The Resource Management Act 1991: Well Meant But Hardly Done

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1 Introduction

The Resource Management Bill was introduced to Parliament in December 1989.[1] The objective of the Bill was "to integrate the laws relating to resource management, and to set up a resource management system that promotes sustainable management of natural and physical resources".[2] The legislation was finally enacted some nineteen months later. Few pieces of legislation in New Zealand have been so thoroughly researched and debated prior to their enactment,[3] and no piece of environmental legislation in New Zealand has had such great potential. It has been claimed that "The Act completely revamped environmental law in New Zealand and turned a planning statute into a wide-ranging and complex piece of environmental legislation".[4]

Passage of the legislation was attended by high hopes and expectations, but ". . . the honeymoon that followed the RMA's enactment is over. A bumpy implementation period is lasting longer than expected and is still far from complete".[5] Since the original enactment of the legislation there have been five Amendment Acts totalling 191 pages and 369 sections.[6] A Resource Management Amendment Bill was introduced to Parliament in 1999: it contains 114 clauses and runs to 65 pages.[7] This legislative activity is evidence of some of the difficulties that have been encountered with the RMA. Any attempt to modify the common law by the imposition of use, activity and development restrictions is likely to create uncertainty through the need to fit and mould the restrictions to specific locations and resources and through sheer resistance to the restrictions. But the difficulties with the RMA go beyond that. Hutchings has said that the RMA " . . . was sold in different ways to different audiences, as a means for

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1 (1989) 503 NZPD 14165. The Resource Management Act 1991 will be referred to as the RMA.

2 Resource Management Bill, Explanatory Note, i.

3 The background is described in the explanatory note to the Bill and in Palmer, *Environment - The International Challenge* (1995) ch 5. The author was Minister for the Environment at the introduction of the Bill. See also Hunt, Bobeff and Palmer, "Legal Issues Arising from the Principle of Sustainable Development: Australia, Canada and New Zealand" (1991) 9 Journal of Energy and Natural Resources Law 1, 16-21; McLean, "New Zealand's Resource Management Act 1991: Process With Purpose?" (1992) 7 Otago LR 538 and Birdsong, Adjudicating Sustainability - New Zealand's Environment Court and the Resource Management Act (Ian Axford (New Zealand) Fellowship in Public Policy, October 1998) 6-7.

4 Phillipson, "Judicial decision making under the Resource Management Act 1991: a critical assessment" (1994) 24 VUWLR 163, 166.

5 Birdsong, supra n 3, 1.

6 The Resource Management Amendment Acts 1993, 1994, (No 2) 1994, 1996 and 1997.

7 (1999) 579 NZPD 18,068.

satisfying [a wide range of] needs. That's the whole point. The Act sets up a regime that will forever be full of tension".[8] This tension and some legislative failings have now produced difficulties of implementation, doubt and uncertainty in and about most of the key features of the legislation. The inclusion of the statement of the purpose and principles of the legislation in Part II of the RMA has caused difficulties. The failure of central government to supply guidance by the contemplated national policy statements and national environmental standards has left the RMA operating in a partial vacuum. The allocation of responsibility to local authorities is uncertain, and there have been problems with their intended management instruments. The legislative provisions on compensation and heritage protection have proved inadequate. And there have been problems with the consent processing provisions and the provisions by which decisions about resource consents are to be taken.

In describing the background of the legislation, Buhrs and Bartlett supply the general explanation for the difficulties that have now become manifest:[9]

> . . . [T]here was . . . another reason why the resource management law reform project and the subsequent draft legislation never engendered the same degree of resentment and opposition as other Labour [government] initiatives. The ad hoc Cabinet Committees, the Core Group [of officials], and the legislative drafters fashioned an Act, although comprehensive in scope and seemingly radical in its departure from past policy, that had wide appeal because it was written in such a way as to leave many issues undecided. Characterised by the Ministry for the Environment as 'a framework rather than a blueprint', the Act was written according to 'plain English' and 'general principle' approaches to drafting statutes . . .. The less detail included, the less opportunity for dispute at the formulation and selection phase of the policy process and the greater the inclination of disparate individuals, interests, and parties to embrace the reform in principle, seeing in it what they wanted to see. Contention over details of policy was thus postponed until the implementation phase . . .. Agreement was achieved on goals and objectives, but only as expressed in general, precatory language. Concrete, operational goals and objectives of the reform would be worked out over time, in the course of a political struggle over means . . . .

The 1991 legislation has therefore obliged New Zealand society to undertake the process (and the costs of the process) of the political struggle within a loose legal framework to find out what the objects of the legislation are — to deal with the " . . . degree of unfinished business with the law".[10] Much of this struggle has been conducted in a judicial setting. Citizens, administrators and the courts engaged in this process have been admonished by Cooke P, as he then was, that the " . . . Act is not to be approached in any narrow way or with an eye to the

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8 "Collaborating for Quality", Proceedings of the fifth annual conference of the Resource Management Law Association (28-31 August 1997) 1, 7.

9 *Environmental Policy in New Zealand* (1993) 124, citations omitted. See also Milligan, Resource Management Act: emergent themes and available techniques (New Zealand Law Society Seminar, March 1998) 5.

10 Frieder, Approaching Sustainability: Integrated Environmental Management and New Zealand's Resource Management Act (Ian Axford New Zealand Fellowship in Public Policy, December 1997) 53.

protection of supposedly vested administrative interests".[11] But the legislators of 1991 chose a course radically different from that of the Proculians and the Sabinians, schools of jurists of the first and early second centuries AD: these ". . . jurists distrusted broad statements of principle. This was not because they were unable to formulate them but because they understood that the wider the statement, the more there would be exceptions to its application and so there was a danger that the law would be uncertain and unpredictable".[12] So it has proved.

2 Part II — the Purpose and Principles

It has not been common for statutes in New Zealand to contain a whole set of purpose provisions in a separate part of the legislation, though purpose sections are now used more frequently.[13] Part II of the RMA, called "Purpose and Principles", contains four sections — the stated purpose of the Act and its meaning (section 5), the listing of five matters of national importance (section 6), the listing of nine other matters (section 7) and an allusion to the principles of the Treaty of Waitangi (section 8).[14] It was claimed in 1994 that, "The most significant Part of the legislation . . . is Part II . . .. Without a clear understanding of the relative importance of [Part II] in relation to the rest of the Act, and a better understanding of the actual meaning of the provisions themselves, the Act will not be able to function effectively".[15]

Prior to their enactment there was much dispute about the content of these provisions. The stated purpose did not alter ("The purpose of this Act is to promote the sustainable management of natural and physical resources"[16]). But the elaboration of the meaning of "sustainable management", and the arrangement and statement of the other provisions went through a number of changes.[17] As stated by the Minister for the Environment at the enactment of the legislation, the Hon. Simon Upton, the purpose provision ". . . has been the subject of intense debate by competing parties that have argued alternatively that it is weighted too far in favour of development as too far in favour of the environment. Critics have been preoccupied with whether an appropriate balance is struck in

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11 *Auckland Regional Council* v *North Shore City Council* [1995] 3 NZLR 18, 19; [1995] NZRMA 424, 426.

12 Stein, *Roman Law in European History* (1999) 17-18.

13 Burrows, *Statute Law in New Zealand* (2nd ed, 1999) 153.

14 The text of these sections is reproduced in the Appendix.

15 Phillipson, "Judicial decision making under the Resource Management Act 1991: a critical assessment" (1994) 24 VUWLR 163, 164.

16 RMA, s 5(1); Resource Management Bill, cl. 4(1).

17 See the discussion by Upton, Minister for the Environment when the RMA was finally enacted, in "Purpose and Principle in the Resource Management Act" (1995) 3 Waikato L Rev 17, 28-38. See also the parliamentary debate at the third reading - (1991) 516 NZPD 3018-3019, 3022, 3026 and 3036-3037. The incoming National government in November 1990 caused a Review Group to be appointed to examine the incomplete legislation: see the Review Group's *Discussion Paper on the Resource Management Bill* (December 1990) 4-12 and the *Report of the Review Group on the Resource Management Bill* (February 1991) 5-17 and 145-146. And see the appendix to the article by Harris, "Sustainable Management as an Express Purpose of Environmental Legislation: the New Zealand Attempt" (1993) 8 Otago LR 52, 73-76.

this clause".[18] As enacted, the provisions of Part II are a compromise, or a series of compromises. All interests are represented — nothing is left out. But nothing is really decided.[19]

The courts have now had some eight years to develop a jurisprudence on the RMA. The importance of Part II and its place in the legislative scheme were discussed by Barker J in *Falkner* v *Gisborne District Council*:[20]

> The Long Title of the Act states: "An Act to restate and reform the law relating to the use of land, air and water."
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> Part II of the Act sets out its governing purpose and principles which infuse its decision-making and policy formulating procedures. Of these, the purpose (being the promotion of sustainable management as defined in s 5) is paramount. At each operational level, policy statements, plans, and rules promulgated under the Act are linked back to the core provisions of Part II. Moreover, Part II must be considered in determining any resource consent application (s 104 as amended). This represents a relatively new form of statutory organisation; the Act is structured around a fundamental purpose and various principles which function as substantive guidance to decision-makers at a localised level. The Act itself is perhaps not so much a code as such (in that it merely sets certain standards and delegates much to the local authorities); it does, however, represent an integrated and holistic regime of environmental management . . ..
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> The Act prescribes a comprehensive, interrelated system of rules, plans, policy statements and procedures, all guided by the touchstone of sustainable management of resources.

No doubt Part II does "infuse [the] decision-making and policy formulating procedures".[21] But the suggestion that its provisions supply "substantive guidance" is, with respect, optimistic.

As early as 4 November 1993 in *New Zealand Rail Ltd* v *Marlborough District Council*, Greig J put forward an approach to Part II that has since been accepted in many cases:[22]

> This Part of the Act expresses in ordinary words of wide meaning the overall purpose and principles of the Act. It is not, I think, a part of the Act which should be subjected to strict rules and principles of statutory construction which aim to

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18 (1991) 516 NZPD 3019. The Hon. Peter Dunne, an Opposition member, said " . . . there was a great deal of debate in the select committee [on the Bill] about the shape and intent of clauses 4, 5 and 6 [the purpose and associated provisions], and there was, I think, a general agreement of the end that the kind of amendment put forward [by the Government] accommodated the position generally but did not take account of some of the Opposition's specific concerns" - ibid, 3022.

19 See the comments of Buhrs and Bartlett, supra 674.

20 [1995] NZRMA 462, 477, citation omitted.

21 Part II or the purpose of the Act are repeatedly mentioned in the legislation: see RMA, ss 32, 45, 56, 59, 63, 72, 104, 119, 147, 149, 171, 174(4) and 192.

22 [1994] NZRMA 70, 86; see also *Stark* v *Auckland Regional Council* [1994] NZRMA 337, 340 (HC), *Marlborough District Council* v *Southern Ocean Seafoods Ltd* [1995] NZRMA 220, 227 (EC), *Mangakahia Maori Komiti* v *Northland Regional Council* [1995] NZRMA 193, 214 (EC), *North Shore City Council* v *Auckland Regional Council* [1997] NZRMA 59, 93 (EC) and *Green and McCahill Properties Ltd* v *Auckland Regional Council* [1997] NZRMA 519, 526-527 (HC).

> extract a precise and unique meaning from the words used. There is a deliberate openness about the language, its meanings and its connotations which I think is intended to allow the application of policy in a general and broad way.

These comments were made in response to submissions that sought to limit opportunities for coastal development by argument from section 5 and section 6(a), which promotes (*inter alia*) preservation of the natural character of the coastal environment. Greig J's remarks are, with respect, an eminently sensible judicial response to provisions such as those of Part II. But the fact that these provisions "allow the application of policy in a general and broad way" does not much assist in reaching specific, defensible decisions about specific resources in a given context, indeed the multiplicity of provisions acts to inhibit that process. And, his Honour's sentiments notwithstanding, the openness of the language of Part II is the very feature that has allowed others — before and after the *NZ Rail* decision — to argue for precise and unique meanings according to the predilections of the proponent. This feature tends to entrench dispute rather than to promote dispute resolution.

The legislation is much given to definition. There are over a hundred definitions of terms and expressions in section 2 alone. And yet several basic terms, fundamental to the effect and operation of Part II, are not defined or elaborated, such as the expression "life-supporting capacity" that appears in section 5(2)(b). Section 5(2)(c) refers to "adverse effects": "effect" is defined in section 3(d) as including cumulative effects arising over time or in combination with other effects. But the idea and significance of cumulative effects is not otherwise elaborated.[23] Section 5 goes to managing resources and the thrust of the definition is that this should be done in an integrated way. Sections 30 and 31 enjoin upon local authorities the "integrated management" of resources, but this "key theme of the . . . legislation"[24] is not defined.

The Court of Appeal touched on Part II in *McKnight* v *NZ Biogas Industries Ltd*,[25] a prosecution case. The judgment refers to ". . . the broad and carefully drawn purpose and principles in Part II of the . . . Act".[26] There is no doubt that these provisions are broad. And given the effort that went into their expression[27] they can fairly be described as carefully drawn. But that does not make the provisions either individually or collectively informative or helpful: rather, they are carefully indeterminate. This can be demonstrated by almost any of the provisions of sections 5-8. But experience has now revealed that some provisions are more difficult than others: these will now be considered.

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23 See Frieder, supra n 10, 53.

24 Randerson, "Exercise of Discretionary Powers Under the Resource Management Act 1991" [1991] NZ Recent Law Rev 444, 456. See also David Williams QC, "The Resource Management Act and the problem of legislative indeterminacy" (1995) 1 BRMB 165, 168.

25 [1994] 2 NZLR 664.

26 Ibid, 672.

27 See the text and citations supra 675.

(a) S 5 — "Sustainable Management"

The meaning of this expression has been much disputed, because it is innately disputable. One commentator has said that "at the top of the list of *undefined* [sic] terms is the very purpose — sustainable management":[28] and yet earlier in her paper the author cites the statement of meaning given in section 5(2).[29] Contemplating that "judicial notice is [sometimes] taken of Hansard", the Minister for the Environment, the Hon Simon Upton said he would " . . . like to take the trouble to make a carefully considered assessment of the intention of Parliament on this occasion",[30] namely the third reading of the Bill in July 1991. He noted that "Clause 4 [the sustainable management provision] enables people and communities to provide for their social, economic and cultural well-being", but he went on to claim that "Clause 4 sets out the biophysical bottom line".[31] Shortly afterwards there appeared the first major analysis of the legislation by Professor D E Fisher.[32] Professor Fisher identified two main elements in s 5(2), which he called respectively "the management function" and "the ecological function".[33] The two functions are, as Fisher noted, joined by the word "while". He said:[34]

> The critical question for the meaning and application of the definition of "sustainable management" is the meaning of the word "while" which links the first stated management function and the second stated ecological function.

But the word "while" is ambiguous. It could portend that any management of resources for human purposes must meet relevant ecological aspirations; or it could signify that human and ecological needs were to be balanced and reconciled — with neither element being dominant. As Fisher remarked, "This issue goes to the very heart of the policy direction of the legislation".[35] But Fisher was not able to resolve the ambiguity: he thought that the grammatically "correct" meaning of "while" favoured its being a "subordinating conjunction" (giving the ecological function "a primary role") but that the legislative history supported treating the word as a "coordinating conjunction", a simple connector of the management and ecological functions.[36] Fisher remarked that, "The fundamental direction of the RMA 1991 . . . depends to a large extent upon the meaning of one particular word: a word not in any way dealing with the actual substance of natural and physical resources."[37] But the ambiguity that he identified in the statement of the RMA's purpose persists. Various other commentators have

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28 Frieder, supra n 10, 53, emphasis added.
29 Ibid, 16. The text of s 5(2) will be found in the Appendix.
30 (1991) 516 NZPD 3019.
31 Idem.
32 "The Resource Management Legislation of 1991: a Juridical Analysis of Its Objectives" in *Resource Management* (1991-); see also Fisher, "Clarity in a Little 'While'" *Terra Nova* (November 1991) 50.
33 Ibid, 11.
34 Ibid, 12.
35 Ibid, 13.
36 Idem.
37 Idem.

ventured their thoughts on the question.[38] But the courts, who for years have had the power to decide the issue, have not. It is as though Fisher so illuminated the difficulty with this key provision that he discouraged attempts to abate the glare: the problem has been avoided or has been subsumed into slightly wider arguments about essentially the same issue.

There have now been several broader comments on the meaning and effect of section 5(2). Associate Professor K A Palmer touched on this section in his 1991 analysis of the new legislation. He said:[39]

> The inevitable complexity of the sustainable management definition is likely to require numerous judicial interpretations, mostly related to particular facts. The nature of the concept almost defies any simplification of the standard or objectives which have been enacted.

Janet McLean was critical of section 5(2) in her comment on the 1991 legislation. She said:[40]

> While seeming to appeal to a high minded objective of sustainability, Parliament has avoided setting priorities in situations short of environmental crisis. [Parliament] can blame bad decisions on local government or the [Environment Court].
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> . . . .
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> In the end section 5 offers too many choices without further guidance. If it tells us little about sustainability, it tells us less about "management".

B V Harris undertook an exhaustive survey of "Sustainable Management as an Express Purpose of Environmental Legislation: the New Zealand Attempt". These were his primary conclusions about section 5:[41]

> The attempt of the New Zealand parliament to place the principle of sustainability at the heart of environmental rule-making and decision-making is commendable. This article has endeavoured to explain and assess that attempt as manifest in s 5 of the Resource Management Act 1991. Regrettably, the principle has proved difficult to transform into workable legislative reality. The shortcomings of the statutory attempt have been exposed: the baffling complexity of s 5; the loosely guided discretion left with rule-makers and decision-makers, and the problem of weighing diverse competing interests where it is difficult to attribute to them comparative worth on a common value scale. Parliament has been criticised for

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38 Milligan, "Pondering the 'While'" *Terra Nova* (May 1992) 50; Harris, supra n 18, 60-61; Pardy, "Sustainability: an Ecological Definition for the Resource Management Act 1991" (1993) 15 NZULR 351; Kerkin, "Sustainability and the Resource Management Act 1991" (1999) 7 Auck U L Rev 290, 298. See also Milligan's later thoughts on s 5(2) in "Equity and the Resource Management Act: A Reflection on Rhetoric and Realities", Proceedings of the Seventh Annual conference of the Resource Management Law Association (30 September - 3 October 1999).

39 Planning and Local Government [1991] NZ Recent L Rev 402, 403.

40 Supra n 3, 548-549.

41 Supra n 17, 73; and see Harris, "The Law Making Power of the Judiciary", Joseph (ed), *Essays on the Constitution* (1995) 265, 269, 273.

> leaving s 5 indeterminate, and therefore abdicating its law-making responsibilities in favour of the courts.

Section 5 has supplied fertile ground for pleaders. The Hon Simon Upton, Minister for the Environment from 1990-1993 and 1996-1999, and Kerry Grundy engaged in a spirited dialogue. Each adopted a radically different view of the extent of section 5. The essential difference between the two was in the extent to which socio-economic and cultural issues are relevant to paragraphs (a), (b) and (c) of section 5(2) and the influence of these provisions on the allocation of resources. Grundy's conclusion was that " . . . the legislative wording in general and the concept of sustainable management in particular . . . requires increased intervention [in resource allocation] and more comprehensive planning".[42] In response, the Minister observed that he was "perhaps uniquely aware of what was intended . . . because the drafting of s 5 is largely mine", and put it that the effect of section 5 is " . . . that whatever people and communities conceive their well-being to be they shouldn't pursue it in a way that prejudices the matters set out in paras (a), (b) and (c) of subsection (2)."[43] The Minister had earlier asserted that the RMA " . . . is [not] about balancing socio-economic aspirations and environmental outcomes. The Act is not designed as a social planning statute",[44] and further that "Section 5 isn't about providing for economic activity".[45] The language of section 5(2) is such that persuasive cases can be put for both points of view: the language resolves nothing. But it does supply the foundation and reason for the dispute — this language that passes for the language of the law. The debate is reminiscent of the proposition — my tower of jelly is firmer than your tower of jelly.

Sir Geoffrey Palmer was Minister for the Environment during the formative stages of the legislation. He is sometimes referred to as the architect of the RMA.[46] In an essay published in 1995 Sir Geoffrey posed the question "What Does Sustainable Management Mean?" and went on to comment:[47]

> The issue of central importance in New Zealand now is how the statutory tests of sustainability will work out in practice . . .. [T]he absence of authoritative judicial interpretations from the highest courts means there is more than three years after the Act came into force, uncertainty. By 1995 it was still difficult to discern what difference the paradigm shift in policy will make.

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42 Grundy, "In search of a logic: s 5 of the Resource Management Act" [1995] NZLJ 40, 44.

43 Correspondence [1995] NZLJ 124; see also Grundy's response [1995] NZLJ 125.

44 "Section 5: Sustainable Management of Natural and Physical Resources", address to the Resource Management Law Association (7 October 1994) 2, published by the Ministry for the Environment (1994).

45 Ibid, 6. See also Grundy, "Rural Land Use and the RMA" *Planning Quarterly* (December 1995) 24 and Upton's response "In Search of the Truth" *Planning Quarterly* (March 1996) 2. And see the review of the debate and discussion of the meaning of s 5(2) in Pardy, "Planning for Serfdom: Resource Management and the Rule of Law" [1997] NZLJ 69.

46 See, eg, Sonja Davies speaking during the third reading debate on the Bill — (1991) 516 NZPD 3035.

47 "The Making of the Resource Management Act", *Environment — the International Challenge* (1995) 145, 169.

Earlier Sir Geoffrey had worried that some judges of the Environment Court had "seriously lost the plot".[48] Sad to relate, it remains true that there is little in the way of authoritative judicial interpretation of section 5. Smith conducted an exhaustive review of the cases — reported and unreported — decided in all courts from 1991-1997.[49] His conclusion on the courts' approach to section 5 was this:[50]

> The dominant feature of the cases considering s 5 is the inconsistency of reasoning. The non-specific language of s 5 provides an opportunity for flexibility in decision making, but the danger is that the complexity of the language will result in inconsistent and uncertain decisions. The evidence to date suggests this is occurring.

Sometimes the Environment Court has adopted an expression of the effect of section 5(2) in which the environmental aspects have dominated. Thus in *McIntyre* v *Christchurch City Council*, a case in which consent was sought for a cell phone facility in suburban Christchurch, the Court remarked that "The objective of sustainable management . . . is subject to the achievement of the matters described in paras (a), (b) and (c)".[51] But the Court has now tended to the rounder approach as put in *North Shore City Council* v *Auckland Regional Council*:[52]

> Application of s 5 . . . involves consideration of both main elements of s 5. The method calls for consideration of the aspects in which a proposal would represent management 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 well-being, health and safety. It also requires consideration of the respects in which it would or would not meet the goals described in paras (a), (b) and (c).
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> The method of applying s 5 then involves an overall broad judgment of whether a proposal would promote the sustainable management of natural and physical resources. That recognises that the Act has a single purpose . . .. Such a judgment allows for comparison of conflicting considerations and the scale or degree of them, and their relative significance or proportion in the final outcome.

Sometimes the Environment Court has acknowledged the conflict within section 5(2), as in *Fletcher Challenge Energy Taranaki Ltd* v *Winter & Clark* where the Court remarked that " . . . the meaning given to sustainable management in

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48 Ibid, 146, referring to some comments of his Hon Judge W J M Treadwell.

49 Smith, "The Resource Management Act 1991 — 'A Biophysical Bottom Line' vs 'A More Liberal Regime'; A Dichotomy?" (1997) 6 Canta L Rev 499.

50 Ibid, 521.

51 [1996] NZRMA 289, 319; see also eg *Trio Holdings* v *Marlborough District Council* [1997] NZRMA 97, 112.

52 [1997] NZRMA 59, 94; on appeal Salmon J appeared to approve the Environment Court's approach — *Green and McCahill Properties Ltd* v *Auckland Regional Council* [1997] NZRMA 519, 527. See also *Royal Forest and Bird Protection Society of New Zealand Inc* v *Manawatu-Wanganui Regional Council* [1996] NZRMA 241, 269; *Caltex New Zealand Ltd* v *Auckland City Council* (1997) 3 ELRNZ 297, 304; *Shirley Primary School* v *Telecom Mobile Communications Ltd* [1999] NZRMA 66, 99; *Judges Bay Residents Association* v *Auckland Regional Council* Decision A72/98.

the . . . Act contains interlocking goals which can sometimes be in conflict with one another".[53] But generally the Court seems to be content with the "broad overall judgment" formula of the *North Shore* case. The effect of this approach is to render the concept of sustainable management virtually meaningless outside the facts, circumstances and nuances of a particular case. "Sustainable management" becomes a sequence of single instances, all distinguishable. The legislature might almost as well have said that sustainable management means sugar and spice and all things nice. Had that been done then at least those attempting to deal with the definition would have known it was not to be taken seriously.

(b) S 6 — matters of national importance

Section 6 of the RMA is the successor of a provision originally introduced to the legislation in 1973.[54] Of that provision it was said:[55]

> This is an odd section. In the first place it is a strange mixture of exhortation and legal rule. Just what point there is in including in an Act of Parliament a declaration that certain matters are of national importance is hard to see. What legal force can such a pronouncement have?

The 1991 legislation has redoubled the confusion by combining the "national importance" provision with a stated and defined purpose, with "other matters" (section 7) and with the principles of the Treaty of Waitangi (section 8). There is now a modest body of jurisprudence on the respective status and effect of these provisions: it is generally held that sections 6-8 are accessory or subordinate to section 5, and that inter se they are ranked hierarchically (though of course each is to be given its due importance).[56] The Environment Court recently counselled against " . . . adopt[ing] an over-schematic approach to sections 5-8 which is not justified".[57] The Court pointed out:[58]

> Those sections do not deal with issues once and once only, but raise issues in different forms or more aptly in this context, from different perspectives, and in different combinations. In the end all aspects go into the evaluation as to whether any issue being considered achieves the purpose of the Act.

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53 [1999] NZRMA 1, 6.

54 The Town and Country Planning Amendment Act 1973, s 2, inserted a new s 2B called "matters of national importance" into the Town and Country Planning Act 1953; this was modified and embroidered in the Town and Country Planning Act 1977, s 3. The text of s 6 will be found in the Appendix.

55 Evans, "The Purpose of District Schemes" [1976] NZ Recent Law 136, 138.

56 This can be inferred from the language of the admonitions in ss 6, 7 and 8 respectively; and see *New Zealand Rail Ltd* v *Marlborough District Council* [1994] NZRMA 70, 85; *North Shore City Council* v *Auckland Regional Council* [1997] NZRMA 59, 67; *Mason-Riseborough* v *Matamata-Piako District Council* (1997) 4 ELRNZ 31, 45.

57 *Wakatipu Environmental Society Inc* v *Queenstown-Lakes District Council* Decision C 180/99 at 46.

58 Idem.

Clearly, nothing must be left out, stemming from section 6 or the other sections. And everything must be given due weight, though it is the resource manager or court that decides what is "due", not the legislation.

Section 6 contains several abstract and relative terms that enlarge the uncertainty in the concept "national importance" and in the process of managing at once "the use, development, and protection" of natural resources. Thus the section goes to "the natural character of the coastal environment" and the protection of it from "inappropriate" use; it goes to "outstanding natural features and landscapes" and the protection of "significant indigenous vegetation".[59] As a practical way of dealing with the matters put by the section the courts have concluded that the asserted imperatives are not absolute or inviolable.[60]

The section asserts five matters without prioritising them. As reported from the Select Committee on the Bill, the legislation contained a subclause in the national importance provision saying that "The priority and weight to be given to the principles . . . is a matter to be determined by the decision maker depending on the issue . . . and the nature of the decision required".[61] This subclause must have been thought superfluous for it was not in section 6 as enacted. The potential for conflict between the matters of national importance exists, as it did with kindred earlier provisions. The courts' solution to competing matters, each of national importance, has been to invoke a balancing exercise.[62] It was partly this feature that led a commentator to suggest of an earlier national importance provision that " . . . the purpose behind [the section] . . . is ill-suited to the provision of a body of rules applicable to particular facts and able to be argued meaningfully....".[63] The position is *a fortiori* with section 6 of the RMA.

(c) S 7 — Other Matters

This section contains a series of vague encouragements.[64] There is potential difficulty in "having particular regard" (as the section requires) to kaitiakitanga. A new definition of this term was substituted in 1997, providing that:[65]

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[59] The courts have conscientiously considered the meaning of each of these expressions - see eg *Browning* v *Marlborough District Council* Decision W 20/99 and *Pigeon Bay Aquaculture Ltd* v *Canterbury Regional Council* [1999] NZRMA 209, 231 ("natural character"); *New Zealand Rail Ltd* v *Marlborough District Council*, supra n 57, 85-86 ("inappropriate"); *Wakatipu Environmental Society Inc* v *Queenstown-Lakes District Council*, supra n 58, 48-52 ("natural" and "outstanding").

[60] *New Zealand Rail Ltd* v *Marlborough District Council*, supra n 57, 86; *Te Runanga o Taumarere* v *Northland Regional Council* [1996] NZRMA 77, 95; *Trio Holdings* v *Marlborough District Council*, supra n 51, 116.

[61] Resource Management Bill as reported from the Committee on the Bill, cl 5(3).

[62] *North Taranaki Environment Protection Society Inc* v *Governor-General* [1981] 2 NZLR 312, 316 (CA); *Environmental Defence Society Inc* v *Mangonui County Council* [1989] 3 NZLR 257, 260 (CA); *Te Runanga o Taumarere* v *Northland Regional Council*, supra n 60, 95.

[63] Shera, "Section Three of the Town and Country Planning Act 1977: Adjudicating the Non-Justiciable" (1987) 5 Auck U L Rev 440, 443.

[64] The text of this section will be found in the Appendix. The RMA, s 2, elaborates the section with definitions of "kaitiakitanga", "amenity values", "intrinsic values" and "environment" as well as "natural and physical resources".

[65] Resource Management Amendment Act 1997, s 2, substituting the original definition

> "Kaitiakitanga" means the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources; and includes the ethic of stewardship.

W M Karaitiana has offered this explanation of the new definition:[66]

> In this context kaitiakitaka refers to the act of applying the celestial and terrestrial curricula to guard the mauri (lifeforce) of the resource and the wairua (ordained spirit) of the relationship of the people with [the] resource as a creation from God.

By and large, the "other matters" have been relatively innocuous, seldom exercising strong influence on the overall evaluations of decision-makers. But they can assume greater significance where section 5 and 6 points are not raised.[67] The only one of the matters without an environmental flavour is section 7(b) - "the efficient use and development of natural and physical resources". But the effect of this provision is equivocal. The Environment Court considered section 7(b) in *Baker Boys Ltd* v *Christchurch City Council*,[68] a case concerning an application for consent to a supermarket, saying:[69]

> Perhaps a weak evidential presumption is raised by section 7(b) that market forces should be left to work, and that strengthens if section 5(2)(a) and (b), and section 6 matters are not an issue. . . . Of course if there is such a presumption it is rebuttable . . . .

The case does, though, illustrate a point made extra-judicially by his Hon Judge J R Jackson[70] — " . . . everything under the RMA has transaction costs: lawyers and planners fees being the most obvious, but they are by no means the only ones".

(d) S 8 — Treaty Principles

This section enjoins functionaries to "take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)". This short provision has been the source of great difficulty and confusion, and much litigation.[71] The phrase "principles of the Treaty" almost excites reverence, a worshipful attitude. And yet as

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in RMA s 2. The terms "tangata whenua" and "tikanga Maori", falling within the definition, are separately defined in RMA, s 2.

66 "Core Values and Water Resources" [1999] NZLJ 337, 340: the author employs the South Island Maori spelling of "kaitiakitanga". See also Hayes, "Defining Kaitiakitanga and the Resource Management Act 1991" (1998) 8 Auck U L Rev 893.

67 *Marlborough Ridge Ltd* v *Marlborough District Council* [1998] NZRMA 73, 85.

68 (1998) 4 ELRNZ 297.

69 Ibid, 319. The decision was appealed to the High Court — *Foodstuffs (South Island) Ltd* v *Christchurch City Council* (1999) 5 ELRNZ 308 — but s 7(b) was not discussed.

70 "Metamorphosis", paper for the New Zealand Planning Institute Conference (20 March 1998) 5, footnote omitted. His Honour chaired the Environment Court in the *Marlborough Ridge* (supra n 67) and *Baker Boys* (supra n 68) decisions.

71 The text of s 8 will be found in the Appendix. The Ministry for the Environment published its Working Paper 3, *Case Law on Consultation* in June 1995 (24 pp). By June

solemnly enacted in section 8 the phrase, while having an ineffable quality, is empty. As the Rt Hon Mike Moore, Labour member and sometime Prime Minister, observed in his valedictory statement to Parliament:[72]

> This Parliament has passed legislation . . . without really knowing what it means. I am not quite sure what "taking into regard the spirit of the Treaty of Waitangi" means, but let us do it anyway. We are painting by numbers. We have no clear picture and vision of where we are going. Therefore we are surrendering the rights and prerogative of Parliament. Because we do not know what it means, we expect a court or some commission to determine what it means.

The phrase "principles of the Treaty" is evocative, and yet the process of ascertaining Treaty principles has required invention and creation rather than the discovery of precepts that had been ascertained but had become lost. The Privy Council has said that " . . . the 'principles' are the underlying mutual obligations and responsibilities which the Treaty places on the parties".[73] As Mr Moore indicates, it is the courts that have filled the vacuum created by Parliament. It has been said that —[74]

> In attempting to create a body of concepts and doctrines to interpret [the] expression ["principles of the Treaty"] the Courts are really carrying out a kind of constitutional interpretation.

Prof J F Burrows remarks that " . . . provisions [such as section 8], imposing positive duties to have regard to and comply with the *principles* of the Treaty, require the Courts to give meaning and content to those principles. In other words the Courts have in a sense to interpret the Treaty".[75] The Parliamentary populism of section 8 and kindred provisions marks a breach of the fundamental understanding of our democratic society — that the people elect representatives to Parliament to make laws and allow the formation of a government that will appoint judges who administer the laws.

The doubts inherent in having the courts announce the content of Treaty principles are reinforced by their constant-blossoming quality. The Environment

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1999 it had published a second edition *Case Law on Consultation* (RMA Working Paper, 28 pp). Having devoted some 20 pages to litigation on whether s 8 imposes a duty of consultation (sometimes thought to be a Treaty principle) Beverley remarked: "Thus far lack of express provision has been a catalyst for the issue of consultation in the resource consent procedure. The absence of a clear directive has allowed the courts room to explore the application of section 8 in a specific context of the RMA": "The Incorporation of the Principles of the Treaty of Waitangi into the Resource Management Act 1991 - Section 8 and the Issue of Consultation" (1997) 1 NZJEL 125, 146. See also Beverley, "The Mechanisms for the Protection of Maori Interests Under Part II of the Resource Management Act 1991" (1998) 2 NZJEL 121.

72 (1999) 579 NZPD 18734, quoted (1999) 22 TCL 36 3.

73 *New Zealand Maori Council* v *Attorney-General* [1994] 1 NZLR 513, 517.

74 Boast et al, *Maori Land Law* (1999) 278.

75 *Statute Law in New Zealand* (2nd ed, 1999) 303; see also Harris, supra n 41, 268. For a further discussion of Treaty principles see Round, *Truth or Treaty?* (1998) 122 et seq.

Court remarked on this feature in *Mason-Riseborough* v *Matamata-Piako District Council*, saying:[76]

> Clearly the principles are not to be [found] in stone like the Ten Commandments. It is not possible to promulgate a comprehensive or complete set of Treaty principles. Indeed it is undesirable to attempt to promote a definitive or exclusive set of Treaty principles because the Treaty is a living and continuing document which calls to be interpreted and applied not simply as at 1840 but in a contemporary setting. Cooke P said of the Treaty — *"What matters is the spirit"*.

To this may be added the complication that commentators have now identified two views of tikanga Maori —[77] the "traditional view" and the "pragmatic (or informed) view".[78] To exemplify the latter view, the authors cite evidence given by Sir Tipene O'Regan, who spoke of —[79]

> . . . the dynamic and evolving character of traditional Maori values. . . . [I]t is the capacity for dynamic adaptation which is the particular genius of Maori culture and its associated values. . . . [W]e should follow the historical precept of our tupuna and permit our values to flourish in accordance with the changing environment and the expansion of human knowledge and capacity.

A potential for growth and development is an asset to any culture and any community. But section 8 occupies a central place in a complex and interconnected legislative scheme. How are the "underlying mutual objectives and responsibilities" of which the Privy Council spoke[80] to be revealed with the assurance apt in a law for all communities if the values on which the principles are based are, as Sir Tipene says, "dynamic and evolving"? Section 8 yields, not law, but another occasion for ongoing dispute and litigation. All communities bear the costs of this.

3 Central Government Omissions

It was always contemplated that the RMA would supply a framework within which more detailed provisions would be developed.[81] Central and local government were each to develop the detail. At the initiative of central government the Act allows the development of national environmental standards (a special sort of statutory regulation)[82] and national policy statements,[83] and it

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76 (1997) 4 ELRNZ 31, 47, citing Cooke P in *New Zealand Maori Council* v *Attorney-General* [1987] 1 NZLR 641, 663 (Environment Court's emphasis).

77 "Tikanga Maori" is defined in RMA, s 2 as meaning "Maori customary values and practices".

78 Gould and Daya-Winterbottom, "Blood, Sweat, and Fears" [1999] NZLJ 342, 343.

79 Idem, citing evidence that led to consent orders made by the Environment Court in *Te Runanganui O Taranaki Whanui Ki Te Upoko O Te Ika A Maui Inc* v *Wellington Regional Council* Decision W48/98, noted (1999) 3 BRMB 10.

80 Supra, n 73.

81 See the Explanatory Note to the Resource Management Bill, ii.

82 RMA, ss 43 and 44.

83 RMA, ss 45-55.

mandates the creation of a New Zealand coastal policy statement.[84] Janet McLean said in 1992, "If central government is to delegate these broad powers [of management] it should take responsibility for generating relevant information. That should be a priority for regulations and national policy statements".[85] There have been numerous calls for national standards and policy statements,[86] but Government has chosen to ignore or reject them. Rather than create legislative standards, Government's policy has been to develop guidelines on some topics.[87] Central government has seriously hampered the work of others attempting to implement the legislation. Susan Rhodes, an experienced legal practitioner, has remarked:[88]

> The lack of central government direction on significant environmental issues is a tremendous frustration to applicants [for resource consent] and submitters, as well as to local authorities, who have to litigate standards on individual applications on a local basis.

The inaction of central government has made implementation of the 1991 legislation the more fraught and its results the more uncertain. The Government's course may in part be explicable by the procedural requirements attending the development of standards and policy statements. But Government has long known of this problem,[89] and has only recently begun steps that may overcome it.[90] Meantime a significant vacuum remains.

4 Local Government Functions and Plans

Local authorities are prime agents in implementing the legislation, along with central government and the Environment Court. And yet, "The RMA does not

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84 RMA, ss 56-58. A statement was promulgated on 5 May 1994.

85 Supra n 3, 552-553.

86 See eg OECD, *Environmental Performance Reviews, New Zealand* (1996) 110; Somerville, "The Resource Management Act 1991 — an Introductory Overview" in *Resource Management* (1991-) 13. The Hon Simon Upton, Minister for the Environment, reported that the legislative review yielding the Amendment Bill introduced on 13 July 1999 had generated 18 submissions calling for national policy statements on various topics — "National Direction or National Interference", address to Resource Management Law Association (1 October 1999) 2.

87 See eg *Air Quality — Compliance Monitoring and Emission Testing of Discharges to Air* (Ministry for the Environment, 1998), *Water Control Guidelines Nos 1 and 2* (1992, 1994) and the Minister's address, supra n 86. It was announced on 20 January 1999 that a national policy statement on biodiversity would be developed to explain s 6(c): the Minister acknowledged that " . . . Central government has provided virtually no guidance about how the objective of section 6 is to be advanced . . ." — *EnviroNet 25* (26 January 1999) 1.

88 "Proposals for Amendments to the Resource Management Act — An Applicant's/Submitter's Concerns" in *Resource Management Act Amendments: the more it changes, the more it stays the same?* (Auckland District Law Society, 27 April 1999) 31.

89 The then Minister for the Environment, the Hon Rob Storey, described the national policy statement mechanism as " . . . too cumbersome, costly and slow . . ." — *Environment Update* (Ministry for the Environment, April 1993).

90 See the 1999 Resource Management Amendment Bill, cls 17-21.

clearly define the roles and responsibilities of regional and territorial local authorities".[91] Sections 30 and 31 of the Act and associated provisions do make an earnest attempt at this definition of roles, but the provisions have not proved successful. The first two cases involving the legislation to reach the Court of Appeal were both concerned with the scope of local authorities' respective powers. One case concerned the extent of a regional council's powers by a regional policy statement (a sort of plan) to restrict urban development. Cooke P, delivering the Court's judgment, was moved to comment:[92]

> Notable though the Resource Management Act is for the aspirations and principles embodied in it, their very generality seems to have led in the drafting to an accumulation of words verging in places on turgidity. But... it has become possible to pass through the thicket without much difficulty.

The case turned on the differentiation of "policies", "methods" and "rules".[93] The other case dealt with the respective powers of local authorities to control activities on land. Section 30(1)(c) makes regional councils responsible for "the use of land" for some purposes; section 31(b) makes territorial authorities responsible for controlling "any . . . effects of the use . . . of land". The Court observed:[94]

> . . . [I]t is difficult to see how a territorial authority could control the effects of use without regulating the use itself. We think . . . what is limited is not so much what can be controlled, but the purpose for which it can be controlled. The control of the effects of land use must involve some degree of control of the use itself.

The Court went on to declare that for some purposes the rule-making powers of regional and territorial authorities overlapped.[95] The Resource Management Amendment Bill would substitute new provisions for sections 30 and 31, intended to clarify the functions and reduce the overlap.[96]

The RMA also makes a purposeful effort to provide for the plans of local authorities.[97] The 1953 legislation provided that district schemes were to adopt the form prescribed save as required to express clearly and accurately the scheme's requirements.[98] This restriction was abandoned by the 1977 Act, but its requirements for district schemes were informative and still quite

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91 Frieder, supra n 10, 53.

92 *Auckland Regional Council* v *North Shore City Council* [1995] 3 NZLR 18, 20.

93 RMA, ss 59, 68 and 76. The decision of the Environment Court is *Application by North Shore City Council* [1994] NZRMA 74.

94 *Canterbury Regional Council* v *Banks Peninsula District Council* [1995] 3 NZLR 189, 194.

95 Ibid, 195.

96 Cl 11 and Explanatory Note, ii. Rhodes, supra n 88, 31 suggests the present provisions are confusing.

97 Sections 59-62 (regional policy statements), ss 63-70 (regional and regional coastal plans), ss 72-77 (district plans).

98 Town and Country Planning Act 1953, ss 21(2) and 52(2)(f) and Town and Country Planning Regulations 1954, reg 16(2).

prescriptive.[99] By the RMA, local authorities are given greater discretion: their policy statements and plans are each unique.[100] The Environment Court also has a wide discretion to deal with plans: for the Court "the broader and ultimate issue" is whether " . . . on balance, implementing the proposal would more fully serve the statutory purpose than cancelling it."[101] The Ministry for the Environment has considered developing a model district plan, but it dropped the idea because it " . . . soon proved impossible — there were too many different factors to be taken into account".[102] The legislation therefore allows planners full scope to assert the rival philosophies suggested by A K Grant: " 'everything that is not permitted is forbidden'; and 'everything that is not forbidden is permitted' ".[103] The courts and the public must then deal with the often uncertain results.

5 Compensation and Heritage

The perceived impositions of the planning legislation have always been a sensitive point. Older legislation dealt with the matter by a broad award of "full compensation", followed by qualifications that rendered the award largely illusory.[104] Section 85 of the RMA reverses the sequence by first denying that the legislation takes or injures interests in land, and then offering a form of amelioration. The relief takes the form of cancellation or change of the provision that impinges, not monetary compensation. To gain this relief, a person with an interest in land must demonstrate that the plan provision "renders [the] land incapable of reasonable use, and places an unfair and unreasonable burden" on the applicant. The vagueness of this language seems to have deterred claims to the relief, for there have been few attempts to invoke the provision. There are but two reported decisions directly on section 85, both arising from the same application. In the first,[105] the Environment Court developed a procedure allowing direct application to the Court for cancellation of the provision, the Court perceiving that there was a gap in the legislation on this point. The second decision[106] dealt with the substantive application. Here the Court concluded that section 85(3) creates two tests ("incapable of reasonable use" and "unfair and unreasonable burden") and developed the second with a list of seven considerations.[107] These decisions will inform and assist future applicants, but

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99 Town and Country Planning Act 1977, s 36.

100 They are often also long and complex: the proposed Christchurch district plan is in several volumes that fit into a sturdy container. In weight and appearance the result is not unlike a concrete block.

101 *Countdown Properties (Northland) Ltd* v *Dunedin City Council* [1994] NZRMA 145, 179 (HC), cited in *Wakatipu Environmental Soc Inc* v *Queenstown-Lakes District Council* Decision C180/99, 31.

102 *Environmental Update* (November/December 1999) 6.

103 *Lawtalk 500* (22 June 1998) 10.

104 Town-planning Act 1926, s 29; Town and Country Planning Act 1953, s 44; Town and Country Planning Act 1977, s 126. And see the comments of Barker J in *Falkner* v *Gisborne District Council* [1995] NZRMA 462, 479 — "The compensation provisions in the predecessors of the [RMA] . . . were notoriously opaque".

105 *Application by Steven* (1997) 4 ELRNZ 64.

106 *Steven* v *Christchurch City Council* [1998] NZRMA 289.

107 Ibid, 299.

the language of the "tests" is no less uninstructive. Section 85 has excited complaints. A report commissioned by the Minister for the Environment said: "The present approach is both inefficient and inequitable".[108] The compensation provisions are to be further debated.[109]

The RMA also contains a set of sections designed for the protection of heritage places by which "heritage orders" may be made.[110] An order may be made if (*inter alia*) "the place merits protection" and the order is "reasonably necessary" to protect the place.[111] These provisions have also seldom been invoked. This may be because the open criteria discourage applications, or because successful applicants may be invited to acquire the subject property and pay compensation[112] — a result that may be avoided by protection measures contained within a district plan. This feature and the attitude of the Historic Places Trust seems to explain why few heritage orders are sought or made.[113]

6 Resource Consents — Processing and Decisions

(a) Consent Processing

Part VI of the RMA contains a code for dealing with resource consents that is at once detailed and replete with discretions.[114] This is to be expected in a regime intended to deliver bespoke answers for individual cases. But the sheer uncertainty of some discretions has created needless difficulty. Sections 93 and 94, dealing with the notification of applications for consent, have been the main source of trouble.

It was claimed that a "main feature of the [1991 reform was] that individuals and the community may have a greater and more direct say in resource management",[115] but this claim has now been shown to be hollow. Unlike the former planning legislation,[116] the RMA does not restrict participation to those with standing. But under the RMA, "Notification has replaced standing as the gateway to public participation".[117] If an application is not notified, no third party participation is possible at the primary level. And non-notification has virtually become the norm: in the 1997/98 year ninety-five percent of applications were non-notified.[118] Decisions on notification turn on whether there are "adversely affected" persons, whether the adverse effects are "minor", whether

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[108] McShane, *Land Use Control Under the Resource Management Act* (April 1998) 40. See also Ryan, "Should the RMA Include a Takings Regime" (1998) 2 NZJEL 63.

[109] Ministry for the Environment, *Analysis of Submissions on Proposals for Amendment to the Resource Management Act* (March 1999) 323.

[110] Sections 187-198.

[111] Section 191(1).

[112] Section 198.

[113] *Catholic Archdiocese of Wellington* v *Friends of Mount Street Cemetery Inc* Decision C125/99. See the evidence of the Trust's heritage conservation manager cited at 11-13.

[114] See ss 90-94, 99, 100, 102, 103, 106-108, 116, 117, 127 and 128 et al. And see Randerson, supra n 24, 459-461.

[115] Explanatory Note to the Resource Management Bill, iii. See also *Report of the Review Group on the Resource Management Bill* (February 1991) 102-103.

[116] Town and Country Planning Act 1977, ss 2(3), 45, 66 and 118.

[117] Birdsong, supra n 3, 51.

[118] Ministry for the Environment, *Annual Survey of Local Authorities 1997/98* (June 1999) 8.

it is "unreasonable" to obtain the approval of affected persons, and on whether the consent authority "considers special circumstances exist".[119] These provisions have been applied by local authorities to yield the result mentioned, something they have been able to do the more vigorously because their decisions are not open to appeal.[120] This situation has led to numerous applications to the High Court for judicial review, seeking to overturn decisions not to notify.[121] Notification has been an unsatisfactory feature of the legislation — again because of the vacuity of the criteria for it.[122]

(b) Consent Decisions

Any system of resource management that is not totally rigid will admit of exceptions. The consents regime of the RMA operates to license the exceptions. By nature these are uncertain, but the Act reduces the discretion in a number of ways. Through rules in their plans, local authorities may create classes of activity carrying different statutory incidents — permitted, controlled, discretionary, restricted discretionary, non-complying and prohibited activities.[123] No consent is required for a permitted activity, and none is possible for a prohibited activity.[124] Controlled activities automatically gain consent, but it may be "granted on any condition that the consent authority considers appropriate".[125] Applications for consent to restricted discretionary activities may only be refused for matters specified in plans, but with that limit the authority "may grant or refuse the consent".[126] Discretionary activities must be "provided for" in plans, and may have "standards and terms specified", and there are alternative threshold criteria for non-complying activities, but with those limits once again the authority may "grant or refuse consent" and if granting consent may impose appropriate conditions.[127]

If an application is appealed to the Environment Court third parties may claim to participate under RMA, s 274.

119 Ss 94(1) - (5).

120 *Aro Valley Community Council* v *Wellington City Council* (1992) 1 NZRMA 221 and 260, noted with apparent approval in *Quarantine Waste (NZ) Ltd* v *Waste Resources Ltd* [1994] NZRMA 529, 534 (HC) and *Elderslie Park Ltd* v *Timaru District Council* [1995] NZRMA 433, 442 (HC).

121 See eg the *Quarantine* and *Elderslie* cases, supra n 120, and *Murray* v *Whakatane District Council* [1999] 3 NZLR 276 (HC, CA); *Aley* v *North Shore City Council* [1999] 1 NZLR 365 (HC); *Bayley* v *Manukau City Council* [1998] NZRMA 513 (CA); *Lowe* v *Dunedin City Council* [1999] NZRMA 280 (HC).

122 The Resource Management Amendment Bill, cl 37, would substitute new provisions for ss 93 and 94, but preserve some of the language — "minor", "adversely affected", "unreasonable", "special circumstances". Kirkpatrick suggests that a "Code of National Standards" is needed to deal with notification — "Councils' General Responses to the Minister for the Environment's Proposals for Amendment to the Resource Management Act (November 1998)" in *Resource Management Act Amendments: the more it changes, the more it stays the same?* (Auckland District Law Society, 27 April 1999) 21.

123 See the definitions of these activities in RMA, s 2, and sections 68, 76 and 105.

124 See the definitions of these activities and s 105(2)(c).

125 RMA, ss 105(1)(a) and 108(1).

126 RMA, ss 105(1)(b) and 105(3A).

127 RMA, s 2 — "Discretionary activity", and ss 105(1)(b), 105(1)(c), 105(2A) and 108.

Section 104(1) makes consideration of applications "Subject to Part II": authorities are to exercise their discretionary judgment to serve sections 5-8.[128] Section 104(1) goes on to list nine matters to which, where relevant or reasonably necessary to decide an application, the authority is to have regard. The complex final process of regarding and deciding called for by sections 104 and 105 was thus described in *Baker Boys Ltd* v *Christchurch City Council*:[129]

> As for our discretion under section 105(1)(c) we have to make an overall judgment to achieve the single purpose of the Act. This is arrived at by:
> - taking into account all the relevant matters identified under section 104
> - avoiding consideration of any irrelevant matters such as those identified in section 104(6) and 104(8)
> - giving different weight to the matters identified under section 104 depending on the Court's opinion as to how they are affected by application of section 5(2)(a), (b) and (c) and sections 6-8 of the Act to the particular facts of the case, and then
> - in the light of the above
> *"allowing for comparison of conflicting considerations, the scale or degree of them, and their relative significance or proportion in the final outcome."*

Applications and their portents will vary in complexity and significance. But none will be free of ramifications given the admonition on authorities to regard "actual and potential effects on the environment" and the wide definitions of "effect" and "environment".[130] Speaking extra-judicially of the decision making process, his Hon Judge W J M Treadwell has suggested that—[131]

> The decision-maker can [by apt choice of Part II elements] reach a decision based on community values presently existing, and then find a section of the Act or a part of a regional or district plan which supports that subjective judgment.

Within the statutory elements practically any decision on a resource consent application will be defensible — though no doubt some or one will be more defensible that others. The consents legislation seems to bear out the claim "... that resource consents are decided (even in the Environment Court) through a mixture of art, science, justice and democracy".[132] And it is the openness of the legislation that partly explains the remarkable proportion of successful

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128 *Royal Forest and Bird Protection Society of New Zealand Inc* v *Manawatu-Wanganui Regional Council* [1996] NZRMA 241, 263. The text of ss 5-8 will be found in the Appendix.

129 (1998) 4 ELRNZ 297, 328-329 (footnotes omitted); the Court here omits the "jurisdictional hurdles" for non-complying activities earlier identified — ibid, 306-307. The combination of ss 104 and 105 was not discussed on appeal — *Foodstuffs (South Island) Ltd* v *Christchurch City Council* (1999) 5 ELRNZ 308 (HC). The Resource Management Amendment Bill, cl 41, substitutes a single section for ss 104 and 105.

130 RMA, ss 2 — "Environment", 3 and 104(1)(a).

131 "RMA Places Increased Pressure on Decision-Makers", address to NZPI conference, approved precis reproduced in *Planning Quarterly* (June 1994) 5.

132 Remarks of Tricia Devlin, Waikato planner, reported in *EnviroNet 25* (20 January 1999) 4.

applications. Eighty-two local authorities recently surveyed reported that ninety-nine percent of applications were granted.[133]

7 Conclusion

The RMA was conceived to be ground-breaking legislation. Its development cost some eight million dollars,[134] and high hopes attended its passage. But the implementation and functioning of the legislation have been troubled, and the original hopes have given way to a mix of reactions, including a measure of cynicism and disgruntlement.[135] The uncertainty of vague statement is at the root of the most serious difficulties experienced with the legislation — the vagueness innate in the Part II provisions and found in other major legislative features, including local authorities' powers and plans, the compensation and heritage provisions, and those on consent processing and decisions. Experience has yielded both disappointment and surprise.

The RMA creates a complex system for the resolution of environmental conflict. But by Part II, the Act is front-end loaded with a set of unquantifiable values at multiple, indiscriminate poles — present, future, environmental, economic, Maori, Pakeha. Part II is at once a source of bottomless justification and conflict: it makes the potential for conflict endemic to the other major features of the legislation — the creation and administration of various plans, and the consideration of applications for consent. The whole system acts to generate disputes — and the uncertainty attending disputation — instead of promoting dispute resolution by ordered, predictable laws and processes.[136] The aftermath of the 1991 reform reveals the antipodean truth of Charles Dickens' comment that — "The one great principle of the English law is, to make business for itself".[137] But this business is at a cost to society, and as the Environment Court has said — ". . . the costs imposed by the RMA and plans under it are themselves

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133 Ministry for the Environment, *Annual Survey of Local Authorities 1997/98* (June 1999) 9. It seems that only a quarter of the applications would have been for controlled activities for which consent must be given — ibid, 6. Of 659 applications received by the Queenstown-Lakes District Council during 1999 only two were refused — *Otago Daily Times* (25 January 2000).

134 ". . . an unprecedented sum for a law reform project in New Zealand" - Palmer, supra n 47, 153.

135 See Frieder, supra n 10, 65; Birdsong, supra n 3, 1; Miller, "Making the Act Work - a Search for the Holy Grail?" *Resource Management Journal* (July 1999) 11.

136 In the year to 30 June 1999 the Environment Court disposed of 1380 appeals/applications, 502 by formal decision, and had 2869 awaiting hearing - *Report of the Registrar of the Environment Court for the twelve months ended 30 June 1999* 5. Denise Church, Chief Executive, Ministry for the Environment has said - ". . . the RMA has spawned a new industry of consultants and we now have 'experts' where we never had them before" - "Councils, Commissioners and Courts: Who Should Make Resource Management Decisions", presentation to Resource Management Law Association Conference (1 October 1999) 10. Since its inception in 1992, the Resource Management Law Association has grown to a membership of 868 - *Resource Management Journal* (November 1999) 29. There were 450 registrants at the Association's 1999 conference - *R M Newsletter* (October 1999) 1.

137 *Bleak House* (1853) Ch 13; cited in *The Oxford Dictionary of Quotations* (revised 4th ed, 1996) 239:13.

'waste' — economists call them 'transaction costs' — and should be taken into account in assessing efficiency".[138] Good legislation is more than just efficient, but it calls for more specific, attainable goals than the vague and unreconciled hopes that drove the 1991 reform.

Appendix
Resource Management Act 1991

Part II
Purpose and Principles

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.

6. Matters of national importance—

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:

(a) The preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development:

(b) The protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:

(c) The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:

(d) The maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers:

(e) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.

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[138] *Marlborough Ridge Ltd* v *Marlborough District Council* [1998] NZRMA 73, 86.

7. Other matters—
In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—
(a) Kaitiakitanga:
(aa) The ethic of stewardship:
(b) The efficient use and development of natural and physical resources:
(c) The maintenance and enhancement of amenity values:
(d) Instrinsic values of ecosystems:
(e) Recognition and protection of the heritage values of sites, buildings, places, or areas:
(f) Maintenance and enhancement of the quality of the environment:
(g) Any finite characteristics of natural and physical resources:
(h) The protection of the habitat of trout and salmon.

8. Treaty of Waitangi—
In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

[Several expressions used in Part II are defined in section 2 of the Act.]