

The Resource Management Act in the new millennium

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Abstract

The Resource Management Act (RMA) was enacted in October 1991 and was a world first in terms of the scope of the legislation and its focus promoting sustainable management of natural and physical resources. At the time it was enacted, it was anticipated that it would take some time to implement effectively. By 1998, it was clear that a review of the implementation process was required, and a reference group was established by the Minister for the Environment to undertake an assessment.

The assessment by the reference group concluded that the RMA is basically sound, however several aspects of the Act leading to inefficiencies and unnecessary obstacles should be amended. An amendment Bill focussing on procedural changes that were intended to help improve the implementation of the RMA was introduced to Parliament in July 1999. The Bill proposed some significant changes to the RMA and was carried over for consideration in the new session of Parliament. With a change of Government, the proposals now face an uncertain future.

The new Government has signalled changes in direction to develop more national standards and policies, enhance access to and involvement in decision-making processes for communities and iwi, and to ensure Assessments of Environmental Effects are more comprehensively undertaken. There is a need to ensure that these changes do not lead to more inefficiencies and greater costs for development, and that the fundamental impediments and obstacles in the legislation are comprehensively addressed.

This paper provides an update on the current political climate, and the likely implications for the future legislative regime. We conclude that the Act can be made to work in its current form, and that amendments should be made to the Act to improve its implementation for the benefit of all New Zealanders. There is an imperative that all resource users seek to ensure that changes to the RMA do not create further obstacles and impediments to sustainable management of natural and physical resources.

Introduction

The Resource Management Act has been in operation now since 1991 and as we move into a new millennium, it is appropriate to consider what the future might hold. This paper is presented in four sections as follows:

- a brief background on the RMA and how it has been implemented since 1991;
- the recent amendments and proposed amendments and their implications;
- the current Government policy and its likely implications; and
- what is needed to ensure that the RMA is not a barrier to environmentally sound and well thought out development.

The next year will be important in ensuring that the legislative framework provided by the RMA does not impede progress

for those projects where appropriate advice has been sought and the environmental effects are appropriately avoided, remedied or mitigated. The onus is on all resource users to be vigilant and involved to ensure that the RMA remains focussed on promoting sustainable management of natural and physical resources. There is a need to work together to promote sustainable management, and to not let the RMA be hijacked by well meaning zealots.

The Resource Management Act

Background

The Resource Management Act (RMA) was enacted in October 1991 and was a world first in terms of the scope of the legislation and its focus promoting sustainable management of natural and physical resources. The RMA at the time was seen by many as revolutionary and set a high level of expectation in terms of its long title being an "Act to

restate and reform the law relating to the use of land, air, and water”.

An important feature of the RMA when it was enacted was that it included a section detailing the purpose and principles of the Act. The Principal Environment Court Judge, in the foreword to Brooker’s “Resource Management”, commented on the purpose and principles at the time the RMA was enacted as follows:

“... the RMA91 provides an abundance, almost an embarrassment, of guidance for the decision-making process. Those provisions include a statement of the Act’s purpose (s 5); declarations of matters of national importance (s 6); and of other matters of importance (s 7); the duty to take into account the principles of the Treaty of Waitangi (s 8)...”

The purpose and principles part of the RMA was certainly seen as an innovation that would provide some direction and clarity as to what the Act was intended to be about.

Section 5 of the RMA states as follows:

5. *Purpose—*

(1) *The purpose of this Act is to promote the sustainable management of natural and physical resources.*

(2) *In this Act, “sustainable management” means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while—*

(a) *Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and*

(b) *Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and*

(c) *Avoiding, remedying, or mitigating any adverse effects of activities on the environment.*

The High Court and the Environment Court have said that applying section 5 involves an overall broad judgement of whether a proposal would promote the sustainable management of natural and physical resources. This recognises that the Act has a single purpose. Such an approach allows for the comparison of conflicting considerations, the scale or degree of them, and also their relative significance or proportion in the final outcome.

This approach gives ample opportunity for planning documents and resource consent decisions to consider both parts of section 5 (2), for example enabling people and communities to provide for their social and economic wellbeing while avoiding, remedying or mitigating adverse effects. While this has provided a sound basis for the assessment of well thought out and technically well supported

projects, it is unfortunately apparent that in many cases the focus tends to be limited to the second part of section 5 (2) – sustaining life supporting capacities and avoiding adverse effects rather than looking at the whole picture. Almost ten years on, to many would-be consent applicants the RMA often seems far from its purpose of promoting sustainable management and closer to being an environmental protection act.

Having said this, we have had much success during the period since the enactment of the RMA in facilitating resource consent processes for major projects that have resulted in successful outcomes for consent applicants and significant buy-in from the community and environmental groups. The RMA can be made to work, where there is a willingness to make it work and where projects are technically supported. The main issue that we see is that there is an opportunity for inconsistent implementation of the RMA framework throughout New Zealand.

Implementation issues

At the time it was enacted, it was anticipated that it would take some time to implement the RMA effectively. By 1998, it was clear that a review of the implementation process was required, and a Reference Group was established by the previous Minister for the Environment to undertake an assessment.

The assessment by the Reference Group, of which one of the authors was a member, concluded that the RMA is sound in principle, however several aspects of the Act leading to inefficiencies and unnecessary obstacles should be amended. Many of the issues identified stem from a lack of clarity in interpretation of Part II of the RMA (sections 5, 6, 7 and 8), a lack of central government direction on matters of national importance and a lack of accountability on the part of local government. These issues lead to inconsistent implementation of the RMA, increased costs to users, and a tendency towards protectionism. The Reference Group report deals with a wide range of interrelated issues and recommends amendments in a number of important areas. A number of legislative changes were proposed by the Reference Group as being the only practical way to help to improve current practices and procedures and to reduce compliance costs and delay. The essential changes recommended were:

- amending the definition of “the environment” to clarify that Councils should not be involved in social and economic planning;
- substantial strengthening of section 32 - to require far better justification by Councils of policies and plans;
- revision of section 104/105 to give emphasis to the consideration of environmental effects in determining resource consent applications (with social and economic effects relevant factors);
- the use of appropriately qualified Commissioners to conduct all hearings on resource consent applications and for these decisions to be final except on points of law

(subject to the possibility of a de novo hearing in special circumstances);

- enabling applicants for resource consents to apply directly to the Environment Court;
- improving procedures for national policy statements;
- allow for contestable processing of resource consent applications; and
- improve section 85 compensation provisions.

Such changes were considered to be essential in retaining balance to the overall broad judgement required under Part II of the RMA.

Recent Amendments to the RMA

The RMA Amendment Bill 1999

An amendment Bill focussing on procedural changes that were intended to help improve the implementation of the RMA was introduced to Parliament in July 1999. The Bill proposed some significant changes to the RMA and incorporated several of the issues identified by the previous Ministers Reference Group. However, the Bill did not go as far as the Reference Group recommended, and introduced several other potential issues that could give rise to further implementation issues. Instead of resolving implementation issues, the Bill does not fully address the key issues in relation to Part II of the RMA, and does not provide the certainty that was being sought in terms of future interpretation. After attracting many submissions, the Bill was carried over for consideration in the new session of Parliament.

With a change of Government, we understand that the proposals now face an uncertain future. In the Speech from the Throne, introducing the current session of Parliament, the Labour Government announced its intentions in relation to the RMA Amendment Act 1999 as follows:

The proposed amendments to the Resource Management Act at present before the House will be revisited. Those amendments which weaken the Act will be dropped. Those that do not will proceed.

We have been advised that the Government intends to split the Bill into two parts:

- those widely agreed or non-contentious issues; and
- all of the other provisions.

It is our understanding that the Government intends to then proceed with the non-contentious parts of the Bill. Given that there are few parts of the Bill that have not lead to extensive submissions and debate, it would seem that most of the RMA Amendment Bill 1999 is destined to be dropped.

We have been advised that although the Labour Party has talked of splitting the Bill, no decisions have been made on this aspect yet. Because the Bill is before the Select

Committee, the Government can not simply split clauses off the Bill. The Committee has asked the Minister for the Environment for the Government's views on the parts of the Bill that it might not want to proceed with. The Minister expects that decisions will be made over the next few weeks on these issues, and we await with interest the outcome. We expect that the Committee will then start hearing submissions and is likely to report back to Parliament by about May.

Infringement Regulations

Another amendment to the RMA that has had little publicity recently is the implementation of the Infringement Regulations. Initially introduced by the RMA Amendment Act 1996, the Regulations came into effect on 1 February of this year. The Regulations provide for infringement notices to be served by enforcement officers for various types of offences. The offences are those that might be regarded as relatively minor but without the infringement notice provisions could be subject to "full" prosecution procedures and potential fines of up to \$200,000.

This seems to be a reasonable provision in that enforcement proceedings for minor offences can be dealt with quickly and simply. It is expected that Councils will introduce procedures to ensure that they implement the provisions consistently and fairly. However, there is every likelihood in future that those parties exposed to the "full" prosecution process for relatively minor offences may feel aggrieved that they were not dealt with via the infringement notice provisions. Similarly, other parties may well be relieved that only an infringement notice is served. In any case, the new provisions provide further opportunity for inconsistent implementation and uncertainty in enforcement. As at present, the best protection for resource users is to ensure that their operations are fully compliant with the terms of their resource consents.

Current Government policy

The new Government has signalled changes in direction to develop more national standards and policies, enhance access to and involvement in decision-making processes for communities and iwi, and to ensure Assessments of Environmental Effects are more comprehensively undertaken. Some of the changes seeking to improve consistency across the country are supported, however some of the changes are unlikely to lead to more effective implementation of the RMA, or to the promotion of sustainable management as originally intended. There is a need to ensure that any changes made do not lead to inefficiencies and greater costs for development, and that any fundamental impediments and obstacles in the legislation are comprehensively addressed.

The Government has further advised that it would be addressing the following:

Issues of cost, delay, and unevenness in implementation of the Act will be addressed. Additional national policy statements will be prepared and co-operation with local government will be sought in order to get greater

standardisation and more efficiency in the processing of resource consents.

This appears to be in line with what many in the business sector are looking for, and we are supportive of any initiatives that seek to achieve improvements in these areas. We remain of the view that the RMA is essentially sound and that if appropriate advice is sought early in a project, and the project is environmentally sound, then the current mechanisms in the Act can be used to achieve realistic and useful outcomes. It is only where there is inconsistency in application of the mechanisms that difficulties can arise.

We have been advised that in seeking effective operation of environmental legislation the Government will:

- *ensure that sustainable management continues to be the purpose of the Resource Management Act and that all decisions made under the Act are consistent with sustainable management;*

It is appropriate that the purpose of the RMA continues to be the promotion of sustainable management of natural and physical resources. We note that the purpose of the RMA as written now is the “promotion” of sustainable management, not sustainable management *per se*. It would be of some concern if this aspect of the RMA purpose were amended, given the body of case law now interpreting the “promotion of sustainable management”. Although a change such as this does not appear to necessarily be the intention, it is important that the “broad judgement” approach to interpreting section 5 is retained to ensure that appropriate consideration is given to factors other than, for example, simply avoiding adverse effects.

It is also quite clear to us that the Government is taking an active interest in Maori issues, and will be seeking to retain their Maori representation in Parliament. We understand that they will be seeking to:

- *ensure that Treaty obligations are reflected in the RMA and its operation;*

It is accepted and acknowledged that special status should be accorded to Maori cultural and spiritual values under the Act. However, implementation difficulties are being experienced, particularly in relation to consent applications. It is not clear what “treaty obligations” are being referred to and whether the Government will be seeking to delegate its own responsibilities in this area. As a matter of principle, it is important that clear procedures and protocols should be established between Maori and the Crown regarding the Treaty of Waitangi and the exercise of kaitiakitanga. There is a need to provide greater certainty in relation to iwi issues and to ensure that Crown responsibilities in relation to Treaty matters remain with the Crown. We trust that any changes made will bring greater clarity to the respective roles and responsibilities of consent applicants, territorial authorities and the Crown in relation to issues such as consultation and provision for Maori ancestral land.

Labour Governments have traditionally been very supportive of strong local government, including Regional Councils, and it appears that this Government will be no different. They have indicated that they will:

- *support democracy in decision-making by ensuring that councils or their chosen delegates retain control over the planning and consent process;*

The Amendment Bill proposes that all resource consent decisions be made by Commissioners, rather than by Councillors as is presently the case in most situations. We consider that using Commissioners instead of Councillors would mean improved decision-making in many cases. In saying this, we do not criticise the contribution that Councillors make to the process, we simply recognise the limitations that they often have when faced with lengthy and complicated development proposals. Councillors’ apparent lack of formal training in, and understanding of, resource management and/or local government requirements often leads to poor decision-making. Supporting democracy in decision-making will not necessarily lead to better decisions, or to consistency with the purpose of the RMA. We consider that it is important that whoever is making the decisions are provided with the appropriate training, tools and time in order to arrive at decisions that promote sustainable management of natural and physical resources. Given that it appears to be a common theme in Government policy in all sectors for locally elected decision-makers, it seems likely that there will be little change from the current approach where elected Councils make the majority of the resource planning and consent decisions. It is imperative therefore that resource users ensure that elected representatives do understand resource management principles and are aware of all the issues when making their decisions.

As noted earlier in this paper, the Government has stated its intention to:

- *split the present Resource Management Amendment Bill and bring back to the House a small Bill addressing widely agreed and urgently required amendments including:*
 - *providing a right of review against non-notified decisions;*
 - *removing “economic” from the definition of “environment” to stop trade competitors misusing the Act;*

We note that these are not necessarily “widely agreed and urgently required” amendments. In fact, the proposed change in the Amendment Bill to enable non-notified decisions to be reviewed by the Environment Court is opposed by many. Notification decisions are by nature an administrative decision and the appropriate method for reviewing such decisions is by judicial review in the High Court as it is now. All other administrative decisions are reviewed by the High Court, providing appropriate checks and balances and there is no reason why notification decisions should be any different. A more appropriate change to the notification provisions of the

RMA would be the provision of limited notification procedures in the RMA.

The Amendment Bill proposals to remove the word “economic” from the definition of “environment” is similarly not “widely agreed”. In fact, we are concerned that removal of this word could lead to legitimate social and economic benefits being dismissed from consideration because a decision-maker in the years to come takes the view that such benefits are irrelevant. Unless the proposed change is balanced by amendments elsewhere in the RMA (such as in section 104) to ensure that social and economic benefits can be considered, then the change is not supported. Rather than simply addressing the issue of stopping trade competitors from misusing the RMA, the change could have far wider ramifications.

The Labour Party has also signalled that it would:

- *initiate urgent research into RMA implementation and in particular planning and consent application procedures, in order to determine the need for any further amendments. This work will review submissions made to date and include:*
 - *improving access to and involvement in the planning and consent processes for communities and iwi;*
 - *ensuring cumulative effects are taken into account in the planning and consent processes;*
 - *streamlining processes where this does not threaten good environmental outcomes, such as by encouraging pre-hearing conferences;*
 - *rights of written questioning at consent hearings;*
 - *determining means of ensuring Assessments of Environmental Effects are more comprehensively undertaken and their authors held to account for their AEE reports;*
 - *developing means for facilitating constructive community involvement in Environment Court hearings without risk of costs.*

Much research into RMA implementation has already been undertaken, and there is already a clear consensus that there is inconsistent interpretation and implementation of the RMA by local government. We consider that what is needed is not more research but more action to resolve the issues that have been identified. For example, many contested consent processes currently make extensive use of pre-hearing processes, as identified in the Ministry for the Environment annual Council surveys.

Where an applicant has an environmentally sound and well thought out proposal and has sought early advice on the appropriate options, it is more likely that iwi and the community will have the opportunity to participate in the process. Facilitating this process is an important function of an experienced RMA adviser and can often lead to agreed outcomes without recourse to hearing processes. We have

participated in a number of processes where successful outcomes have been achieved, and where communities, iwi and environmental groups have also participated.

Improving access to consent processes for communities and iwi by providing legal aid and greater opportunity to challenge decisions will potentially lead to more adversarial processes, and may lead to greater costs for both consent applicants and the community without achieving any better outcomes. Similarly, facilitating community involvement in Environment Court hearings without risk of costs will potentially increase adversarial processes and is unlikely to lead to better outcomes. In the latter case, it is not clear how vexatious appeals will be prevented and how “constructive community involvement” will be defined. We are aware of a recent case that demonstrates the extent to which iwi can currently be involved in hearing processes, the High Court has inexplicably ordered an applicant to provide to the High Court at the applicants cost a full transcript of verbal iwi evidence presented to the Environment Court. The High Court is hearing an appeal from the applicant on a point of law relating to the extent of existing use provisions for a quarry that should not involve consideration of iwi issues.

We are aware that the Labour Party policy also includes the following proposals:

- *guide and support environmental sustainability by providing the leadership and central guidance envisaged under the Act;*

Providing such guidance is provided in terms of giving certainty and addressing matters of national importance, such as iwi issues, then such initiatives should be welcomed. As noted earlier, one of the issues identified by the previous Ministers Reference Group was a lack of central government direction on matters of national importance. Provision of leadership and guidance on matters of national importance would assist with seeking consistent implementation of the RMA across New Zealand.

Following on from the statement above regarding the improvement of access and involvement for communities and iwi, we understand that one of the important proposals to achieve this is to:

- *remove the barriers to public participation by ensuring that environmental and community groups will be eligible to apply for a capped legal aid fund at an Environment Court hearing, as will eligible applicants. Labour will develop criteria against which the validity of applications will be assessed;*

Such an initiative could potentially lead to an increase in appeals that have little substance or merit, resulting in greater costs for applicants who have properly prepared their case but are faced with extended Environment Court hearings. It is expected that such an approach will discourage applicants and could impose an impediment to development, without enabling “people and communities to provide for their social

and economic well being". Responsible applicants, of which there are many, who have included the community and iwi in their consultation processes and have developed a project that finds support among many should not be penalised because, for example, a disgruntled environmental group with an issue only marginally related to the consent being sought, can seek and obtain legal funding to make an unnecessary appeal.

We understand that the Government will also be trying to:

- *further remove barriers to public participation by promoting and providing funding for a Community Environmental Advocates network. Its primary roles will be in giving advice and carrying out some research into resource management cases brought to it. Its focus will be on giving community and environmental groups knowledge and skills useful in pursuing the resource management process.*

Such advocates may potentially be helpful if their role is to assist the community to make informed decisions on resource consent proposals and how they might be affected. A Community Environmental Advocates network will have its limitations however in that they will not necessarily be aware of the particular community or business issues associated with a particular development. We consider that the best way to remove barriers to public participation is by involving the community in the resource consent process through forums such as consultative group meetings. In this way those people who are affected by a proposal can be given specific knowledge and skills about the particular proposal and can make an informed decision about it. Unless informed advice is given, then a network such as that proposed will have limited effectiveness and is likely to simply result in more un-informed involvement in consent processes, and consequently greater costs to applicants.

Another interesting initiative proposed by the Government is to:

- *make the reporting of serious environmental accidents compulsory. This will raise public awareness and will also enhance the prospects of effective remedial action. Failure to disclose will be an offence, additional to any offence arising from the accident itself.*

This proposal can potentially lead to instances of "double jeopardy" where a company can be penalised twice for the same incident. Most companies are generally responsible, and are not easily able to hide the results of serious environmental accidents. In many cases, such incidents are reported as they occur and are dealt with in appropriate ways at the time of the incident. In our view it is better to focus remedial actions and preventative actions for the future in an environment of trust, rather than one where reporting is compulsory and open to penalty provisions. Such provisions as this are unnecessary and only serve to reinforce the "them and us" type of mentality. In order to get effective reporting of environmental incidents, a relationship of trust rather than coercion must be developed.

Many of the issues discussed above have the potential, if any changes made are not appropriate, to introduce impediments and obstacles to the promotion of sustainable management of natural and physical resources. At the current time we await with interest announcements from the Government on their timetable for policy implementation and what will be on their final agenda.

Actions required

Having identified some of the potential pitfalls of the Labour Government policies, can anything be done to counteract the possible negative effects and ensure that the RMA is workable into the new millennium? Now, more than ever before in the history of the RMA, it is imperative that business groups individually and collectively stand up and be heard on any changes that are proposed to the RMA. This is the case irrespective of whether the changes are positive or negative – it will be necessary to ensure that any positive changes make it through the review process. Industry needs to seek to have a united voice that acknowledges the role of the RMA but also acknowledges the need to ensure that all parts of promoting sustainable management of natural and physical resources are pursued. It is important that this is not seen as threatening the purpose and principles of the RMA, which have achieved wide acceptance in theory, but is seen as an honest attempt to ensure that the RMA is implemented fairly and reasonably across all sectors of the community.

We understand that the Minister for the Environment has several priority issues that she is seeking views on at present. These include:

- the need for national guidance and national policy statements;
- barriers to public participation;
- placing emphasis on environmental outcomes;
- biodiversity and the national Biodiversity Strategy;
- the urban environment, including loss of heritage buildings, public transport, infrastructure and urban sprawl;
- waste minimisation; and
- increasing backlogs and delays at the Environment Court.

Now is the time to be expressing views to the Minister on these issues.

Conclusion

This paper provides an update on the current political climate, and the likely implications for the future legislative regime. The RMA can be made to work in its current form, however amendments could be made to the Act to improve its implementation for the benefit of all New Zealanders. There is an imperative that all resource users seek to ensure that changes to the RMA do not create obstacles and impediments to the promotion of sustainable management of natural and physical resources.

Authors

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Dr Mitchell was a member of the Minister for the Environment's Resource Management Act Reference Group, which was established to advise on changes to the Resource Management Act. He is the convenor of, and spokesman for the Resource Management Business Forum, and is the President of the Resource Management Law Association.

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Mr Matthews has been responsible for technical and practical advice on regional plans under the RMA, and policy documents under other legislation. He has provided advice on a range of resource consent, monitoring and other RMA issues since the RMA came into existence, and has been actively involved in many resource consent application processes for large development projects.