative attention. Too often known and reliable research is not followed or not examined, and seat-of-the-pants reactions and popular sentiments are used to change the law more than careful analysis. In this age when there are a variety of social science research methodologies available for examining how legislation has performed in practice, this seems unfortunate. It is only by carrying out such work that it will be possible to make definitive judgments about the quality of both the policy and the law.

The reasons why inadequate examination of laws passed takes place afterwards are as follows:

- It costs money to do research and such expenditures are outranked by other priorities.

- Such investigations can be complex and that is a disincentive to undertake them.

- Public concern often does not emerge strongly enough to secure attention due to the lack of influence of those who are adversely affected.

- Enforcement is frequently expensive and policy-makers would rather not know whether the law is being followed.

- The increased complexity of many of the problems with which modern legislation deals make it easy to get it wrong.

- Those who fashion legislation, particularly ministers, would rather not know that it has not turned out how they would have wished or how they said it would.

- Political ideology drives much legislation rather than rigorous empirical analysis so the incentives to find out how it worked are lessened.

Some new mechanisms should be developed to look rigorously at the effect of legislation that has been passed and to ensure that it achieved the objectives upon which it was based and did not achieve unforeseen consequences of a deleterious kind. It seems a sound idea to do this examination before rushing in with amendments as occurs so often in New Zealand. Such analysis is also necessary before embarking on new proposals to replace existing law. Further, evaluations can pave the way for the development of a new legislative approach where the existing law contains serious defects upon examination. Such evaluations can show where existing law is out of date or otherwise unsuitable for purpose. The reports should spark public involvement and debate.

With the Resource Management Act over the years I have seen little empirical research that convinces about how the law is actually working out. No doubt empirical research is expensive but before changes are made it is really necessary to find out what is actually happening. Only that way can meaningful improvements be made. Far too many of the changes to the RMA have been driven by anecdote, prejudice and interest rather than evidence. The Ministry does not seem to be funded for empirical research to any significant degree and in that situation vested interests have had a great deal of latitude to influence policy outcomes. Reform needs to be evidenced based.

The Part 2 Saga

Significant changes to the Act in a desire to streamline it were made in 2009 and more changes were made in 2011 and 2013. It is interesting to note that on occasions the fast track may turn out to be a slow track and a dead end. Call in procedures used for the Ruitaniwha Dam in Hawkes Bay and the Mt Victoria tunnel project were both unsuccessful in securing quick outcomes favourable to the developers. There are a number of reasons why a fast track can turn into a slow track and the Act may better to be streamlined generally than to contain legal means to leap frog its procedures. In 2013 more wide ranging changes to the Act were proposed by the Government and announced. But they were unable to secure the numbers in the House to introduce these new policies because they involved significant changes and weakening of the environmental bottom lines set out in Part 2 of the Act.

The origins of the policy are to be found in the 2012 publication of the Ministry of Business Innovation and *Employment Business Growth Agenda: Building Natural Resources:Progress Report.*[3] This document laid down a clear commitment to increase New Zealand's agricultural outputs through irrigation and intensification. That policy appears to have driven the proposed changes to the RMA and was accompanied by subsidies for irrigation projects.[4] It has resulted in severe pressure upon many water resources and a rapid deterioration in water quality in many areas of New Zealand. That deterioration is well illustrated in the New Zealand Environmental Reporting Series, *Environment Aotearoa 2015-Data to 2013* published on 21 October this year. It found:[5]

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[3] Ministry of Business Innovation and Employment,*Business Growth Agenda:Building Natural Resources:Progress Report* (MBIE, Wellington, 2012).

[4] Crown Irrigation Investments Ltd, the website of which says it has three functions:
1 Assessing proposals against investment criteria to select optimum schemes to invest in, as well as establishing and implementing strong contractual structures.
2 Managing investments in accordance with the Crown's investment requirements.
3 Exiting schemes when commercial viability is reached.

[5] Ministry for the Environment, *Environment Aotearoa 2015-Data to 2013* (Wellington 2015) at 54.

> Between 1990 and 2012, the estimated amount of nitrogen that leached into soil from agriculture increased 29 percent. This increase was mainly due to increases in dairy cattle numbers(and therefore urine which contains nitrogen) and fertiliser use.

This reminds me that many aspects of New Zealand's environment have deteriorated since we have had the Resource Management Act-water quality, wetlands, anthropogenic climate change, acidification of the sea, species loss and land erosion. So there is no case for weakening its environmental protections.

In particular detailed proposals announced in 2013 would have tilted the Act in favour of economic development at the expense of the natural environment. In particular there was a desire to conflate sections 6 and 7 of the Act into one list, thus removing the hierarchy and amending or deleting a number of the provisions. There were no plans to touch section 5, but nonetheless the weakening was in my opinion palpable because Part 2 drives every decision-maker under the Act; it is the "lodestar" or the "engine room" that governs all functions, duties and powers under it. The changes would have had significant consequences for the environment and support for the policy could not command a majority in the Parliament so it was not introduced. The purpose of the original project was to shift to a new sustainable development paradigm. What was proposed imperilled sustainability.

The most important changes that were proposed in 2013 were as follows:

- 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 (but not the 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.

The move to sustainability seems to not have been fully understood by many people in New Zealand. The idea contains two key concepts. The concept of needs and the idea of limitations. The whole concept is that development has to take place within the capacity of the environment and ecosystems to support it. New Zealand was a pioneering country in attempting to integrate sustainability into an enforceable environmental resource management system. The environment and ecosystems were not to be destroyed because to do that will compromise the ability of future generations to meet their own needs. The concept of sustainable development remains the central paradigm internationally and has been reaffirmed by members of the United Nations including New Zealand most recently at the Rio Plus 20 conference held in 2012.

For this reason the battles to save Part 2 were certainly worth fighting and it is gratifying that they appear to have been successful.[6]

Some elements of the RMA framework have been significantly eroded over time by increasing the ability of central government to intervene in decision making, by reducing opportunities for public participation in decision making processes and limiting the capacity for judicial supervision by the Environment Court. New Zealand has not succeeded in decoupling environmental pressures from economic growth and the OECD has told us that. The Act's central purpose of "sustainable management" – that is, growth within the constraints of the environment – thus is yet to be fulfilled. Weakening the Act's environmental bottom lines was the wrong policy. The most dramatic deterioration in New Zealand has been the quality of water in our lakes, rivers and streams.

The RMA jurisprudence:

It has taken a long time for leading cases to reach the senior courts in New Zealand to provide definitive guidance on how the Resource Management Act is to be interpreted. The old planning philosophy was overturned by the new Act. Disputes were dealt with in the beginning by Planning Tribunal Judges who were not sympathetic to the new legislation and quite critical of it. By the beginning of 1995 there had not really been any leading cases about it. There was however a good deal of academic commentary on the uncertainties presented by the Act, an issue that is occurs with all new legislation and one of the reasons why big and quick changes in course are to be avoided. But after the Planning Tribunal was abolished and recreated

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6 Geoffrey Palmer QC *Protecting New Zealand's Environment-An analysis of the Government's proposed Freshwater Management and Resource Management Act 1991 Reforms*(September 2013) prepared for the New Zealand Fish and game Council. http://www.fishandgame.org.nz/sites/default/files/Fish%20and%20Game%20RMA%20Paper%20-%20FINAL%20PRINT.pdf

as the Environment Court new approaches began to emerge. It seems almost as if the stuff of which leading cases are made in the law were consciously avoided by both sides of the environmental divide so their interests were not weakened by the decisions taken.

There emerged in the Environment Court, and indeed in some decisions in the High Court, particularly in a judgment by Justice Grieg in *New Zealand Rail Limited v Marlborough District Council*[7] that the correct approach was an overall judgment approach. In that case Justice Grieg considered that the preservation of natural character was subordinate to section 5's primary purpose, which was to promote sustainable management. He described the protection of natural character as "not an end or an objective on its own" but an "accessory to the principal purpose" of sustainable management. This lead to the application of an overall judgment test which seemed to take priority over the intention of the Act which was to provide environmental bottom lines as clearly illustrated in parliamentary speeches by the Minister for the Environment at the time the Act was passed, the Honourable Simon Upton and earlier by me.[8]

Fortunately the Supreme Court of New Zealand has now provided clarity in the case of *Environmental Defence Society v New Zealand King Salmon*[9]. In a careful and elegant judgment of the Court given by Justice Terrence Arnold matters were made as clear as it is possible to be. It is to be hoped that decision-makers do not return to their old habits of ad hoc balancing. Without going into the facts it is important to note that the Supreme Court in the most important judicial decision since the inception of the Act made a number of significant pronouncements of great precedential value.

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7 *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70(HC).
8 Hon Simon Upton (4 July 1991) 515 NZPD 3019; Rt Hon Geoffrey Palmer (28 August 1990) 510 NZPD 3950.
9 *Environmental Defence Society v New Zealand King Salmon Co Ltd* [2014]NZSC 38(SC).

- It repeatedly emphasised that environmental protection forms an essential part of the RMA's purpose of sustainable management.

- It stressed that sections 6 and 7 are an elaboration of the statement of principle contained in section 5.

- It drew a distinction between the matters addressed in section 6 and those addressed in section 7, noting that the matters in section 6 "fall naturally within the concept of sustainable management in a New Zealand context" and section 6 therefore contains a stronger direction to decision makers.

- It explained that the elements of "protection and preservation" in section 6 "are intended to make it clear to those implementing the RMA that those implementing the RMA must take steps to implement that protective element of sustainable management."

- It rejected the "overall judgment" approach adopted by the Board of Inquiry.

- The Government's 2013 proposed changes to sections 6 and 7 take on a new significance in light of this interpretation. Clearly collapsing section 6 and 7 into a single list after the Court has clearly identified the relationship between the two provisions and explained the basis for it, would make a significant difference. Further, an overall broad judgment approach is not appropriate the Court tells us.

- The matters contained in sections 6 and 7 are a list of values that can be updated over time and they all flow from sustainable management.

- The decision makes it very difficult to argue that the Government's proposals for a reform were a simple "rebalancing exercise". In light of this decision, the apparent decision that the government has made to abandon its plans to radically alter Part 2 is a wise decision. What the decision makes plain is that ad hoc balancing tests are out and environmental bottom line tests are in. For this reason the provisions of the National Policy statement on the coast-line could not be read down and balanced away in the manner that the Board of Inquiry had done.

Those in the business community who resent the RMA and praise markets fail to acknowledge the defects of markets when it comes to dealing with environmental issues. Price signals are often distorted for environmental issues and externalities produced by pollution are not reflected in prices. The polluters do not pay and those harmed by the pollution are not compensated. As the Yale economist Professor William Nordhaus puts it "markets can distort incentives and produce inefficient and potentially dangerous ' free market' outcomes."[10] This is the reason that the environmental bottom line in the RMA is so important and tinkering with it so unwise.

The unfortunate feature of the struggle on Part 2 has been to cause years of delay in making the processes of the Act less cumbersome, less bureaucratic and more user-friendly. Another policy failure?

National policy statements and Environmental standards

One of the main reasons why the Resource Management Act has not worked as well as it should have has been the failure of successive governments to use the tools that have been available since the Act's inception, to provide National Policy Statements and National Environmental Standards at the

[10] William Nordhaus "The Pope and the Market" *New York Review of Books October 8-21, 2015*, 26 at 27.

central government level.[11] In developing the statute at the beginning it was clear that there were issues upon which central government had to decide upon the precise policy. The two instruments that were designed into the Act to allow gaps to be filled in as time went on were the provisions relating to national policy statements and the others relating to national environmental standards. These have direct legal force.

It is hard to understand why so few of these instruments have been made. It is true the procedures are somewhat elaborate for both of them, particularly for national policy statements, but following the *King Salmon* decision the force of these statements from the government's point of view should be clear, and as long as they are made within the four corners of Part 2 they will be binding. Only been four national policy statements have been made one of which, the Coastal policy statement, was required by law to be made. Five national environmental standards have been made since 1991. Much trouble and expense for many people could have been avoided had more extensive use been made of these instruments. Central government failed to do the work and provide the guidance required to make the statute work well. Years of central government being asleep at the wheel made the implementation of the Act by local government much more difficult than it needed to be.

I see now from the Ministry for the Environment's website that the Ministry has a work plan for ten new or revised environmental standards and policies. This certainly seems to be progress.

Making Planning documents

The hierarchy of plans provided for by the Resource Management Act means that many different plans are produced in many different parts of New Zealand. There are regional plans and there are territorial district plans.

[11] Resource Management Act 1991, Part 5, sections 43AA to 58A.

Making plans under the RMA was a challenge to many local authorities in the early years. Many local authorities re-invented the wheel at considerable expense and with little attention about shared ways to deal with common problems.

The government has announced its intention to try and cure this by the provision of planning templates and that is a change that I support. There are simply too many plans. They are too diverse and they are too complicated. This has involved local authorities in considerable duplication of effort and there has been a proliferation of planning documents.

When I chaired the Wellington Region Local Government Review Panel the New Zealand Planning Institute told us:[12]

> "There are just too many plans and consequently too many varied planning responses to the same issues across the region. This has resulted in ineffective and inefficient planning and resource management outcomes."

I expect this problem is universal and needs to be cured. It needs to be done with determination. While plans for local government amalgamation seem to have withered or been abandoned in many parts of New Zealand the requirements to produce plans can be streamlined and can be fixed.

There should be one District Plan for each region. It would be desirable that that be developed after a spatial plan has been adopted. Spatial planning involves articulating a long term vision of 20 to 30 years. It translates strategic decisions about infrastructure and land use into priorities and policies to guide future development. It integrates, coordinates and aligns various policies and plans with investment decisions. It requires multi-party

[12] Wellington Region Local Government Review Panel, *Future Wellington-Proud, Prosperous and Resilient* (Wellington October 2012) para. 515.

engagement from all levels of government and infrastructure providers. And it provides some clear vision about how areas will develop in the future.

For example, in Wellington the Panel that I chaired thought it was unfortunate to find that Wellington City had a plan, Porirua City had a plan, Upper Hutt had another one, Lower Hutt yet a fourth in what amounts to one big urban agglomeration. The costs of different plans, using different concepts and making different requirements only increases costs.

These views were written before the publication of the Productivity Commission's recent report on the planning framework.[13] That report, although concentrating upon making land available for housing uncovered some underlying difficulties that do not relate to the RMA. Chapter 11 is worth close attention. The Commission said the lack of integration between the RMA, the Local Government Act 2002 and the Land Transport Management Act 2002 causes difficulties and should be addressed. The legislation makes it too difficult to integrate decisions about land use, transport and housing. It also found there was insufficient responsive infrastructure provision, a sluggish planning system and some in-built incentives to oppose the growth of cities. It found a much deeper review was required to adequately address the issues.

Some redress of the difficulties can be accomplished by the preparation of a National Policy statement on urban planning and the requirements of cities and housing. But many of the weaknesses analysed in the report can be traced to the highly prescriptive plans that many local authorities have adopted. The RMA was designed to be flexible. In the hands of some authorities it has descended into a highly prescriptive system. But bad plans cannot be attributed to the RMA. They are the result of local decisions made

[13] New Zealand Productivity Commission, Using Land for Housing (Wellington October 2015)
http://www.productivity.govt.nz/inquiry-content/2060?stage=4

in the absence of guidance from central government. The Productivity Commission supports spatial planning and I agree.

The place of the Environment Court

The place of the Environment Court needs to be seriously considered in any amendments to the Resource Management Act. Its primacy has over the years been whittled away by various procedures designed, it seems, to circumvent it or provide alternatives to it. Partly that is because of the political overlay that is contained in the Resource Management Act. Ministers are given substantial powers under the Act to fast track processes and call them in. Special procedures are provided for the appointment by Ministers of Boards of Inquiry. Over the years there has been an increase in the capacity of Ministers to interfere in the Resource Management Act and that has some unfortunate consequences.

The testing of expert and scientific evidence in front of the Environment Court is a major safeguard to ensure that the ecological bottom lines of the statute are obeyed. The retreat from the overall balancing test is certainly important in that regard. But it is necessary to go further and to ensure that Part 2 can be properly examined by the Environment Court in all its aspects. The mixture of political and legal functions now contained in the Act is not stable and needs attention.

The reason for having an Environment Court is to ensure that the environment is properly protected and development proposals are in conformity with the law. And ultimately these are legal issues, the way the statute is structured.

So in my view, far from weakening the role of the Environment Court, it needs to be strengthened. The Court itself needs to be strengthened as well. Some of the decisions that the Environment Court has to make are of

great importance and it would be useful to ensure that there was the capacity in that Court for very highly qualified legal practitioners to join it. In big cases millions of dollars are at stake. The status and power of the Environment Court needs to be enhanced not weakened.

There is also the difficulty that some of the procedures of the Court and the statute are too cumbersome. Appeals before the Environment Court are de novo, with no burden of proof requirements and no presumption in favour of the decisions being appealed against. Hearings take too long, the evidence is too unrestricted and the time and costs involved are too great. These matters can be and should be addressed but they should not be addressed at the expense of the fundamental principle embedded in the statute. Amendments made to the Act in 2009 allow for direct referral to the Environment Court for resource consents and notified applications to change the conditions of a resource consent. The purpose was to streamline decision-making for large and complex applications thereby saving time and costs. Notice of a requirement for a designation or a heritage order can also be done this way. Changes in 2013 allow direct referrals to proceed without the consent of the consent authority being first obtained. These changes should help along with the changes contained in the Environment Court Practice Note of 2014.

But my own view is that a full review of the procedures and processes of the Act needs to be engaged in. It does not need to be as cumbersome as it is now. The capacity of lawyers to engage in lengthy and time wasting arguments that are often futile should be limited and the Judges need more power to control proceedings.

Local Government and enforcement

Perhaps the boldest step in the RMA reforms was to give substantial power over the environmental issues to local government in the administration of

the Act. Coupled with the failure of central government to live up to its responsibilities to provide the guidance provided for in the Act, many of them floundered around with injudicious use of consultants. The Councils lacked capacity and skill and it took them time to develop it. This is an important reason why I favour local government amalgamation. Public servants of quality with access to resources are required for sophisticated regulatory systems.

There are thoughts in the Wellington policy making establishment now about what can come after the RMA, as if some large new programme can satisfy the vocal special interests that will always be with us where environmental issues are concerned. The counterfactual to local government involvement is to go back to central government and I would judge that to be both impracticable and deeply unpopular. Better to strengthen regional government and provide more central government guidance.

There are aspects of local government administration of the RMA that are seriously defective. The overall performance has been unsatisfactory in many respects and inept at handling problems of complexity. I have professionally been involved in advising on complaints concerning serious failures to follow the Act. Subterranean efforts are made to try and avoid implementing it often for local political reasons. This occurs in areas such as biodiversity in rural areas where there are development interests that have significant local political power. Despite the fact that Act says provision must be made for the protection of areas of significant indigenous fauna and vegetation sometimes this does not occur.[14] And not enough people are watching. There needs to be more auditing of local government's adherence to the Act.

My experience is backed by the research of Jeffrey K McNeil that demonstrates that the high degree of devolution in a devolved policy

[14] Marie A Brown, R T Theo Stephens, Raewyn Peart, Bevis Fedder *Vanishing Nature-facing New Zealand's biodiversity crisis* (EDS Auckland, 2015) 53-55.

making context does not generate good environmental outcomes. It creates the opportunity for agency capture. [15] He suggests that many regional councils are dominated by farmers which serves to explain the slow response to dairying impacts over time. His PhD thesis suggests a reconfiguration of regional government in New Zealand to manage the environment more efficaciously. I do believe that a reconsideration of the role and structure of regional government is necessary for the RMA to function more effectively.

Many of the real difficulties with the Act occur at the local level. Resource Management lawyers know this.[16] Let me give an example. Many consents are subject to multiple layers of conditions and enforcement. A condition about noise from a proposed wind farm might be coupled with a monitoring requirement and a reporting requirement with an enforcement role for the local consent authority. Modifications sought by objectors can be numerous and costly. There is no general template (although there could be and should be for wind farms). So councils up and down the land have files full of conditions that are often not looked at again, not actively enforced in most cases and very hard to locate. Yet they have legal force. And although they are law they are often badly drafted, hard to interpret, and ambiguous. This is not good enough and should be fixed. These defects can matter a great deal when enforcement orders and abatement notices are in issue. Plans and the consents under them amount to species of tertiary legislation that threatens to engulf the rule of law and cause widespread irritation for ordinary people.

There exist serious issues about enforcement. It is not uniform and I suspect that elected officials sometimes intervene when they should not. It is as wrong to do that at local government level as it is at central

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[15] Jeffrey K McNeil The Public Value of regional government: how New Zealand's regional councils manage the environment, PhD thesis, Massey University 2008 available McNeilhttp://mro.massey.ac.nz/bitstream/handle/10179/724/02whole.pdf?sequence=1&isAllowed=y

[16] I am indebted to Hugh Rennie QC of Harbour Chambers, Wellington for a number of the insights in this section.

government level, where it is plainly and completely unconstitutional for elected officials to have any input into individual prosecution decisions. Consent authorities received 90 per cent of penalties under the RMA which provides, in my opinion, improper incentives to prosecute. Prosecutions should not be examined as a cost versus revenue issue. Robust internal systems are required. I think the system would benefit from a central government generated document similar to the Solicitor-General's Guidelines for the prosecution of criminal offences.[17] At the local level conflicts of interest easily arise in these situations. Abatement notices and enforcement orders require similar attention.

The prosecution system has some odd features unlike ordinary criminal procedures. Jury trials for serious offences are available but most Environment Court judges do not have jury warrants. Charges are laid in the District Court but usually heard by Environment Court judges. Prosecutions should be heard in the District Court by criminal jury judges sitting whether with a jury or not. Penalties should not be paid to the local authorities. It might be worthwhile having a panel of RMA prosecutors approved by the Solicitor-General around the country. Enforcement is important and it needs to be upgraded and done properly, above all professionally. Heavy penalties for breaches of environmental legislation are common in most countries but the legal infra-structure for enforcement in New Zealand needs attention. There needs to be a review by central government of the enforcement mechanisms of the RMA. Some financial help for local authorities will be needed here in all probability.

Conflicts of interest

There has been a tendency due to the broad responsibilities of Regional Councils, especially in relation to water catchments, for Councils to become

[17] Crown Law Office,Solicitor-General'sProsecution Guidelines) as at 1 July 2013. http://www.crownlaw.govt.nz/uploads/prosecution_guidelines_2013.pdf

involved in the development of irrigation projects since they have the legal capacity as regulator to consent to damming rivers and building dams. When a Regional Council itself becomes a developer, as happened in the Ruataniwha dam saga in the Hawkes Bay this appears to raise serious conflict of interest problems that ought not to be tolerated. A regulator should not under the Resource Management Act be a developer. The lack of transparency and the ability for political manipulation seems clear upon its face. The government's policy of intensification of agriculture combined with conflicts of interest in the Regional Councils seems to me to raise issues that need attention.

Conclusion

There is much about the RMA that needs to be fixed. But the fixes lie in better plans and better processes, not in altering the environmental bottom lines. The legislative history of the Act since 1991 demonstrates a picture of confusion and inadequate law-making processes that have failed to address important problems. The machinery of government seems not to have been been up to the task. Failure to make policy statements and environmental standards handicapped the legislation and left local authorities wandering in the wilderness. It is important to rectify these weaknesses. Many of the political reactions that led to amending acts for the RMA over the years have made the legislation worse not better. Constant fiddling debilitates both the Act and its administration.

While the work of the Productivity Commission is important, it does not by itself amount to a blueprint for a new legislative design as it stands. It analyses the problems but not the precise solutions with legislative precision. Big changes in existing local government policies, particularly amalgamation and other legislation is required to produce the integration for which the Commission calls. The incoherence on the face of the New Zealand statute book on these matters is fairly obvious, but it will require

much wider reform efforts than have so far been contemplated to successfully address the issues. And the reforms will have to head in a different direction.

My great hope is that the task of integration is done once, done right and not hurried. Much time has already been wasted. The dawning realisation that New Zealand has become a complex place has been some time in arriving. The pressures that greater population exerts on the environment, coupled with the development of much larger cities, brings new challenges. The ingrained New Zealand pattern of quick legislative cut and fill needs to be abandoned and some enduring legislative designs engaged with. This will involve sorting out the confused pattern of local government and the legal controls over it.

Thank you.