The Resource Legislation Amendment Bill, the Productivity Commission Report and the Future of Planning for the Environment in New Zealand

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Introduction

Let us begin with the proposition that there is much the Resource Management Act that needs to be fixed. How that cure is to be effected is not widely agreed. Indeed, the policy surrounding the Resource Management Act at present seems confused. We need to stop and ask what are we trying to do in this space? I shall in this address try to unravel the issues. Being a planner in this febrile policy context must have its challenges.

In my judgment the overall conclusion to be reached is that New Zealand does regulatory statutes rather badly. They are insufficiently researched. They are not rigorously tested before being enacted. Nor are sufficient efforts made to find out how they worked in the real world. And large statutes are amended far too readily leading to incoherence and uncertainty in the market. No doubt these are not positive conclusions. But I have been around a very long time and seen these issues come back again and again.

My overall conclusion is not restricted to the Resource Management legislation. New Zealand's methods of law making are deficient both within the executive government that conducts its affairs in secret on legislation and in the Parliament that concentrates on politics rather than scrutiny of the legislation itself. Sooner or later we may wake up that these ingredients are impeding better governance in this country. How the law is designed, how it is consulted about, how it is drafted and how parliamentary scrutiny proceeds are all vital issues in securing quality legislative outcomes.

The failures of the Resource Management Act can be laid at the doors of central government and local government. Failure to make policy statements and environmental standards that the Act provides for handicapped the legislation. It left local authorities wandering in the

wilderness. Too often local government did not appreciate the nature of its duties under the Act and there was too much political interference.

It is important to rectify those weaknesses and there are signs that that is occurring. But the brutal truth needs to be faced. Political reactions that have led to numerous amending acts for the RMA over the years have made the legislation worse, not better. Constant fiddling debilitates both the Act and administration. And the pattern is continuing.

Confusion, duplication and policy competition

There are currently three major policy reviews occurring in the same policy space; the Resource Legislation Amendment Bill, public submissions were due on 14 March 2016, the Productivity Commissions Better Urban Planning Review, submissions on a 95 page issues paper closed on 9 March 2016. And third Local Government New Zealand's Blue Sky discussion about New Zealand's resource management system asked for submissions in February.[1] At the very least stakeholders will have suffered from submission fatigue.

Three sets of submissions on related but not identical topics were due almost at the same time but what is worse these inquiries, particularly the Select Committee and the Productivity Commission work overlap. Both concern in detail the system of planning. This appears to me to be a recipe for confusion and a potential policy train wreck. Serious resources need to be brought to bear on a topic like this. To balkanize the policy resources of a small country in three separate efforts seems both unwise and profligate.

Desultory efforts to change the Resource Management Act have had little success in the past. More robust, determined and high quality effort within

[1] Local Government New Zealand, *A 'blue skies' discussion about New Zealand's resource management system, A discussion document prepared for LGNZ by MartinJenkins, December 2015*

executive government with local government input could have produced a much better outcome and much more quickly.

The Resource Legislation Amendment Bill

On 3 December 2015 the Resource Legislation Amendment Bill received its first reading and it was a referred to the Local Government and Environment Select Committee for public submissions. The Bill is 170 pages in length. It is technical and difficult to follow. The Minister the Honourable Dr Nick Smith said the Bill makes 40 changes to six different Acts. The Bill implicitly accepts that the amendments proposed in 2013 to alter the environmental bottom lines of the statute in part 2 will not proceed. But the changes are extensive and quite a number may not survive Select Committee scrutiny.

The most important changes are:

- Joint development of national environmental standards in national policy statements;

- New regulation making powers designed to permit specified land uses to avoid unreasonable restrictions on land, and to prohibit and remove Council planning provisions;

- New provisions in the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012;

- Lengthy new provisions to enable the development of a national planning template which gives the Minister for the Environment power to direct the required structure and format of policy statements and plans and to specify matters (objectives, policies, methods and rules)

that either must be included in any policy statements or plans or may be included at the discretion of Council;

- Amendments to ensure Councils provide sufficient land for residential and business developments to meet long term demand;

- Lengthy provisions allowing for collaborative planning processes to substitute for normal processes. That was designed particularly for the land and water forum work;

- Substantial powers to designed to centralise control, introduce many detailed procedural changes and to provide a new fast track.

The politics in the House of Representatives surrounding this Bill need to be considered. The Bill was not supported by the Honourable Peter Dunne who voted against it. So did Act MP David Seymour (who thought the amendments were too weak) and the Green Party also voted against it. New Zealand First abstained and Labour voted for it.

The Maori Party cast their votes for the first reading only, having successfully secured concessions that involved removing two objectionable provisions before the Bill was introduced, and winning enhanced iwi and Maori consultation provisions in return. The Maori Party prevented the introduction of privatized consenting. Alternative consent authorities, where public powers would be exercised by organisations approved by the government, but not by people who are publicly accountable officials, had been drafted but dropped before the Bill's introduction. The Maori Party also stopped changes in the Bill that would have imposed new limitations on restrictions on the use of land. They may secure further changes at the Select Committee stage.

But I sound a word of caution. Given the complicated political situation evidenced by the voting upon the Bill's introduction it is not easy to predict how the Bill will fare at the hands of the Select Committee. The parliamentary debates warrant close study. Predicting the outcome would be speculative.

Issues with the Bill

Let me now turn to the weaknesses that I think this Bill exhibits.

There are at least three significant and dangerous trends running through the Bill. These are:

- Greater Ministerial control and centralised decision making that over rides local planning decisions.

- Reduced opportunities for public participation in decisions that will affect local communities.

- Emphasis on speed, rather than quality, of decision-making.

It is my view that the process for collaborative planning particularly for fresh water management will prove to be unworkable and is likely to deliver outcomes that will be detrimental to the quality of New Zealand's rivers, lakes and streams. The whole collaborative enterprise was based upon the principle that it would be accepted as a whole system. It would not be served up to the government in bits and cherry picked by the government on the basis that it would advance the pieces that it liked. There is a more serious objection here.

Collaborative planning is likely to pave the way for untransparent dirty deals at the expense of freshwater quality. This is not the sort of situation that is likely to elevate the standards of our public decision making. Power imbalances will threaten the integrity of environmental outcomes. The way it appears in the Bill collaborative planning seems to be designed to favour development interests over the environment. It is wrong to assume that it is possible to find an accommodation of all the relevant interests through mutual compromise. Environmental bottom lines will not survive a process like that.

I think the adoption of a national planning template is a positive development, but there are very grave weaknesses in the manner that this policy has been translated into law. A national planning template can set out "requirements or other provisions relating to any aspect of the structure, format or content of regional policy statements and plans." Furthermore, the extent of the proposed content may be prescribed through the national planning template under new section 58C. I read this proposal as allowing the Minister to use the national planning template to give directions to District and Regional Councils on substantive matters of policy. It could be used also to tell Councils what they substantively can and cannot do. It goes very far beyond the national planning template described in the public consultation documents circulated by the government before the Bill was introduced.

There have been many efforts to streamline the processes of the RMA over the years. They never seem to work very well. This Bill contains another streamlined planning process and it is far from clear there is any evidence to support the need for such a process as the one that is proposed. The real risk is that it will politicise the planning process and lead to quick and suspect decisions based on political expediency. This is supposed to be an effects based statute.

There are also significant changes to the regulation making power in the legislation. The effect of these amendments will be to significantly increase the scope of the regulation making power, thereby increasing the power of the Minister to direct the outcome of planning and consent decisions under the Act.

There are a great many more detailed objections that could be made to various provisions in this exceedingly technical Bill. I am sure the MPs on the Select Committee will have enormous difficulty with the Bill. It is the sort of legislation that you would want to have a damp towel around your head when you read.

The legislative solutions on offer do not seem to me likely to achieve much. They will make the Act more complex, cumbersome and bureaucratic. There will be so many alternative routes to getting to yes, resulting in increased transaction costs and legal costs. The people who design the processes do not have to make them work.

The Productivity Commission's Better Urban Planning Issues paper

The Honourable Bill English as Minister of Finance launched a new inquiry by the Productivity Commission on 1 November 2015. He announced the terms of reference asking the Commission "to review urban planning rules and processes and identify the most appropriate system for land use allocation." [2] This followed the concerns expressed by the Commission in its earlier report which is called "Using Land for Housing", October 2015 that made the case for integrating across the Resource Management Act, Local Government Act and Land Transport Management Act.

[2] Beehive.govt.nz. See terms of reference at www.productivity.govt.nz

What current analysts seem to forget about the Resource Management Act is that the inspiration for it came from the report of the World Commission on Environment and Development which set out principles for environmental protection and sustainable development. The Commission's report issued in 1987 is known as the Brundtland Report after its Chair who was the Norwegian Prime Minister. The Brundtland Report defines sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."[3] It contained two concepts:

The concept of needs and the idea of limitations. Rather than viewing "development" and "environment" as competing values, one to be sacrificed to the other, the Brundtland Report approaches the two as inseparable – needs could only be met within the limitations of the environment. That report puts sustainable development in the international mainstream. It is a concept that appears not to be so popular in New Zealand governmental circles as it was when it was new, but that report formed the foundation of the Earth Summit held in Rio de Janiero in 1992 and receives expression in principle for the Rio Declaration:

> "In order to achieve sustainable development, environmental protections now constitute an integral part of the development process and cannot be considered in isolation from it."

It is for this reason that the Resource Management Act is driven by part 2, the purpose and principles. The purpose of the Act is to promote "the sustainable management of natural and physical resources." [4] All this grew

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[3] *Report of the World Commission on Environment and Development: Our Common Future,* A/42/427 (1987) at ch 2, [1].

[4] 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-*

out of the National government's policies in the late 1970's of "Think Big". The National Development Act 1979, now happily repealed provided 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. The Resource Management Act 1991 replaced as many as 50 different statutes that dealt with these matters and created a one stop shop.

The established jurisprudence

A notable feature of the original Resource Management Act was that the environmental safeguards in it were defined and limited in part 2 of the Act. This applies to all decision-makers and decisions made under the authority of the Act. It has taken a very long time to reach judicial understanding of how these provisions should be interpreted. But now, many years after 1991, one consequence of starting again would be to lose the granulated and now clear jurisprudence that applies. That would be a retrograde step.

Leading cases have been slow 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 at 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 on it. There was however a good deal of academic commentary on the uncertainties presented by the Act, an issue that occurs with all new legislation and one reason why big quick changes and direction are to be avoided. But after the

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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, which 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).

Planning Tribunal was abolished and recreated as the Environment Court new approaches began to emerge. It seems almost as if the stuff of which leading cases are made was consciously avoided by both sides on the environmental divide, so their interests were not weakened by the decisions taken. To cut a long story short the Supreme Court of New Zealand has now provided clarity in the case of the *Environmental Defence Society v New Zealand King Salmon.*[5] In a careful and elegant judgment of the Court given by Justice Terence Arnold matters were made as clear as possible. It is to be hoped that decision-makers do not return to their old habits of ad hoc balancing.

Without going into detail 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:

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

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

- It drew a distinction between 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 than section 7.

- It explained the elements of protection and preservation in section 6 "are intended to make it clear to those implementing the RMA that they

[5] *Environmental Defence Society v New Zealand King Salmon Co Ltd* [2014]NZSC 38(SC).

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 section 6 and 7 take on a new significance in light of this interpretation. 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 unfortunate feature of the struggle over Part 2 is that it has caused years of delay in making the processes of the Act less cumbersome, less bureaucratic and more user friendly. What the Supreme Court decision demonstrates in a remorseless analytical manner, is that the environmental protections in the Act are real, and any reduction of them would be a retrograde step. People who want to change the approach have to recognise that the sustainability paradigm constitutes the key anchoring principle and the key policy for the whole Act.

Where is the evidenced based policy?

It needs to be observed that over the years we have seen very little empirical research that convinces about how the Resource Management Act is working. No doubt empirical research is expensive but before changes are made it really is 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. Such a position certainly allows political pressure to be exerted for

change. Whether the direction in which that change should proceed is based on evidence is entirely another matter.

New Zealand has a bad habit of passing large legislative schemes and never analyzing whether they were effective or efficient in achieving their goals. There are many reasons for this phenomenon, but none of them convinces. Some exciting new developments on this issue have been tried in some European countries. New mechanisms should be developed to look rigorously at the effects of legislation that is being passed, and to ensure that it has achieved its objectives upon which it was based and that there are no unforeseen consequences of a deleterious kind. It seems sound to do this 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.

Changes to the RMA

Dr Roger Blakeley,[6] who was Secretary for the Environment at the time the RMA was conceived and passed and I have been active in making submissions both to the Productivity Commission and the Local Government New Zealand Inquiry. I have also been assisting the New Zealand Fish & Game Council in its submission to the Select Committee on the Bill.

Dr Blakeley and I feel, and he was present at the creation, that the RMA does need to be fixed. The cures do not require throwing out the Act, nor should they involve changes to the purpose and principles of the Act as set out in sections 5, 6 and 7. Our recent experience with stakeholders is that there is support for the original intention of the RMA as articulated by the

[6] **Dr Roger Blakeley** was Chief Planning Officer, Auckland Council from 2010 to 2015. He was Secretary for the Environment and Chief Executive of the Ministry for the Environment from 1986 to 1995, during the time of the development of the Resource Management Act, 1991.

responsible Ministers at the time, myself and Simon Upton. The core idea was that the development must take place within the capacity of the environment and ecosystems that support it. That is why the Resource Management Act is driven by Part 2, the purpose and principles.

But we do think major change is needed. In particular:

- Regional spatial planning at the strategic level.
- Integration across the RMA, Local Government Act and Land Transport Management Act.
- Better provision for urban planning and development within the RMA.
- Mitigation and adaptation to climate change.
- More central guidance through national policy statements and national environmental standards.
- Better district planning and rule making.
- Better institutional design and decision making.
- Rigorous monitoring and evaluation of effective legislation.

These changes would not be disruptive to the established jurisprudence, but they would require radical changes in behaviours and actions by parties that have responsibilities for implementation under the Act. I do not have the

time to go into detail on all of this now. You are free to read our submission to the Productivity Commission.

But I would add one thing. One of the greatest problems that the RMA faces lies in the prescriptive nature of the processes and procedures that the Act prescribes. There are so many different processes now and so many different avenues that applicants can go down, that the matter has become far too complicated, bureaucratic and difficult. The processes need to be totally reconsidered. The processes need to be made simpler, clearer and much less convoluted.

Integration across the RMA, LGA and LTMA

The Resource Management Act brought multiple processes under one law with a common purpose. It reduced the number of decision makers. It removed arbitrary differences in management of land, air and water. The complexity that the Productivity Commission in its earlier report has correctly identified arose from the complications involved with the Local Government Act 2002 and the Land Transport Management Act 2003.

In our view if the integration of the three statutes is to be achieved, even within an over arching statute, the legislative design problems are formidable. Such an enterprise also runs the risk of undoing the recent progress with the jurisprudence.

We do think the Local Government New Zealand's option to create a separate planning act and environment act would cause extreme upheaval. We think that would be a seriously retrograde step. It is contrary to the objective of better integration and would push us back 25 years. There is no post RMA world.

The New Zealand statute book has to be viewed as a whole. And that is the place to start. Concentrating reform efforts on one subject such as land for housing is bound to have unexpected consequences elsewhere.

The issue of climate change does not seem to figure in these debates and it should. Planning for climate change in the future is going to be an enormous issue and central government so far in New Zealand has not taken that on board. One has only to read the report of the Parliamentary Commissioner for the Environment in November 2015 Preparing New Zealand for Rising Seas: Certainty and Uncertainty to understand that this is an enormous issue and can be ignored no longer. Post the Paris Agreement there is going to have to be a sea change in New Zealand's climate change policies.

What is needed are simple principles and processes that will work in the real world. The fixes lie in better plans and better processes, not in altering environmental bottom lines or in the absence of rules. 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 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." This is the reason why the environmental bottom lines in the RMA are so important and tinkering with them is so unwise. Humankind's destruction and defilement of the natural environment is seriously endangering the continuation of life on this planet. The failure is one of rational ecological governance.

When it comes to environmental issues the market fails to capture many of the values and contributing factors at play. The externalization of environmental and social costs seems to be inevitable in an atmosphere where governments seek endless economic growth. Elementary economics suggest that the polluters should pay so the costs of development are not externalized to the public, but how often does that happen?

Local Government

Let me conclude with a word about local government. The policy problems that are outlined in this speech all depend upon the reform of the structures of local government. These are going to be necessary to achieve the outcomes that the government wants. Government policies so far in this area have lacked bite and determination.

Local government needs more constitutional autonomy in New Zealand than it enjoys. Too often it is regarded as the agent of central government to be kicked around and told what to do and not properly consulted. There is little doubt that the local government legislation in New Zealand is defective. Whenever a new government comes in it changes the legislation and often in ways that are incomplete and unclear. Constant meddling with the local government legislation is as counter productive as the constant meddling with the resource management legislation. When you put both together it is a rather lethal combination.

In an announcement on 16 March 2016 the Minister for Local Government announced what were described as "major reforms" to deliver better services for ratepayers. The purposes of the reform include more flexibility to collaborate and develop shared services.[7] The summary provided by Internal Affairs contains policy changes to provide:

[7] Poseta Sam Lotu-liga "Major Reforms to improve services for ratepayers." 16 March 2016 https://www/beehive.vot.nz/release/major-reforms-improve-services-ratepayers

.greater flexibility for councils to collaborate to deliver services and infrastructure;

. new processes for council-controlled organisations dealing with transport, water and for the establishment of joint committees;

.greater ability to transfer functions between councils;

.more opportunities for joint governance;

.new and more flexible re-organisation processes, including Council led re-organisations and an improved Local Government Commission-led reorganisation process; and

.more powers to the Commission with some increased accountability.

I think it is hard to judge how this will work out until the Bill is available. But in my opinion the proposals fall far short of a principled, carefully worked out pattern for local government reform in New Zealand.

It looks very like another chapter in a long saga of fiddling. The intention is to make the changes in time for them to come into effect early in the new local government term.

I leave you with the idea that significant constitutional change is required in New Zealand if local government is to flourish. Let me suggest the following. A set of constitutional principles along the following lines:

1. The state shall have a strong transparent and accountable system of local government based on the principle of subsidiarity. That is to say decisions should be made as close as possible to the people whom they affect.

2. The provision of services and the solution of problems should take place as close to the citizens as practicable and "in accordance with allocative efficiency" as the nature of the relevant process allows.

3. The right of units of local government to manage their own affairs independently in accordance with laws and regulations under the supervision of the state shall be laid down in Acts of parliament.

4. All local government builds on the concept of community.

5. Central and local government policies must be coherent but within a broad general framework local authorities must have self government, with freedom to decide and control local policies. Administrative supervision of local government will be limited to ensuring compliance with the law and the execution of delegated responsibilities.

6. Local government representatives shall be democratically elected by secret ballot under an Act of parliament.

7. Local government shall be open and transparent in its decision-making and accountable to its citizens.

8. The financing of local government by the imposition of rates on land and property provided for by Act of Parliament needs to be accompanied by a revenue sharing programme with central government negotiated between central and local government.

9. When new responsibilities are placed on local government by central government, that must be preceded by adequate consultation and estimate of what the new responsibilities will cost to administer.

Good luck with your conference. I hope I have stimulated some debate.