



Think Piece 2

Improving implementation of the Resource Management Act at the local level can produce better outcomes



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THINK PIECE 2

The first *Think Piece*, written for Simon Upton, then Minister for the Environment, was intended to stimulate reforms of the Resource Management Act itself. However, the MMP environment has made it virtually impossible for coalition governments from either side of the political spectrum to make significant changes to the legislation.

Hence *Think Piece Two* targets the implementation of the RMA at the local and regional level. Local people, community groups and councillors are more likely to achieve superior resource management through their own behaviour and actions than waiting for major reforms to the legislation itself.

The Act does not need reform to produce better outcomes. Local people and local politicians have the power to produce quality planning documents and quality resource management.

“The intention is not to seek agreement but to promote debate”

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Foreword

I am sure all New Zealanders are proud of our country's beautiful and unique environment. However, to maintain it we must have a growing, wealthy, and productive country. Our people must enjoy good health, education, and high standards of living.



Federated Farmers of New Zealand (Northland) Inc. and its rural information channel www.federatedfarmers.com are in the 'outcome' business. Rather than criticise and complain we prefer to analyse problems from a whole of community perspective and seek appropriate solutions. We also believe that local people should participate in local issues. The Labour led government has been pursuing policies of devolution and partnership with local communities, a policy direction we support. The idea behind *Think Piece 2* was to provide local and regional government some ideas on how to deliver superior resource management. This was the brief we gave Owen when we asked him to write this sequel to the original *Think Piece* commissioned by Simon Upton, then Minister for the Environment for the National Government, in 1996.

That original *Think Piece* was intended to stimulate a debate among practitioners and users of the Act which would lead to the introduction of reforms through Parliament. But for various reasons these reforms stalled. It now seems probable that the MMP environment will make it difficult for a Government of any persuasion to make substantial changes to the Act, although it may be, that over time, an accumulation of small changes could amount to major reform. Owen has suggested a few ideas that require central government involvement which would help local communities better undertake their RMA responsibilities. We recognise that even our small suggestions may require substantial time, commitment and negotiating skill from all those involved. However, we would like the government to seriously consider them.

We concluded that many groups and individuals outside the parliamentary environment can make better use of their time, knowledge and experience, by working to improve the quality of planning documents generated under the legislation, as it exists. After all, there is nothing in the Act that forces councils to produce planning documents that are so thick, verbose, and complex that ordinary citizens, and indeed the staff behind councils' own counters, cannot give consistent interpretations of what the planning documents say.

Too often the Act is a scapegoat for dreadful planning documents prepared by bureaucrats who have no sympathy with the purpose of the Act and who prepare planning documents more in keeping with the Town and Country Planning Act which the Resource Management Act was meant to replace.

This focus on local government also reflects our considerable success in improving the quality of planning documents within the Northern Region of the North Island. This has been achieved by making substantial submissions to Councils on the contents of their proposed Plans and Plan

Changes. Hearings Committees have frequently taken these submissions on board and we believe that the benefits are already apparent in the relevant District and Regional Plans.

We hope that this *Think Piece 2* will encourage other groups, individuals, councils and individual councillors to recognise that:

- (i) Local decision makers are largely in control of the contents of their Planning Documents, and;
- (ii) The Act provides local councils with a remarkable degree of freedom to prepare Planning Documents which will “enable people and communities to provide for their **own** social, economic and cultural well-being, and their health and safety”, while protecting the natural and physical environment.

This *Think Piece 2* is structured under general topic headings and the discussion focuses on how these matters can best be addressed by council through their planning documents. Changes to the legislation are suggested only where the case is clear and the amendment is straightforward or is already being considered by Parliament.

Finally, there is much debate about the Act and its implementation, and this debate covers a wide range of areas. However, we have asked Owen to raise some new issues and concerns, which have grown out of our experience in the field. In particular we have decided to focus on the costs of implementing and administering the RMA, if only because there is now widespread agreement that these costs are out of hand.

The most widespread complaint about the administration of the RMA is that it has generated massive compliance and transaction costs and that these compliance and transaction costs are both impeding economic growth and development and consuming resources which otherwise could be invested in superior environmental outcomes. After all, if a landowner who decides to voluntarily construct a massive wetland finds that his application costs exceed \$100,000, he also has to accept that he has \$100,000 fewer dollars to spend on constructing and planting out the wetland. It is difficult to see how such costs promote sustainable management - especially when they fall entirely on the applicant.

Hence this second *Think Piece* focuses on transaction costs because this is the most important issue facing the legislators, the councils, and the resource users, managers and land owners.

We have commissioned this report to provide some constructive ideas on how we all can move forward. We would hope that you the reader respond accordingly.

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1. INTRODUCTION

1.1 What we know about the resources and people of the world.

Many planning documents have been prepared by consultants and advisers who have been influenced by commentators predicting environmental catastrophe and the collapse of the world economies because of a scarcity of resources.

The Club of Rome and others predicted that well before the year 2000 all manner of resources would be depleted and that the combination of the population explosion and collapse of the world food supply would have led to mass starvation before the end of the twentieth century.

These beliefs were stimulated and encouraged by the “Oil Shock” of the early seventies which encouraged many to believe that this was an early indication that the world was running out of oil, and that similar shortages of metals such as copper, aluminium, silver, tin and gold would soon follow.

None of these disasters came to pass. Indeed there are now more known oil reserves than there were in 1972, while the prices, in constant dollars, of all natural resources have consistently fallen. Food production is higher than it has ever been. The problem facing the developed economies is obesity rather than starvation.

So called “natural resources” are not “natural” but are the products of human invention. Hence, as population increases, and more of those populations are educated, more trained minds are put to work inventing new technologies and hence new “natural resources”. Hence the supply of “natural resources” continues to increase. If certain raw materials become scarce then prices rise and societies come under pressure to find substitutes.

Sailing ships were replaced by steam – but not because the world ran out of wind.

1.2 The population explosion is over

Given the massive population increases of the mid-twentieth century it was easy to believe that population growth would eventually bury the planet in a sea of people.

This problem was always exaggerated. The world’s population can be accommodated on Stewart Island if each person has a square metre each, while standing shoulder to shoulder, they could all fit within the boundaries of Lake Taupo.

More importantly, the most significant change of the last years of the twentieth century has been the population **implosion** within the wealthy nations of the developed world. The fertility rate of many developed countries is now around half of that needed to

maintain a static population. This means that countries such as Italy, Spain and France will halve their present population by the end of the next generation – around the year 2040.

By about the middle of the twenty first century the total world population is likely to go into real decline for the first time in human history. There have been previous population collapses – such as those which struck Europe during the 12th and 13th centuries. But this contemporary collapse is the result of human choice. We now know that wealth is the most potent contraceptive, and the next most potent indicator is female literacy. Hence, as people get richer and more women are given access to education we can expect birth rates to fall and populations to follow.

Technological enhancement will continue if only because higher levels of education will compensate for the decline in the number of minds. Fortunately, brains can innovate faster than stomachs consume. Hence, the grounds for panic and extreme measures diminish by the day.

This does not mean that we can ignore the effect of our activities on the environment. In particular the biosphere remains vulnerable to degradation or collapse, from both human and natural activity. However, we also know that as people become wealthier their concern for the quality of the environment increases. Fortunately their increased wealth means that they have more discretionary resources to use to protect and enhance their environment.

1.3 The virtuous circle

For too long the environmental debate has been couched in terms of “development versus the environment”. The fact is that economic growth is not a threat to the quality of the environment but is necessary to achieving the higher quality of environment we all now aspire to.

Increased wealth is the best way to reduce population pressure. We are not about to be engulfed by a tidal wave of human bodies stacked one on top of the other. We are not about to run out of food or other resources.

If we set ourselves environmental targets and goals, and apply ourselves sensibly to putting to good use the increased wealth and knowledge which is accumulating day by day, we can achieve those targets and goals.

On the other hand if we want to guarantee that our environments will steadily degrade and that the soil, water and air will become more and more polluted and unusable then

all we need do is enforce programmes and regulations which destroy wealth and discourage innovation.

The last Kyoto conference in Johannesburg turned a corner when the attendees recognised that poverty is the great polluter and that we cannot clean up the world while millions of people have no access to clean water, sewage treatment, and continue to burn off forests just to grow their food.

When Julian Simon first proposed that the world's major resource is the human mind many found his premise difficult to accept. But surely the evidence is clear. Once there were only two of us. Now there are over 6,000 million of us. And yet this current generation of human beings is the best fed, longest lived and wealthiest and healthiest that the world has never known. If humans were a drain on resources then those first two people should have been 3000 million times richer than the average human today. They were not.

Of course we can force species into extinction, and have been doing so over the last 50,000 years – but we now appear to have done our worst. Extinction is also a part of the evolutionary process. Some ninety percent of species which have ever lived are now extinct. The world did not end. So the idea that a single extinction or group of extinctions can throw the world into chaos or catastrophe is not supported by the evidence.

As humans get richer we want to live longer and want to live that life in a more enjoyable environment. There is little point in living next to the beach if you cannot swim in the water and cannot eat the fish – either because they are diseased or have been fished out. There is not much point giving up smoking if you continue to breathe industrially polluted air. So we find ourselves in a virtuous circle. As we grow wealthier our environmental standards increase and we find we have the wealth to do something about improving the environment we live in. Often we find we do not have the knowledge, but once we have identified a problem, we are able to divert wealth into researching cost-effective solutions.

Hence economic growth and development go hand in hand with the enhancement of our natural and physical environment. We should certainly have learned by now that you cannot preserve an environment by locking it up and preventing all innovation and change.

The Heritage Parks of the UK, which essentially lock up the rural environment and close down the economy, are succeeding only in generating rural slums. The exceptions are where the landed gentry (either old or new) have the funds to maintain huge areas of countryside as a hobby, using their personal millions to do so.

New Zealand's local councils are learning a similar lesson. We cannot protect the amenities of our rural environment by preventing innovation and change. Federated Farmers of New Zealand (Northland) Inc. found there was often a conflict between the Annual Plans and the District Plans of the local Councils. The Annual Plans talked about promoting growth, employment and development. And yet the District Plan tended to regard all growth as something to be avoided – claiming that it would “detract from rural character” or “degrade rural amenity”.

District Plans would carry tables showing that almost all the census areas, bar one or two, were losing population but would describe those one or two centres of growth as being subject to “development pressure.” The rules were then written to try and to stamp out these one or two pockets of growth.

It may be that city folk driving through these rural areas enjoy their static quality, confident that they can return year after year and that nothing will have changed, but for the local residents the important amenities are their schools, hospitals and service centres. And unless there are people and young people in particular, then the schools close, and the hospitals close and the shops are boarded up.

The end result is rural decline.

1.4 Suggested remedies

1.4.1 Local level

Residents and landowners throughout New Zealand should read their District Plans and assess their attitude to growth and change. All too many planning documents require any innovative land use to be notified. The consequent cost of hearings and appeals and the final outcome of the application will depend on the objectives and policies of the plan.

If for example those objectives and policies focus, in a rural area, on, say, “preserving character” rather than allowing “sustainable management” as defined in the Act then don't be surprised if the population falls, and shops, hospitals and schools close down. Innovation brings new skills, new jobs and investment – but it also brings change. Many people instinctively resist any change – especially to the environments of their childhood. But if your planning documents are determined to preserve things as they are, then the entrepreneurs and change agents will leave for more dynamic pastures.

1.4.2 The Act

See later discussions on Section 32 and 7.

2. THE TOWN AND COUNTRY PLANNING ACT AND THE RMA

2.1 A short-short history of the Act

Land is unusual, if not unique, in that one owner's use of land can degrade the value of neighbouring land. If someone builds in front of a property and blocks the sea view, the owners of the rear property are deprived of the enjoyment of their land. On the other hand, if I break my whole dinner set yours suffers no damage. The 'pure' solution is to depend on the common law to seek compensation for such costs. The problem is that by the time the damage is recognised it may be too late to reach a just solution.

Courts are reluctant to force owners to tear down their completed structures. Hence, over the centuries, most cities have introduced some form of simple building controls for the same reason as they introduce traffic laws. A few simple rules and a few freedoms traded away provide a useful compromise which protects everyone's interest. Furthermore these traditional restraints were simple and reciprocal. Landowners do not mind providing side yards if they know that neighbours have to reciprocate. All parties share the benefit of reduced fire risk and the right to some light.

Then, as part of the reform movements of the late nineteenth and early twentieth centuries, a new group began to promote their own views of what cities should look like, and how people should live. The end result was that by the nineteen fifties town planning was a well established profession in New Zealand and elsewhere, and the Town and Country Planning Act required all towns and regions in New Zealand to prepare District Schemes.

This legislation was based on the idea that planners could plan cities in much the same way as architects plan houses – only on a larger scale. Houses are divided into sleeping, cooking and living rooms; so, it was assumed, the ideal city should be “tidied up” into residential, commercial and industrial zones

The industrial economies of the time provided some justification for the separation of smoky, noisy and industrial areas from residential neighbourhoods. But this sound case was extended to encourage the segregation of all uses, as though living above a grocery shop was as uncomfortable as living next door to a steel mill.

One of the unexpected outcomes of this segregation of use was that the cities built after the war became segregated by a whole host of parameters such as age, race and income. Some suburbs proudly promoted the fact that young children would not be disturbed by the sight of old people, or any other "deviants".

By the sixties and seventies there was widespread reaction against bland sterile suburbs surrounding central areas in decline and the replacement of vital village neighbourhoods by massive shopping centres, and further concentration and isolation of

all human activity. Furthermore the Town and Country Planning process had been captured by those who were already occupying their favoured land and wanted to prohibit new development, while commercial interests were using the procedures of the Act to restrain competition.

Then came the environmental movement – which first gained international standing through the United Nations Human Environment Conference of 1972, and then the Rio Conference of 1992. Suddenly it seemed much more important to protect the planet than to protect property rights. Also, the environmental movement encouraged a new and legitimate focus on the external costs of development – which was where controls on building and land use began, hundreds of years ago.

2.2 The RMA replaces the Town and Country Planning Act

In the spirit of the reforms of the eighties, the New Zealand Labour Government introduced, and the following National Government passed, the Resource Management Act.

The Resource Management Act was intended to remove the right to “control and direct” the use of land. No more zoning; and the Resource Management Act makes no reference to planning anywhere. The trade-off was that Local Government would be given much more power to control adverse effects on the “natural and physical environment”. The original premise was that anyone could do what they liked provided they addressed the impact of their development on the natural and physical environment. Presumably you could build a steel mill in Remuera if you could control the noise pollution, air pollution and deal with any effluent. It seemed like a great idea; but its embodiment in the legislation was seriously flawed.

Along the way someone realised that this grand concern for the planet did not deal with the centuries-old need to protect the property rights of landowners against the activities of their neighbours. After all, it is hard to argue that a ten foot high fence does any damage to the natural and physical environment. And so Section 7(c) allowed councils to have particular regard to the maintenance and enhancement of amenity values.

This single clause has virtually allowed the whole edifice of the Town and Country Planning to re-enter through the back door. The quite draconian powers, which the Act provided to limit genuine and severe environmental degradation of the natural and physical environment, could now be applied to local properties.

The other fatal flaw was the introduction of the word “sustainable” into the statement of purpose of the Act as “to promote the sustainable management of natural and physical resources”. “Sustainable” defies definition once it extends beyond the sustainable

management of forests, specific crops or fisheries and similar elements of the biosphere. The end result is that “unsustainable” now means any activity which the environmental planners disapprove of.

For example, many District Plans and Regional Policy Statements include something to the effect that “present urban forms are based on the motorcar and hence are unsustainable”. Such “self-evident truths” are presented with no supporting justification or argument let alone any section 32 analysis of the rules they generate.

The outcome has been massive additional costs of development – especially in the Auckland and Canterbury Regions, where no discernible benefits can possibly justify the increased costs of land and housing, with the resulting overcrowding and other social and economic problems engendered by an inflationary housing market driven by enforced scarcity of supply.

2.3 The RMA focuses on Effects rather than Use

The whole point of the new legislation was to manage effects of use rather than the use itself. This was an intelligent move designed to promote innovation and the use of new technologies and information. Not so long ago a printing house was noisy and emitted all manner of fumes and used huge amounts of lead etc. Such establishments belonged in an industrial zone because of these noxious effects. These days anyone can publish a magazine out of their living room and no one next door would be the wiser because there are no effects on the environment. The true “planners” reject this approach because if they cannot control the location of land use then they cannot control where we live, work, and play and they cannot translate their other grand theories into action.

Hence, we end up with the contorted “effects based” approach of Rodney District’s *Proposed Plan 2000*. The authors claim it is an “effects based plan” because they have analysed activities in terms of their effects and then determined what activities are allowed in each zone. They claim that this has the merit of certainty and simplicity. They must have a strange notion of simplicity because the *Proposed Plan 2000* is so large and detailed and poorly worded as to be quite incomprehensible – even to its authors. True “effects based” plans such as Taupo’s are slender and easy to read. (Taupo’s total plan is thinner than my thumb, and that includes the planning maps. The subdivision rules take up only one page.)

The Rodney zone statements include the “anti-innovation” catch all phrase which declares that any activity not on the list is deemed to be a non-complying activity.

One outcome is that, in the rural zone, raising and training horses is a permitted activity, but raising and training donkeys is a non-complying activity. What on earth do donkeys

do which is so much more damaging to the environment than horses? Many organic farmers (who tend to shun mechanised farm vehicles) are discovering that donkeys are useful farm animals without the rapacious appetites of horses. But Rodney's planning documents mean that Rodney farmers will have to buy their donkeys from donkey farms in Kaipara District or some other council which focuses on effects rather than a planner's lists of approved land uses.

2.4 The connection between power, theory and conviction.

The Town and Country Planning Act gave Councils and their planning professionals the power to promote the social, economic, and cultural welfare of the community – which was a huge power indeed. Yet, in practice, the power was “bridled” by the absence of any potent theory.

Planning officers of those times – and I was one of them – spent most of their time negotiating simple conflicts between neighbours or between activities and the surrounding neighbourhood, or interpreting the simple rules which controlled the different zones. We had no grand theories. And we certainly never entertained the idea that we had some mandate to “save the planet”. Because we had no grand theories we had few means to exercise power. Mr Hannah, the council solicitor, used to challenge any new rule on the grounds of “necessity”; if the best the planners could come up with was “desirable” Mr Hannah would draw a line through the offending rule.

But many of the new practitioners who administer the RMA are committed to saving the planet which is obviously a noble aim and justifies any grand plans needed to achieve it. And those who believe their destiny is to save this planet have concocted a host of theories to justify their interventions. Of course these noble few are working to “save the planet” from those who would despoil it. They have identified the enemy – and it's the rest of us.

The old time planners had great powers but few theories. Today's planners have fewer legal powers but have grand overarching theories which find their expression in the massive planning documents which weigh down so many of our shelves.

There is no single silver bullet which will set things right. However, Councils can be encouraged to challenge these theories and, in particular, to challenge the manner in which the theories are used to generate objectives, policies and rules within the Planning Documents.

It isn't easy. Councillors often have some vague unease about the latest policy to surface through their bureaucracy but if they raise a question they will be told “the Act requires it” or they will just be fed a long and obscure paper which restates the case.

2.5 The infection of the “Triple Bottom Line”.

2.5.1 The ARC *Air, Land, and Water Plan*

The RMA was intended to have a biophysical focus. The Act was intended to remove the powers of Councils to indulge in social engineering, or direct and control the way we live, work and play. But a planning profession which has been educated to believe that managing the way we live work and play and managing change to promote social good is what it's there for doesn't give up on these powers too easily. Where the Act limits their powers they simply rewrite it so that they get them back.

For example, the Introduction to the ARC proposed *Air Land and Water Plan* includes the following statement:

... meeting the requirements of paragraphs (a), (b) and (c) of section 5(2) therefore requires the integration of the environmental, social and cultural aspects of the environment, and the establishment of safeguards to ensure these conditions are maintained.

(My underlining)

Section 5(2) says no such thing. And I have never read any other planning document which claims that section 5 requires that social and cultural conditions are to be maintained. This would promote a static tribal society rather than the open and democratic society which we live in.

The Act has a strong biophysical approach and the planning documents it generates are not intended to integrate the environmental, social and cultural aspects of the environment. This “triple bottom line” approach is characteristic of the European notion of “sustainable development” but is rejected by the RMA in favour of “sustainable management” as defined in section 5.

This is not just my own view. Simon Upton, who was responsible for the crafting said in the third reading of the Bill:

“Unlike the current law, the Bill is not designed or intended to be a comprehensive social-planning statute. It has only one purpose – to promote the sustainable management of natural and physical resources”.

He restated this principle in his speech to the Resource Management Law Association of New Zealand Conference, 7 October 1994, and has even further restated this principle, recently, from his office in France. ¹

¹* Simon Upton, Helen Atkins, Gerard Willis; “Section 5 Revisited: a critique of Skelton and Memon’s analysis”, *Resource Management Journal*, Issue 3, Vol X, Nov 2002. See further discussion below.

However, the RMA does allow for such matters to be considered when deliberating on applications for consent which deal with particular issues.

But the RMA does not give councils the powers to plan or engineer the social and cultural aspirations or structures of the people and communities of the region. If councils focus on the biophysical character of the natural and physical resources of their regions and districts they will remain on safe and cost effective ground.

Parliament alone has the power to right or rewrite legislation and Parliament has to go through lengthy and exhaustive processes to make the slightest change to any legislation let alone legislation as complex and controversial as the RMA.

However it has to be conceded that certain academics, and some members of the planning profession, are pushing hard for the RMA to become expanded to embody the principles of the Town and Country Planning Act. This position has been most strongly argued in the recent paper by Memon and Skelton. This is the paper which prompted Upton and others to respond with their own challenge referred to above.

The two papers are long and should be read in total.

No matter where our philosophical sympathies lie there can be no doubt that requiring decision makers to consider social, cultural, and economic factors, and then to indulge in a major balancing act between these competing factors must increase transaction costs – if only because a whole new army of consultants will be welcome in the hearing rooms and courtrooms throughout the country.

2.6 The flawed definition of the environment

In their paper Upton, Atkins and Willis do concede that the Environment Court has succumbed to these arguments in a couple of recent cases, and that if this trend is to be halted a change to the legislation is necessary. The authors first restate their understanding that the Act narrowed the focus of the old Town and Country Planning Act with its new emphasis on managing the adverse effects of activities on natural and physical resources.

They endorse the position taken by the Board of Inquiry into the proposed coastal policy statement chaired by former Judge Turner. His summation of section 5 (2) was as brief as it was lucid:

S5(2) RMA then defines “sustainable management”. It does not call for a balance to be struck between an objective of promoting the use of resources for the present well-being of the community and the so-called “ecological objective” set out in clauses s5(2)

*(a), s5(2) (b) and s5(2) (c) (respectively: the needs of future generations; life-supporting capacity of air, water, soil and ecosystems; and, the adverse effects of activities on the environment), as was argued by the Minister's representative. Rather, clauses (a), (b) and (c) are three specific objectives or constraints which must be pursued while people and communities are being enabled to provide for their well-being etc. S5(2) RMA requires management to be carried out in a way which achieves the objectives or applies the constraints of (a), (b) and (c)."*²

(my emphases)

Having dealt what they (optimistically?) hope is a death blow to the "integrative" misreading of section 5, the authors go on to suggest that the problem lies with the definition of "environment" which sits within section 5(2)(c). I am sure they are right.

Section 2 of the RMA defines 'Environment' as including:

- (a) ecosystems and their constituent parts, including people and communities; and*
- (b) all natural and physical resources; and*
- (c) amenity values; and*
- (d) the social, economic, aesthetic and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters.*

Paragraph (d) is the killer. Not only is it impossible to interpret with any confidence; it is impossible to say what might or might not be excluded by this tortured sentence.

Tortured prose engenders more tortured prose in a vicious spiral of incomprehensibility. The Ministry for the Environment demonstrated where such prose takes us with its report back from the select committee on the Resource Management Amendment Bill which explains:

It can be argued that the existing definition of 'environment' is such a broad definition that it covers just about everything. While this broadness may promote a holistic approach to environmental management, it does not necessarily contribute to a clear legal understanding of what the definition should include.

In addition to the breadth of the definition, the precise legal meaning of paragraph (d) and its relationship to paragraphs (a) to (c) is not clear. In

² *In a Memorandum re the Inquiry into the New Zealand Coastal Policy Statement NZCPS 3NZPTD 109*

paragraph (d), social, economic, aesthetic and cultural conditions are expressed to be part of the environment if they affect the matters in paragraphs (a) to (c) and if they are affected by those matters. The significance of this definition and the extent to which those conditions can exist separately from people and communities (already included in paragraph (a)), is unclear. Whatever the definition is attempting to achieve, it does not deliver an unambiguous and legally precise guide to those who must apply the Act's provisions.”³

We trust that makes everything perfectly clear.

Simon Upton is convinced that the sponsors of the Act which was finally passed in 1991 never intended the definition of the environment to include every aspect of our lives and hence to allow decision makers to indulge in balancing the social, economic and cultural benefits of a project against the environmental impact of its effect. Hence, in 1999, he proposed the amendment which would remove paragraph (d) of the definition of environment and augment paragraph (c) to embrace “the health, safety, amenity values and cultural values of people and communities”.

Strangely the Green Party members and other strong environmentalists seem to want to promote the “trade-off” approach of “sustainable development” to the strong environmental focus of “sustainable management” as defined in the RMA.

I would have thought they would strongly resist the idea that adverse environmental outcomes can be justified by strong employment and growth prospects.

I must be missing something in their political calculus.

2.7 A further distorted interpretation of Section 5

I once asked the head of a Council's Economic Development Unit to ask the Chairperson of the Hearings Committee “Which part of the Act gives Council the right to indulge in land use planning and social and economic engineering?” – An approach which was frustrating his attempts to stimulate growth and development in the District.

He was referring to section 5 which he was told “is about enabling people and communities to provide for their social, economic and cultural well being” and that “because Councillors are elected by the Community then Councillors have the power,

³ Ministry for the Environment, *Report on the Resource Management Amendment Bill*, 15 September 2000, p23

and the duty, to provide for the community's social, economic and cultural well-being. This means that Council has to be able to direct and control the use of land."

You have to admire the genius for reading a justification for planning into a paragraph which was designed to prevent it.

However, now that this interpretation is gaining currency it may be time to amend Section 5 to make such interpretations more difficult, if not impossible.

During the debate which followed the first *Think Piece* many advocated removing the reference to "communities" altogether because "people" actually covers all such groupings. The US Constitution opens with "We the people of the United States, ..." The authors of the Constitution saw no need to say "We the people, and the communities, of the United States..." because "communities" is redundant.

One remedy would be to remove the reference to "communities" from Section 5. This solution enjoys a long standing and well tested constitutional precedent. However, we live in a political culture besotted with the idea of community and this reform is unlikely to fly.

Hence my pragmatic alternative is to rephrase section 5 as follows:

*Sustainable management means managing the use, development, and protection of natural and physical resources in a way or at a rate which enables **people, families, and groups with shared or common interests**, to provide for their social, economic, and cultural well-being and for their health and safety while – etc.*

Why families? For some reason, many planning documents discriminate against the interests of families and extended families in particular – although the same documents may make specific provision for Papakainga housing for Maori.

Too many district plans force retiring farmers off their property. The rural subdivision rules prevent a retiring farming couple from subdividing off a small piece of the family farm to live on, while allowing their sons or daughters to build a new house on the balance and carry on the family tradition. The young planners who write these documents seem to believe that once we are past sixty we should be in a rest home or in a town house next to a railway station and spend our time watching TV.

Just when many families are accepting some responsibility for caring for their aged parents in a home environment during their later years, many planning documents have been changed to make it difficult to build a granny flat on the property. Apparently such

granny flats are to be discouraged because once the aged parents die then the young family may “let it out for money”. (This is a quote – I am not making it up.)

Why groups of shared or common interests? This would encourage the authors of planning documents and consent authorities to recognise that there is no such as “the Community” but that there are many communities of people with shared or common interests. Hence their documents would enable groups to develop Papakainga Housing estates, eco-villages, managed parks, religious communes or whatever, while resisting the notion that there is a monolithic entity out there called “the community” and that council alone knows its single mind.

2.8 Suggested remedies

2.8.1 Local

(i) Effects based Plans

Councillors and citizens should insist that their Planning Documents reflect the “effects based” approach which was intended.

(ii) Contestable advice

Councillors should fund their resource management policy committees with a budget, which can be used to commission contestable advice. If its good enough for Cabinet it should be good enough for Councils. Much nonsense could be avoided, and some ideas even killed off at birth. Economists might even be able to demonstrate what a genuine section 32 analysis looks like.

(iii) Reject Social Engineering in RMA planning documents

Planning documents should be purged of any objectives, policies, methods, or rules, which imply that councils have the power to manage social, economic and cultural matters rather than maintain the biophysical focus of the RMA.

2.8.2 The Act

(i) Section 5

Rephrase section 5 to read as follows:

*Sustainable management means managing the use, development, and protection of natural and physical resources in a way or at a rate which enables **people, families, and groups with shared or common interests**, to provide for their social, economic, and cultural well-being and for their health and safety while – etc.*

(iii) Section 32

Section 32 is intended to prevent half baked ideas gaining standing in the planning documents. Parliament has strengthened Section 32 every time its gets

a chance. But most section 32 analysis never includes any real economic analysis. Councils don't employ economists and the planning profession seems to have no idea that cost and benefit analysis involves assessing the time value of money. One useful change to the act would be to include a reference to the time value of money under the list of things to be considered when carrying out the Section 32 analysis. If nothing else this might force councils to employ people with the skills to do the job.

(iv) Definition of Environment – Section 1.

Remove paragraph (d) of the definition of environment and augment paragraph (c) to embrace “the health, safety, amenity values and cultural values of people and communities.

3 THE HIGH COSTS OF APPLICATION AND PROCESSING OF CONSENTS

3.1 Do the users pay?

Since its inception in 1991, the RMA has been applauded by many as a piece of legislation which set a high quality objective and which attracted widespread support from most sectors of society. But as is so often the case the aspirations have not been realised in the implementation.

In the words of J McNeil of Otago University

“The sentiments of progress and fair change to planning and development that lay behind the enactment of the RMA were quickly applauded; however, several problem areas quickly surfaced. These issues include “red tape and costs”. ... Concerns over costs are compounded by section 36 of the Act which allows councils to levy charges for the applications, another sign of the “user-pays” philosophy”.⁴

The user pays approach is widely accepted as a fair method of cost recovery for services provided. That in itself is not the problem. The user pays principle depends on correctly identifying the user. As administered, the present RMA regime implies that the applicant is the user even if the application falls within 99% of the rules of the planning documents. A single objector can impose massive costs on the applicant who incurs these costs in the process of providing benefits to the objector – who therefore is surely the “user”.

Also, some of the costs of application frequently relate to meeting clear public interest goals. The applicant has to pay these costs even though they are of no benefit to the applicant. In one case the private objector gets off scott free. In the second case “the public” gets off scott free.

Ms Lyndsay Singleton has written a PhD thesis which closely examines the Act to determine whether the conventional wisdom about where such costs should fall is correct. Her preliminary findings are challenging to say the least and I have drawn on her thesis in preparing the following discussion.

3.2 Section 32 and Section 36 – the connection

The Act requires that any objective policy method or rule should be subject to a rigorous section 32 analysis which should include an analysis of the benefits and the costs. While councils usually prepare a document called a Section 32 report I have yet to see one

⁴ 1 McNeil J. *The Resource Management Act 1991: An overview of its impact on business management* (1998)

which makes any serious attempt to identify real costs and benefits in monetary terms even where these can easily be identified.

One of the reasons councils take such a cavalier attitude to costs in particular is that they use the charging system to ensure that they don't incur any – all the costs are collected from the applicant. This became clear to me during the preparation of submissions on the Auckland Regional Council's proposed *Air Land and Water Plan*.

3.3 The standard response to the demands of s32.

The Section 32 analysis as represented in the *Section 32 Report* to support the proposed *Air Land and Water Plan* was clearly inadequate. A consistent theme throughout the report is that many of the costs and benefits are intangible and cannot be given a monetary value and therefore cost benefit analysis "is not possible". This statement was made as a declaration of fact even where it was clearly wrong.

It was obvious that the authors of the report had no training or expertise in economics, in general, and in cost and benefit analysis, in particular. Otherwise they would not have reached this conclusion so readily and so frequently. This was probably not their fault. The Act requires councils to prepare Section 32 analysis and it is therefore the councils' duty to ensure that they employ, as staff or consultants, people who have the skills and qualifications to do the job.

3.4 Examples of inadequate analysis

3.4.1 Economic costs of the methods chosen. (Page 19 of the report)

The first paragraph of this section says:

The ARC is accordingly required to evaluate likely implementation and compliance costs of the methods chosen. This is very difficult to carry out for many policies and objectives as costs and benefits can only be assessed accurately on a site specific basis.

(My emphasis)

Precisely.

Many of the objectives, policies and rules apply to "natural areas" on private property and many require "enhancement" as a means of mitigating, avoiding and remedying past activities on private property.

Many of the consequent methods and rules add up to 'takings' in that they deprive landowners of the use of large areas of their land. The courts have found that it is not possible to carry out a section 32 analysis of such designations unless the owner has

been consulted, because only the owner knows what costs these methods and rules may impose.

Therefore the reason the authors found themselves in difficulty was that:

- (a) they had not identified, on the planning maps, the natural areas to which the rules apply (which is contrary to the Act)
- (b) hence they had not consulted with the owners of these identified natural areas and
- (c) therefore they could not carry out the cost and benefit analysis required by section 32.

The Act does not allow functionaries to avoid their duties under section 32 by avoiding their requirement to properly identify natural areas on the planning maps.

On page 21 of the Report the authors claim:

The objective will impose economic costs on resource users but these cannot be readily identified. The ARC considers however that the social and environmental benefits of this objective will significantly outweigh those economic costs.

If the costs cannot be identified how can the ARC be so sure that any benefits will exceed the unknown costs?

3.4.2 Where do the costs and the benefits fall?

More importantly, the authors do not seem to appreciate that the first questions raised by any genuine analysis of local costs and benefits is “Who pays the costs?” and “Who receives the benefits?” In many of the cases under discussion the land owners are being asked to bear all the costs of enhancements, and other activities, which provide no benefit to the landowner, but which provide substantial benefit to the general public or other resource users.

It should be clear to the analysts that rules or methods which impose costs on one group while providing benefits to others fails to meet the tests of section 7(b) and section 32 (1)(c)(ii).

Section 7(b) requires councils to have particular regard to:

the efficient use and development of natural and physical resources

Section 32(1)(c)(ii) requires councils to ask whether a rule

Is the most appropriate means of exercising the function, having regard to its efficiency and effectiveness relative to other means.

Both sections refer to efficiency which has three arms: productive efficiency, allocative efficiency and dynamic efficiency.

A rule which imposes costs on a single landowner in order to achieve public benefits fails to meet these efficiency tests. In particular such a rule offends against allocative efficiency because the private landowner is being asked to subsidise public benefits.

Section 85, which says that compensation is not payable on account of a rule in a plan, assumes that the rules have passed the s32 test and further that no “takings” are involved. “Takings” come under Part VIII of the Act which requires that compensation be paid.

Section 85 makes it clear that a potential polluter should not be paid for being required not to pollute. But section 85 grants no right to any council to simply take large areas of land (especially in the absence of an application for any change in use) without compensation. (See Chapter 7 below)

3.4.3 The cost of information.

Every Section 32 report I have examined appears to assume that information comes free. It does not. This ARC report was no exception. There had been no attempt to even recognise that information has a high cost let alone assess that cost. This is a particularly important deficiency in that the proposed *Air Land and Water Plan* calls for lengthy lists of information to be supplied with an application for many resource consents.

For example, Section 2.1.4.8 of the report provides a list of 15 categories of information which may be required to assess:

... the effects of use and development on natural character, terrestrial and aquatic ecosystems and natural features.

Each one of these items listed below this general heading could tie up a team of experts for several years. For example item (g) calls for information on the:

access migratory and dispersal pathways for terrestrial and aquatic fauna.

Item (o) calls for information on the:

Water and air quality necessary to protect human and ecological health.

Similarly, section 6.4.43 of the *Section 32 Report* advises that applicants seeking to provide a dam on a perennial river or stream must “demonstrate” that:

(f) adverse effects on any habitat of fauna or flora including wetlands, either upstream or downstream of the dam are avoided, remedied or mitigated;

and

(g) *adverse cumulative effects that may arise from the scale, location or number of dams in the catchment are avoided, remedied or mitigated:*

Where would one begin if one received a section 92 request to provide information under these items? Who would one employ and where would they find the answers?

3.4.4 The precautionary principle

This “cost of information” deficiency was further compounded by the fact that the plan adopts “the precautionary principle” which can allow a council to decline an application on the grounds of “a lack of scientific knowledge”. It will be all too easy for the council to identify a lack of scientific knowledge in relationship to almost any application made under this proposed plan, if an officer of council so chooses. This is where the precautionary principle is so dangerous to the open society. It inverts the customary relationship between the citizen and the state.

Our constitutional system of government assumes that a citizen is free to act unless the state can prove harm. The precautionary principle turns this on its head; citizens have no freedom to act unless they can prove perfect safety – which is, of course, impossible. This is why the RMA makes no reference to the precautionary principle and asks only that applicants avoid, remedy, or mitigate identifiable adverse effects.

The ARC’s proposed *Air Land and Water Plan* requires applicants to prove that their proposal will have no adverse impacts, including ones which have not been identified in the plan and for which there is no identifiable source of information. The requests for information are open ended so that the council can keep on asking for information forever. There is no means of establishing when the requirement has been satisfied – especially when the precautionary principle is invoked.

I was dismayed when a client of mine advised me that he had already spent over \$100,000 on consultants to support his **voluntary** proposal to build a wetland on his property because of information demanded under section 92 to meet the requirements of this new plan.

I could not believe it. Surely Council should be encouraging the construction of wetlands, not penalising those who seek to do so. But now that I have read the document I can see that Council is free to require several million dollars worth of information if it sees fit – and in particular if it wants to decline a proposal by attrition of the applicant’s bank account.

3.4.5 The easily measurable costs of construction.

Many of the costs associated with such plans are generated by demands for the construction of physical plant and infrastructure. There should be no difficulty in assessing such costs within a genuine Section 32 analysis. And yet most Section 32 reports make no attempt to do so. The *Section 32 Report* supporting the ARC proposed *Air Land and Water Plan* was no exception.

For example, the discussion of costs and benefits under the policies affecting farm dams generally assumed that “the policy does not lend itself to any systematic cost benefit analysis.” Yet there is plenty of information on the costs of building and maintaining dams.

The plan proposed that new charges and financial contributions be introduced and yet there was no list of these new costs within the Section 32 Report. The last paragraph on page 144 of the Section 32 report says:

In some circumstances the policies may have economic costs by encouraging landowners to construct dams off rather than on stream, for example where two off-stream dams are required to provide the equivalent yield of a single on-stream dam. The ARC considers that these costs are outweighed by the long term environmental benefits of encouraging off stream dams.

Surely a thorough Section 32 analysis should make some attempt to compare the cost of building and maintaining one on-stream dam with the cost of building and maintaining two off-stream dams and also compare the compliance costs and monitoring charges associated with two dams rather than one.

There was no attempt to carry out even this most basic analysis of costs.

There is not a single dollar item listed within this *Section 32 Report* even though the plan proposes numerous costs, charges and financial contributions. Section 32(1)(b) makes specific reference to an assessment of “the likely implementation and compliance costs.” This ARC *Section 32 Report* ignores this requirement of the Act.

3.4.6 Use and development – a scant appraisal

Page 27 of the same ARC *Section 32 Report* contains a statement which is also clearly wrong, and shows that no economists or even people with a remote understanding of economics in general and cost benefit analysis in particular were involved in writing this report.

Under the discussion of ***Use and Development – Objectives***, discussing growth management and the Metropolitan Urban Limit (page 27), the report says:

This objective will impose economic costs on some landowners by preventing them from subdividing their properties for housing development. The ARC considers however that the more intangible social and environmental benefits of this objective outweigh the costs imposed on individuals.

This statement is wrong on every count. The ARC growth strategy imposes massive costs on the whole region and indeed on the whole country. During March 2003 there were complaints that the Reserve Bank would not reduce interest rates because of the rapid inflation of house prices in the Auckland Region.

My own 1996 report to the Reserve Bank (*The Impact of the RMA on the Housing and Construction Index of the Consumer Price Index*) predicted that this inflationary pressure would occur every time there was an increase in housing demand in the Auckland region because the Growth Strategy, and the existence of the MUL, makes it so difficult, time consuming, and costly to respond to the increase in demand by increasing the supply of land.

The subsequent experience in the US confirms my own findings. Those cities such as Portland and others which have introduced Growth Management Strategies have all experienced a massive increase in housing costs. Those cities which used to have the most affordable housing in the US now find they are at the top of the unaffordability index. The environmental costs are also high as developers are encouraged to increase densities while councils are willing to abandon environmental standards. At least one developer of high quality residential neighbourhoods has withdrawn from the New Zealand market because the Growth Strategy forces the developers to build low quality housing developments for which they get the public blame.

Finally those who persevere and have the funds to fight their way through the system end up with land which is highly expensive because it is in such scarce supply.

This means that such property developers can charge a profit and risk allowance of say 130% instead of the normal 30%. The end result is that only Americans and Germans can afford to buy the coastal sections, at say Pakiri, which have ground their way through the system.

These costs and “benefits” are easily assessed and there is now much international research to provide the methods. Even the ARC’s own “Toolbox” says that the Growth Strategy increases the cost of land, while admitting that benefits are difficult to identify, let alone quantify.

One can only conclude that the cost and benefit analysis has been deemed to be so difficult because the ARC does not want to face up to the findings.

3.5 The general problem

Most Section 32 reports assume that if benefits are not quantifiable then there is no need to analyse the costs. The authors of such reports appear to have made no attempt to familiarise themselves with cost and benefit analyses carried out by other organisations both here and overseas.

The Section 32 analysis required by the RMA is simply a restatement of the requirement of most Parliamentary systems and the US system to require regulatory impact statements. Those who prepare these regulatory impact statements take their obligations seriously. Many of these reports are available on the Web and should be used as models for local analysis. But we do not have to look overseas to find cost and benefit analysis which has to deal with both quantifiable items and those less easily quantified.

The Government's own land transport authorities have to deal with such issues every day. For example, road designers have to decide whether the monetary costs of upgrading a section of road can be justified by the increased safety and hence the lower loss of life, reduced accident and fatality rates, and health care costs and so on.

Their analysis routinely assesses the additional costs of the upgrade and then has to make an assumption about the value of a human life or human injury. They do not simply assume that any increase in costs can be justified by increased safety or the general enhancement of the motoring environment. So why is their behaviour so different from that of the analysts in council resource management departments?

The answer is obvious. The roading analysts have to carry out rigorous analysis because these authorities have to meet the costs of any proposed enhancement or remedies out of their own budgets.

Councils can afford to be cavalier about both costs and benefits because they collect all the costs from the private landowner or resource user – including the costs of application, information, compliance and monitoring.

This leads to gross inefficiency because standard economic theory recognises that if any goods or services are under priced they will be over-consumed. These objectives, policies, methods and rules come at no cost to the councils – indeed they are presently a source of revenue. Naturally they are over consumed.

Hence the failure of the Section 32 analysis means that we are necessarily over-regulated and private wealth generators are excessively “taxed” to provide poorly

identified public goods. This subsequent over-regulation fails to meet all the efficiency tests which underpin the RMA.

Submitters should not need to prove that they are over regulated because this is an inevitable consequence of the fact that councils claims all the benefits on behalf of “the environment”, while passing on all the costs of regulation. Such regulations come free, and hence are “over produced and over consumed.”

The only remedy is to require councils, like the road designers and builders to face up to the costs as well as claiming the benefits.

3.6. The general remedy

3.6.1 Get the pricing right

The remedy for the failure to address the costs of these regulations can almost certainly be addressed by changing the pricing system so that councils have to absorb some of the costs of implementing their plans.

While some cases may actually require compensation we recognise that councils are hugely reluctant to accept their responsibility to compensate for takings. But even these injustices would be largely remedied or avoided if councils had to pay their fair share of the costs of application and information – ie. the package of transaction costs which attach to their objectives, policies, methods, and rules.

3.6.2 The Act provides the remedy

The reason the councils avoid the costs of their over-regulation is that they ignore or circumvent the requirements of the Act. Most Councils have enthusiastically adopted the principle of “user pays” when it comes to charging for the costs of application, the costs of supply of information and their own costs of processing consents. Hence all costs are seen as collectible – and hence avoidable.

However, the legislation and case law challenges this presumption.

3.6.3 What Section 36 actually says.

Section 36 Administrative Charges, gives Councils the power to charge for RMA services and says:

(1) A local authority may from time to time, subject to subsection (2), fix charges of all or any of the following kinds:

(a) ... (not relevant)

(b) Charges payable by applicants for resource consents, for the carrying out by the local authority of its functions in relation to the

receiving, processing and granting of resource consents (including certificates of compliance):

...

(3) Where a charge fixed in accordance with subsection (1) is in any particular case, inadequate to enable a local authority to recover its actual and reasonable costs in respect of the matter concerned, the local authority may require the person who is liable to pay the charge, also to pay an additional charge to the local authority.

(4) When fixing charges referred to in this section, a local authority shall have regard to the following criteria:

(a) The sole purpose of a charge is to recover the reasonable costs incurred by the local authority in respect of the activity to which the charge relates.

(my emphases)

Environment Canterbury is a useful example of a typical local authority approach to charging, (see Environment Canterbury's *Resource Management Act 1991- Policy for Charges*) if only because it has a clear policy set down in writing.

Like most, if not all such council policies, it says:

1.3 This document sets out the policies of Council in respect of charges for the following functions:

Receiving, processing and deciding on:

Applications for resource consent. ...

(my emphasis)

The wording is significantly different from the wording of Section 36(i)(b).

While the act refers to "Receiving, processing and granting of" applications for resource consents, this council's policy document refers to "receiving, processing and deciding on resource consents."

Why has Environment Canterbury changed the wording? I can only presume that someone recognised that subsection 1(b) suggests that the Council can collect charges only when it has actually granted a resource consent. What happens where an application has been declined?

Environment Canterbury, has decided to charge in all cases, whether or not its grants the application, and as far as I can tell, so does every local authority in the country.

Imagine if councils adopted the literal wording of the act and collected costs from applicants only if they granted a consent. The outcome would be a dramatic change in process for many Councils. Waitakere City has a routine policy of piling cost on cost on cost on its applicants when the staff have decided they do not approve of some application (usually subdivision outside the MUL). They hope that the applicant will abandon the application because of the burden of these costs. If Council could recover its costs only if it granted the consent then this whole process would be counterproductive **and one of the biggest generators of complaints against the RMA would disappear.**

Also, if Councils actually charged according to the wording of Section 36 they would have an immediate incentive to reduce ongoing demands for information under section 92. These demands are frequently intended to persuade the applicant to give up because of a lack of funds, or because the costs of the application soon exceed the benefits to the applicant. Furthermore, Councils would have a strong incentive to reduce their internal peer reviews of information provided by the applicant.

Councils would also be encouraged to improve the efficiency of all their processing because they could no longer collect charges for applications which were abandoned. This does not mean that applicants would get off free. They would still meet most of the costs. But the Council would also have to meet its fair share. Council would also have an incentive to assist the Applicant to succeed – i.e. to **enable** the applicants rather than place obstacles in their way.

And section 5 says that people and communities are to be “enabled” by their councils, not obstructed at every turn.

3.6.4 Collecting only reasonable and actual costs.

Almost all Councils charge out for staff time on the basis of a budgeted hourly rate which is designed to cover the costs of running the consents department. This is unlawful because Section 36(3) and (4)(a) permits councils to collect only their “actual and reasonable costs”, and the council must be able to identify these “actual and reasonable costs”. In *Whangarei District Council v Northland Regional Council* [1996] NZRMA 445, J Baragwanath found:

[Northern Regional Council] objected to the evidence of its actual performance, since budgeting for administration, monitoring and supervising of consents must be performed prospectively. I do not uphold the objection. Whilst it is of course necessary to budget, the actual cost and effort expended bears usefully on what charges are reasonably open to [the Northern Regional Council] to impose.

Judge Baragwanath's concluding statement in this decision sends out a warning to local authorities not to base their charges on budgeting. Yet, almost without exception, local authorities set hourly rates for additional charges under s36(3) based on annual budgets and revenue targets set by their accounting divisions. The local authorities then quote these hourly rates as the justification for actual charges without identifying the actuality of these charges to real cost. This is contrary to s36.

In a recent objection (represented by Auckland QC, Peter Woodhouse) to Auckland Regional Council charges for a resource consent application, the Council withdrew its claim for fees at the door of an s357 hearing room. The Council conceded, in response to the Q.C's representations, that they had to justify their charges on actual costs incurred, not on the use of departmental budgeting, to determine their hourly rate. The Council had failed to do this. As a result, acting on the advice of Council's own solicitors, the claim for charges was withdrawn.

The Auckland Regional Council has not changed its charging structure and still bases fees for additional charges at hourly rates set by a budgeting regime.

If all councils followed the requirements of Section(4)(a) there would be a strong incentive to minimise processing times and costs and to generally increase the efficiency of the consents. As a private consultant I am prepared to set fixed costs for my clients' applications based on whether they are non-notified or notified etc. Any competent consultant should be able to do the same and allow the swings to compensate for the roundabouts.

If their consents departments could do no more than recover actual staff costs then the department must necessarily run "at a loss" and naturally all councils would then have a strong incentive to minimise those "losses" and to ensure they did not place a huge burden of unrecoverable costs on the council. The present charging regime allows councils to regard their consents department as a source of revenue, and even profit.

3.6.5 The use of external consultants

Of course, one way councils could continue to charge for "actual" costs would be to place all their consent processing with external consultants because they could then argue that the consultant's total charge was an "actual" cost.

For many smaller councils the use of outside consultants makes good sense because they cannot afford to carry in-house the range of expertise necessary to deal with the wide range of applications which land on their desks. In some of our smallest councils these can include applications for hydro dams, timber processing plants, dairy factories, meat processing works and chemical plants. In reality our smaller councils probably have to deal with more difficult applications than their big city cousins.

However, even the smallest council over time should be able to develop some in-house skills. Indeed there is a strong argument that no council should contract out the entire process and so limiting the staff involvement to administrative function. The staff should be able to deal with controlled and restricted discretionary or other non notified applications. This means that consultants would be called in only for special or large projects. The consultants could then be selected for their skills and experience as it relates to the job.

Each council, regardless of size, would then be able to justify an RMA team of maybe three people headed by an RMA manager who oversees the preparation of strategy and policy as well as the preparation of planning documents and applications. The longer a council operates the more precedent documents it has on file and the less dependent on outside consultants it becomes.

This approach would also open up a career path within even those small councils who otherwise see their own RMA staff disappear to other larger councils as soon as they develop any experience and expertise.

3.6.6 Charges must be paid by the beneficiaries of the outcome

Most Section 32 Reports make no attempt to argue that the policies, methods and rules are designed to benefit the applicants. This is particularly true of those which are designed to provide “enhancement” or to correct past ‘wrongs”, or otherwise to provide general public benefit. Rules which require the protection of wetlands and riparian margins, and so on, are clearly designed to create a public benefit.

Section 36 requires that any charges or costs generated by such policies methods and rules must be met by the Consent Authority because it says:

36(4) When fixing charges referred to in this section, a local authority shall have regard to the following criteria:

(b) A particular person or persons should only be required to pay a charge –

(i) to the extent that the benefit of the local authority’s actions to which the charge relates is obtained by those persons as distinct from the community or local authority as a whole; or

(ii) Where the need for the local authority’s actions to which the charge relates is occasioned by the actions of those persons;

(my underlining)

Section (b)(i) is surely recognising that councils cannot charge applicants for any transaction costs which are associated with requirements which provide a public benefit

rather than avoid, remedy, or mitigate, the adverse effects of an activity which is the subject of an application for resource consent. In other words if the plan requires landowners to carry out activities to protect natural areas or uses an application to enforce these protections then the transaction costs cannot be charged to the landowner.

Section (b)(ii) further reinforces the point that charges for processing and for information must relate directly to the actions of the applicant – not to a decision by Council to protect some existing natural feature or promote other “good works”.

3.7 Proposed remedies

3.7.1 Local

(a) Councils should adopt the requirements of Section 36 of the Act which means they would:

- (i) Collect charges from applicants only for consents granted.
- (ii) Collect only actual and reasonable costs.
- (iii) Collect charges from applicants only if they relate to the benefits of the applicant and have not been imposed to promote public benefits.

(b) Councils should use outside consultants where they provide special expertise but develop in-house skills to handle routine controlled and restricted discretionary activities.

3.7.2 Central

Change Section 32 to include a requirement to take account of the time value of money.

4 OTHER SOURCES OF HIGH TRANSACTION COSTS

4.1 The costs of consulting twice

We now have many judgments which state implicitly or explicitly that “consultation is at the heart of the RMA.” This had led the court to take a “hard line” on notification and suggested that where there is the slightest doubt councils should notify. This message seems to have been widely received and understood. Unfortunately this has led many people to conclude that the ideal district plan has only two rules:

Rule One: I can do anything I like with my land.

Rule Two: You can do nothing with your land unless I say so.

In his paper to the New Zealand Planning Institute “Some Comments on the Resource management Act 1991”, Judge Treadwell said:

Although s32 of the Act is couched in terms which indicate that interference by means of plan provision should be kept to a minimum, councils have, to a degree, brushed this to one side and produced plans running to many volumes with unbelievable complexity. As a result the decisions of the Environment Court have also become long and complex because those decisions must grapple with the plans which the court is dealing. Some plans are so complex that the average man in the street cannot understand them. To produce such a plan is inexcusable.

and

... the necessity for resource consent should be minimised and should only be provided for where the environmental effect of an activity is likely to have some adverse impact which cannot be covered by performance standards, thus necessitating individual examination. Some councils have taken this to heart; others have chosen to use the provision of the Act as a method of giving to their officers, and to their councils, draconian and regulatory control over the lives of their inhabitants. This was never the intention of the Act. ...

The most important point to stress is that the consultative process envisaged by this Act takes place before public notification. ... Once the plan becomes operative then, with the exemption of activities requiring resource consents, the question of consultation virtually vanishes from the ambit of the act except in respect of plan reviews.

Unfortunately the prevailing reality is that communities go through the hugely expensive process of preparing plans only to find that even when the plan is Operative almost any proposal, other than the most simple and minor, will generate the whole process again – and almost every issue will be revisited and argued all over again. The costs are huge.

4.2 Leaping to notify

In too many planning documents the slightest infringement of an environmental standard throws an application from permitted or controlled status into discretionary or non-complying status with all the consequent costs and delays. All too often the impact on neighbourly relations is disastrous. People who thought they had a reasonable if distant relationship with their neighbours find themselves pitted as adversaries within hearings or in the courts, and find that the process has been co-opted to settle old scores. RMA hearings become a form of warfare conducted by other means. Sound section 32 analysis should prevent much of this.

Say someone proposes to build a building one metre higher than the rule permits in a rural zone and the rule declares this to be a discretionary activity. This raises the possibility of costs of maybe \$150,000 and delays of two to three years. I know of one journalist who has been trying to build a carport for over five years. Can any analysis show that the damage to the environment is so great as to justify these massive costs?

It appears to be too easy to allow any slight “departure” to be dealt with through discretionary or non-complying processes. A section 32 analysis which took into account compliance costs would surely encourage rules which catered for as many circumstances as possible and which allowed all but major departures from the plan to be dealt with as controlled or non-notifiable restricted discretionary activities.

The problem with an application which is tipped into the discretionary or non-complying basket is that all issues are up for debate and challenge. And yet it is difficult to see how a bulk and location infringement can lead to a demand to seal a large section of road. (Actual case)

In rural zones it is surely not beyond our wit to allow almost any tourism related activity, such as hotels, home stays, lodges, restaurants, retail etc. to be accommodated by rules provided the lot is large enough. It might make sense to make a lodge a discretionary activity on a small lot in a residential zone but should the defined use alone make it discretionary if it is located in the middle of a 200 hectare farm?

4.3 Reducing transaction costs

Judge Jackson almost certainly had the same thoughts in mind when he concluded, in his paper *Notes on the Role of Economics in the RMA (or vice versa)* presented to the *University of Auckland Environmental Law Forum, April 1999*, that section 7(b) should be amended to focus on these transaction costs. Section 7(b) currently requires councils etc. to have particular regard to:

(b) *the efficient use and development of natural and physical resources.*

Judge Jackson suggested that this section be amended to read:

(b) the need to minimise transaction costs.

His point is well made – although the word “minimise” might have to be constrained by terms such as “reasonable” and “practicable”. Section 32 analyses seldom, if ever, gave any serious consideration to transaction costs and in particular tend to ignore the massive increase in transaction costs implied by changing the status of an application from “permitted” or “controlled” to “discretionary”. If they did so we can be confident that many more applications would be dealt with as non-notifiable restricted discretionary applications.

However, there is more to efficient use than transaction costs and it would be a pity to lose the benefit of the same Judge’s recognition of productive, allocative and dynamic efficiency in numerous decisions, by reducing this whole contribution to transaction costs alone. Therefore a more useful change would be to add a clause to Section 7(b) so as to require councils to have particular regard to:

(b) the efficient use and development of natural and physical resources and the need to promote this efficient use by minimising transaction costs to a reasonable minimum.

However, these changes will have little impact while this need to have regard for efficiency and transaction costs sits within Section 7, which is low in the Resource Management hierarchy – along with the maintenance and enhancement of amenity values and the protection of the habitat of trout and salmon.

If any Government is serious about promoting economic growth and development then economic efficiency should surely be on a par with the other section 6 matters, if only to prevent the efficiency of the rural economy being made subservient to the need to protect landscape architects’ understanding of rural amenity. The rural sector is more than a theme park for urban tourists.

If we want farmers to protect wetlands, and fence off streams, and treat their dairy wastes, we have to allow them to operate their farms efficiently and profitably. If we don’t, these extra costs will simply hasten the transfiguration of the rural countryside into a rural slum.

4.4 High transaction costs suppress good outcomes

In defence of the present administration of the act many environmental groups present a statistic which claims that fewer than 5% of applications are notified. The environmental

groups then argue that this shows that the complaints are unjustified and even that councils are failing in their duties and should notify more.

These pressure groups fail to recognise that many, or even most, private consultants spend most of their time trying to devise ways of modifying their clients' application to avoid notification because of these costs. This often means that any innovation is swept aside and indeed the environmental outcomes are less than first offered. (What could be worse than chopping up a farm into 4ha lots along the road frontage?) In order to avoid the costs of notification the client opts for the worst, but lowest cost outcome.

One consultant has found a way of achieving well designed rural subdivisions by going through a three stage consent process – just to avoid the risks and costs of the notification which would be generated by the single stage application which would have to be notified. This is hardly efficient - it replaces the monetary and uncertain time costs of notification with some more certain costs of time.

If Judge Jackson's change to 7(b) was enacted some of his colleagues may be less prone to rule in favour of notification on the tiniest pretext. Although others of his colleagues have assisted greatly by consolidating the "permitted base line test" to prevail. (The permitted base line test requires the effects of a proposal which is not a permitted activity to be assessed against the effects of any of the activities permitted by the plan. It is difficult to object to a minor household unit on a neighbouring farm if the Plan allows the neighbour to build a 400 cow dairy shed in the same location.

Councils could assist their ratepayers by writing the permitted base-line test into their district plans – to ensure it is taken into account during their own hearings process.

4.5 Build up a data base

Another cause of vexation, and high application costs, is the failure of councils to use the information they collect from applicants to build up a data base. For example, a farmer may be required to provide a whole set of information regarding the flood levels in a river. Having paid out all the costs of collecting this information from a consultant it is annoying to find that a neighbour has provided the same information to the same consultant and also paid the full price.

Surely, with modern filing systems, it would be possible for council to put such information on a data base rather than ask for it twice. This means that the information would be paid for only once. Of course, if this became widely known applicants might put of applications hoping they would not be first and hence be subsidising future "free riding" applications.

Again modern filing systems should enable council to charge the second applicant only half the cost and pay half back to the first applicant.

4.6 Use licensed contractors

Most planning documents (especially Regional Plans) include complex systems of rules relating to earthworks and the management and protection of vegetation, water courses and wetlands. **We support the intention behind these rules.** However, there has to be a better way of managing and administering these rules than depending on land owners having to apply for individual resource consents.

The present rule based systems impose particular hardships on the rural sector. Farmers find that they must apply for resource consents to carry out routine maintenance and repairs on their property. Worse they frequently act in ignorance of newly introduced rules and find themselves before the court and being forced to pay substantial fines and costs for doing what they thought was standard farming practise. Retailers would be upset if they had to apply for a consent to move stock from one side of the shop to another. Manufacturers would be outraged if they had to apply for a consent to relocate a piece of plant, or to strip it down and repair it.⁵

The cost of housing would increase greatly if owners had to apply for a consent to install electrical wiring, plumbing and drainage and were required to provide full details and specifications, and all methods used to prevent electric shocks, leaks and backflows etc. Similarly the costs of building dams, earthmoving, flood control works, etc, can all attract high compliance costs and incur lengthy delays, even when the work is urgent. Landowners face a serious dilemma when they are faced with eroding banks on streams – if they carry out urgent work they too often find themselves in court.

If there were no registered electricians, plumbers and drainlayers many more people would reduce their building costs by carrying out the work illegally. To keep these costs and delays under control New Zealanders have long accepted the use of registered electricians, plumbers and drainlayers. These registered tradespeople take responsibility for the proper installation of these systems and risk losing their livelihoods if their work is substandard.

The compliance costs for much work in the rural sector could be reduced if Council worked with the Regional Council to set up a register of licensed contractors for routine farm maintenance work such as:

⁵ These are not extreme analogies – rules which restrain the right to sell off surplus farm land to raise investment capital are akin to rules which would prevent manufacturers selling their surplus plant to finance new technology. Farmers suspect such rules would not be tolerated – people with no understanding of the modern rural economy introduce rules which deny innovative farmers the right to raise equity by selling surplus farm assets.

- (i) earthmoving,
- (ii) dam building,
- (iii) the building of private roads
- (iv) building of street crossings
- (v) pruning of **listed** trees
- (vi) maintenance and repair of **listed** buildings
- (vii) spraying of chemicals
- (viii) dairy waste disposal systems
- (ix) flood control works
- (x) and similar activities.

Landowners would retain the right to use their own machinery and labour, and to apply for their own consents. But for a great many small landholders, or those who have minimised their investment in capital equipment, the use of registered contractors would greatly reduce compliance costs and almost certainly lead to a higher standard of work, and allow urgent work to be carried out when needed.

Farmers and rural landowners generally face high compliance costs because routine contracting work requires individual resource consents which can incur high costs, and which require administration of complex rules, and which may lead to needless delays.

4.7 Suggested Remedies

4.7.1 Local

- (i) Reduce the dependence of discretionary and non-complying activities and make more use of non notified restricted discretionary status.
- (ii) Write the “permitted base line” test into local planning documents.
- (iii) Ask economists to advise council on how to reduce transaction costs while honouring the purpose of the Act, and make sure economists are involved in section 32 analysis of proposed plans.
- (iv) Develop data bases of information collected from applicants and share the information and the costs so that subsequent applicants don’t have to pay for the same information.
- (iv) Councils and Regional Council should work together to set up a register of contractors who are trained in specialist areas to the level where they can be listed as licensed contractors able to carry out their work without the need for individual resource consents. This would also provide a useful opportunity for the

Regional Council to identify those matters which should be devolved to District Councils.

4.7.2 Central

(i) Raise economic efficiency to the status of Section 6 - which makes it a matter of national importance.

(ii) Change the existing 7(b) (the proposed new 6(f)) to read:

(b) the efficient use and development of natural and physical resources and the need to promote this efficient use by minimising transaction costs.

5 COSTS AND THE ENVIRONMENT OF THE ENVIRONMENT COURT

5.1 Our human attitude to awards for costs

Most of us take the view that when costs are awarded against adversaries it's a good thing, but when costs are awarded against our friends it's a total failure of justice and good sense.

Unfortunately this contributes little to developing good policy.

5.2 A changing environment

When the RMA was first introduced it was new legislation which combined a large number of different statutes into one omnibus Act – which is why it's so thick. The Planning Tribunal which is now the Environment Court, quite reasonably took the position that because the statute was new and that all the old case law was defunct it should take a cautious line in awarding costs. This was surely a reasonable position to take and no one would want to challenge it.

Similarly, when District and Regional Councils began to prepare their first RMA plans the Court took the position that appellants who take a reference to the Court relating to a proposed District or Regional plan or other planning document should not be liable for costs. This too seems reasonable; no one would want to change it.

In the meantime the backlog of cases waiting to be heard stretched out to two to three years and the government and the courts came under pressure to clear this backlog.

One way to clear any waiting list is to discourage people from joining it. I have no idea whether there has been a deliberate policy of using cost awards to discourage references and appeals but rightly or wrongly there is a growing perception that this is now the case. Anyhow, all these changes to the environment surrounding the Court, two of which are “objective” while one may be a “perception” (to use the language of the Court) mean that awards of costs are now much more frequent than they used to be. And the sums are increasingly large.

I have no objection to these costs being awarded as a response to increased familiarity with the legislation, or to the change in the number of references regarding plan preparation to the number of appeals regarding specific applications. However, there are some reasons for concern, as follows:

- (i) The notion that public interest groups should be treated differently to private landowners or ordinary members of the public.
- (ii) The awarding of costs because an argument lacks legal focus.

- (iii) The frequent inability of the Court, when considering costs to take into account any abuse of procedure by Council during the processing of the original application and hearing.

The third issue is best dealt with under Section 9 below, which proposes the establishment of an RMA Ombudsman.

5.3 What is the public interest?

Many people, and some politicians, appear to believe that disputes before Councils and the Environment involve three kinds of parties:

- (i) Greedy developers.
- (ii) Individuals acting in their own interests.
- (iii) Environmental groups and other groups acting in the public interest.

This world view assumes that when councils act as consent authorities they are neutral arbitrators between these competing interests.

These attitudes are understandable given that the news media report only those contests between major parties and these frequently are between major corporations or institutions, (whether private or public) and environmental groups. In reality, most applications to councils are filed by ordinary citizens seeking “to provide for their social, economic and cultural well-being and the health and safety” of themselves, their families or their farm or small business.

These ordinary folk frequently find themselves standing alone against a combination of their council, or councils, environmental groups, and vexatious neighbours who are using the process to revisit some dispute quite unrelated to the case. The contest can be decidedly uneven.

The cases which cause some of the most concern are those where local interest groups throw their weight behind an application because it will provide jobs and development for their community, only to find that the case is taken to appeal by some out of town environmental group claiming to act in “the public interest”.

These “public interest” groups tend to have their head offices in the main centres and they have credibility because they appear urbane, well informed, highly educated and professional. They also have considerable political clout and most electorates are in the main centres. But these “public interest” groups are “pressure groups” like any other – they represent the interests of their members which may differ from those of the community where the application is based.

These “public interest” groups implicitly lay claim to having a higher level of expertise than local interest groups who are dealing with proposals within their own community. Someone may have applied to develop a high quality tourism lodge on some remote part of New Zealand. They may have consulted with a whole range of local interest groups who have decided that the benefits of the project far outweigh any possible damage to the environment. Indeed their perception of “amenities” is likely to include local services; anything which keeps schools, medical services and retail and other services viable is a considerable enhancement to the amenities of their neighbourhood. Furthermore they may well recognise that people with well paid jobs can afford to plant trees and otherwise maintain and enhance their own natural and physical environment, more than they can if forced to live on the dole.

But all too often a group, claiming to represent the public interest, swings into town and files an objection and even an appeal on the grounds that the project detracts from the local amenities – as perceived by urban people who want to visit these remote areas and find them in a state of wildness.

They may have a claim. But such an outside group is a pressure group of no greater or lesser standing than the local groups and individuals. Indeed because the locals have a more intimate knowledge of the local environment and its needs and amenities they may well have a superior knowledge of what constitutes sustainable management in their district.

On these grounds it is difficult to see why such “outsider” groups should be able to lay claim to public funds in order to deprive local communities of projects which they support. This can be legitimate only if we have decided to establish a new “environmental elite” whose claims over natural and physical resources are deemed to be superior to others. This notion does not sit well within an open and democratic society.

A bias in favour of local interest groups can be built into the issues, objectives, and policies of the planning documents. Some councils in regions with falling populations have done so and hopefully the courts will uphold their claim to self-determination.

Government should avoid providing financial assistance and subsidy to any special class of participants. The concept of sustainable development as defined in Section 5 grants no favoured status to those who oppose the provision of social economic and cultural well-being over those who want to provide these benefits for themselves and their communities. If such funds are to be available to national groups then matching funds should be available to local groups so that they can argue their case with equal resources.

However this can create its own “puzzlements”. The Government, via Transit New Zealand, is building a motorway in Wellington; one would presume that Transit’s analysis has confirmed that building the motorway is in the public interest. But in spite of assumed cabinet solidarity on such matters the Ministry for the Environment has funded a local pressure group, the CBC, who opposes the motorway.

A spokesman for the group, said:

CBC made a very strong case for leaving this historic area intact. ... We were only in a position to make any payments because we secured legal aid for the case. Legal Aid was obtained from the Ministry for the Environment fund which is specifically designed to assist community groups undertaking legal action with respect to the environment – well worth investigating if you are contemplating legal action of this nature.

This raises the question, which group is acting in the public interest? The proposed motorway obviously provides the greatest good for the greatest number. There is no obvious and clear cut answer to this question but the case provides a fascinating example of the dilemma we face when trying to determine where the public interest truly lies.

5.4 Cost awards for lack of legal focus and related courtroom “inefficiencies”.

Section 269(2) says that:

Environment Court proceedings may be conducted without procedural formality where this is consistent with fairness and efficiency.

Section 275 (Personal Appearance or by Representative) says:

A person who has a right to appear or is allowed to appear before the Environment Court may appear in person or be represented by another person.

Case law has established that a person “representing” a party to an appeal need not be a qualified legal practitioner.

Over the first ten years of the administration of the RMA many lay people had acted as representatives and many people have led their own cases before the Court. When a person leads their own case this does create problems in retaining the distinction between submissions and evidence. But in many cases the Court has accepted that the applicant (as appellant) could “tell their story” as a citizen rather than under the mantle of presenting expert evidence.

Also in many cases the appellant has spent all their savings (if they had any to start with) during the hearings process and could not afford legal services even if they chose to do so. These appellants are often full of rage and fury at their treatment by the local consent authority and are determined to “have their day in court”.

During the early years of the RMA those on the bench have shown a remarkable sympathy and tolerance for lay people venturing into the arcane environment of the court and have coaxed and guided these people through the process and have made it clear to expert barristers that intimidation or bullying will not be tolerated.

This has been particularly true in the more remote regions of the country where the informal proceedings are somewhat encouraged by the informality of the environment. A school assembly hall or RSA hall has fewer trappings than an urban courtroom while these halls are also less intimidating for lay participants.

While this informality and lack of skill in Court procedures must frustrate experts on the bench, and on the floor of the court alike, it is also true that some of the best and most quoted case law has emerged from cases brought by lay appellants bringing their own cases.

However, of late, awards for costs are being awarded against appellants because their case has “lacked legal focus” which seems to suggest that even a case which is sound in logic and in terms of sustainable management may lead to costs against the parties because of this deficiency. And yet the Act allows a measure of informality and if the Act says that parties are not required to be represented by a legal practitioner then a “lack of legal focus” may be an inevitable outcome.

On the other hand we all have an interest in the efficient operation of the Court.

This problem of the costs of legal representation is particularly acute in rural areas or even in towns and cities outside the main centres.

5.5 A shortage of skilled legal practitioners.

The RMA is complex and specialised legislation and has developed a large body of case law. Many small legal firms are reluctant to take on RMA cases because of their duty of care to their client, especially with the more frequent award of costs.

The only law firm in a small town with any RMA experience is likely to be the firm that advises the local or regional council and obviously has an entrenched conflict of interest.

So a local appellant may find it difficult to find legal representation in their own neighbourhood. For obvious reasons local barristers may be reluctant to refer their clients to the local competition, if there is any. They will therefore tend to refer their client to a city Barrister or Q C. The consequent fees and travel costs daunt most appellants who then attempt to run their own cases or approach lay advocates.

They are likely to lose their case and may well have costs against them.

The Courts appear to have sacrificed informality in favour of efficiency. But there were good reasons for the sections in the Act which suggest informality when appropriate. It seems particularly unfair on the landowner applicant when the presence of Senior Counsel from one of the other parties tends to set the tone and format of proceedings.

The exchange of evidence and the following exchange of rebuttal evidence make lay preparation and participation extraordinarily difficult.

Landowner applicant/appellants are not expert and do not have office staff and juniors to manage large amounts of paper work in a short time. Also their own expert witnesses tend to be people who actually work in the field and have jobs to do. Councils experts tend to be drawn from their full time staff or consultants or from their pool of consultants who do little else than prepare and exchange evidence, then prepare and exchange rebuttal evidence, and then appear in Court.

The scales are tipped heavily against the amateur.

An even more disturbing practice is for councils to draw on neighbour objectors as expert witnesses to support their own case under the guidance of Council's legal council. The end result is that lay appellants find themselves in court dealing with neighbour objectors who enjoy the benefit of legal council at the ratepayers' – and the applicant ratepayer's – expense.

This seems contrary to natural justice to say the least.

5.6 Direct references to the Environment Court

The idea that the parties should be able to proceed directly to the Environment Court in those cases where it is clear that any decision by the local council will be appealed appears at first sight to have considerable merit. Why should the two parties go through this extensive and expensive “dress rehearsal” before a Council Hearings Committee, knowing that the real “show” will be before the Environment Court?

However, I am not sure that the apparent benefits are real, and this may lead to even more delays in getting to the Court for everyone else.

At present the Hearings Committee provides a low cost venue for ordinary citizens to have their say. Anyone can come along and say their piece – even if it has little substance, and lacks “legal focus”. It is not uncommon for a hundred or more submitters to appear before a Hearings Committee dealing with a single major project.

There is no right of cross examination although Councillors may ask questions of their officers and the submitters. But even if the submitters are represented by legal counsel, (which is unusual) there is no opportunity for their legal counsel to cross examine the council staff or other submitters and their witnesses.

If a case goes directly to the Environment Court what happens to these submitters? Can they cross examine every other submitter and their witnesses? If they can, then the proceedings will take weeks. On the other hand, if these submitters are subjected to the current court policies regarding costs, many of them will have substantial costs awarded against them for lacking legal focus and not focusing on the relevant issues.

One answer is to have a pre-hearing – but that of course is what we already have with the Council Hearing. But one thing is clear; if all these submitters and their witnesses have rights of cross-examination the courts will be even further congested. If on the other hand the process is subject to the discipline of awards for costs then there will a public outcry as people become too scared to present their case.

There may well be an answer which escapes me. But unless these matters are addressed in advance, the proposed for direct references to the court may deliver none of the claimed benefits, while seriously curtailing the rights of ordinary citizens to voice their concerns on projects of major public significance.

5.7 Increase the costs of reference

Finally, the case load of the Environment Court would be reduced if vexatious or trivial references diminished. One has to say that in 2003 the low cost of entry to the court encourages references which should either never be considered or should be dealt with by a negotiated settlement. At present it seems to me to be far too easy for objectors or aggrieved parties to simply dig their toes in and take the case to court.

At present, the required fee is only \$55.00.

Maybe it is time for Parliament to make some attempt to get the price signals right.

The following fees for reference might result in better rationing without a loss in equity.

- (i) Leave the fee as it is for landowner references relating to proposed plans, but
- (ii) Raise the costs of a reference by another local authority or other government department to say \$1,000. (This might discourage over enthusiastic Regional Councils from challenging so many Council consents).
- (iii) Increase the cost of an applicant's appeal to \$200.00
- (iv) Increase the cost of an objector's appeal to a consent to \$2,000.

A pricing regime along these lines would impose some discipline earlier in the piece and make referrers think twice before using the court process as no more than a delaying tactic intended to do no more than delay the inevitable.

As the American jurist points out, taking anyone to the court is an "act of aggression" and pricing is a means of tempering our aggressive instincts.

5.8 Suggested remedies

5.8.1 Central

(i) Procedures

These matters do not require any change in the Act – and indeed I am suggesting that the proposed change to allow direct references to the Environment Court may be misconceived.

On the more general matters of the environment of the court, I understand that court proceedings are set by the Judge and the Judges are guided by Judges' Rules which are determined by conferences from time to time. I am not sufficiently skilled or experienced in this field to suggest remedies but can only emphasise the widespread unease generated by the present complexity of proceedings and the paperwork being generated by processes which were intended to be "user friendly".

(ii) Revise the Costs of References

The present fee for a reference is too low and encourages vexatious and frivolous and time wasting appeals. The pricing regime should be examined and reformed to give notice that a reference is not meant to be lightly undertaken. An early cost might reduce the incidence of heavy and far more damaging awards of costs further downstream.

5.8.2 Local

The root cause of some of the problems may well be the lack of legal expertise available in smaller centres and rural areas.

Mayor John Law of Rodney District is keen to use local lawyers to advise his Council. I understand his motivation is to keep business in Rodney District, rather than hand over large sums of money to firms in Queen Street.

This is an opportunity to increase and diversify the skill level available to local citizens of the District. For example Council could appoint one larger local firm as its RMA adviser on say a five year contract, or whatever is sufficient to make it worth while for that firm to invest in training and other resources. But the Council could simultaneously appoint two or three other local firms or sole practice Barristers to assist the key adviser and hence build up skill over time. These could be shorter appointments of say two or three years.

After some years there would a pool of legal firms in the district with knowledge of both the RMA and the local District and Regional Plans. This would diminish the temptation for small businesses and landowners to represent themselves or use lay advocates.

This would increase the overall efficiency of the system without compromising standards or fairness.

6. MAORI ISSUES

6.1 Introduction

No one can have any doubt that, in the past, local government had tended to be dismissive of Maori interests, and indeed, in some cases had been downright hostile to them. Councils and council staff, who would never dream of bulldozing a church cemetery, would routinely run machinery over land which was sacred to Maori. Most accept the sad history which led to the inclusion of the sections of the RMA which make special reference to Maori and which require councils to have regard to their interests, and to ensure that their views are heard, in the preparation of planning documents.

However, we should be equally confident that those who drafted the legislation had no intention to generate two classes of people when it came to the day-to-day administration of plans and the treatment of consents.

The second schedule, which sets out the matters related to districts to be included in policy statements and plans, refers to cultural heritage sites and values as follows:

(2) (c) Natural, physical, or cultural heritage sites and values, including landscape, land forms, historic places and waahi tapu.

The wording is general and *waahi tapu* is the only specific reference to Maori concerns, almost certainly reflecting the fact that previously Maori burial sites and other sacred sites had been treated so poorly. We should probably all look forward to the day when such racially or culturally specific terms are no longer needed and that it can be assumed that Maori, Chinese, Cook Island, Indian, and other sites of cultural and heritage importance will all be treated equally under the law, and by custom.

Similarly, the fourth schedule, when it refers to matters “to be considered when preparing an assessment of effects on the environment to accompany an application”, refers to spiritual values, but only within a broader context as follows:

Any effect on natural and physical resources having aesthetic, recreational, scientific, historical, spiritual or cultural or other special value for present or future generations.

This clause refers to “spiritual values” in a generic sense and does not single out “Maori spiritual values” or any other group’s spiritual values as demanding some unique or special consideration.

The legislation requires Councils to have special regard to Maori interests because of the sad record of the past. However we have to be conscious that many proposals which have the best of intentions can actually lead to an increase in division and conflict, which is of no benefit to anyone.

In particular, both recent and past history tells us that adding religious conflicts to any racial differences will almost inevitably heighten rather than reduce conflicts.

The early European settlers of the United States were fleeing from religious persecution. Their recent experience had taught them a clear lesson which is why the first clause of Article One of the First Amendment to the US Constitution says:

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.

The American Founders were not opposed to religion. On the contrary, they were deeply religious people who knew that only by maintaining the separation between church and state could they guarantee every citizen's right to the freedom of worship, and ensure that no one person or group would have the power to impose their particular beliefs on others.

This lesson of history is clear. If New Zealand aims to have Maori, Pakeha and others, live in harmony in this land we too must maintain and even further promote the separation of religious belief and the powers of the state. The state has a duty to protect people's freedom of belief (freedom of belief is one of the key property rights) but the state must not be given the power to enforce one set of religious beliefs on others.

We must also recognise another simple reality. Religious belief is not connected to racial or ethnic makeup. No one can determine another person's religious beliefs simply by referring to their race. Maori beliefs are diverse and every Maori has the right to believe what they like. No Planning Document has the power to demand that all Maori hold the same set of religious or spiritual beliefs.

It is unfortunate that if anyone becomes critical of the way Maori issues are being handled they run the risk of being accused of racism. But the fact is that many attempts to "set things right" only create further division. New Zealanders are fair minded people are genuinely want to set right the obvious wrongs. But rules which split this community in two will do more damage than good.

6.2 Interpretation and application of s5, 6(e), 7(a) and 8 of the RMA

Many Planning Documents properly declare that the Plan seeks to involve the *tangata whenua* in the plan production process. The first Schedule of the Act requires Council to consult with *tangata whenua* during preparation of the Plan and to have regard to other documents including Iwi plans etc. However, nowhere does the Act direct that

tangata whenua should enjoy any special privileges in the **processing of consent applications** or other matters, once the plan is operative. Once a plan is in place then all citizens and public interest groups are equal before the law.

Many planning documents now include the Treaty, sometimes in both languages along with someone's commentary. Again it is not clear why these need to be incorporated in a planning document. It could be argued that the principles of *Magna Carta* which *inter alia* guarantee property rights and deny the crown the power to seize property without compensation, should be included also. But where would it end?

At least one District Planning Document contains a lengthy recital of the Maori "creation myth". **Surely such a legend or myth has no place in a document which has the force of regulation.** New Zealand is a secular society and this separation between Church and State, which guarantees religious freedom, should be a jealously guarded constitutional principle.

Many planning documents then go on to incorporate statements which assume that all Maori, as a group, or a collective, believe in the statements contained in these documents. Many citizens are Maori and many of them are Christians of diverse denominations, such as Roman Catholic, Mormon, Ratana, etc., or are even atheists. It is no more proper to claim that all Maori believe in "mauri" than it is to claim that all Pakeha believe in "the virgin birth".

Imagine if some Council decided to include a statement called "Pakeha values and perspectives" which claimed that:

The following section, provided by Pakeha, describes the traditional values and perspectives of Pakeha who live on the land of the District. These values and perspectives reflect the predominantly atomistic nature of the Pakeha view of the world.

According to Pakeha tradition God created the earth in seven days and created Adam and Eve who lived in paradise in the Garden of Eden.

The Pakeha approach is based on a belief in the soul, and that all living things are permeated by a life force which separates the organic from the inorganic.

Pakeha believe that God is the Father of creation and his son Christ is the word of God made flesh.

If any Planning Document contained such statements there would be a justifiable outcry and yet the above is an analogue of a statement in a District Plan claiming to present Maori Spiritual Values.

Do the people who write these Planning Documents really believe that all Maori hold the beliefs which they list? Does Kiri te Kanawa believe them? Does Sir Tipene O'Regan believe them? Does the Maori family down the road believe them? Most of my Maori neighbours are Mormon, Ratana, or other Christian, or are vaguely superstitious atheists like many New Zealanders.

Finally, many of these assertions about Maori belief or "the Maori World View" reflects what Roger Sandall (in *The Culture Cult*) calls the "Disneyfication" of Maori and other indigenous cultures.

Prior to the arrival of Europeans, Maori had already removed one third of the tree cover by fire farming, a practice common to pre-industrial cultures around the world. So how can any Plan claim (and many do) that all Maori believe that stripping the land of native trees is an act of indecency?

Similarly no one should blame the early Maori settlers for hunting large animals to extinction or for fire farming the land. This has been a pattern of human behaviour all over the world. It would have been extraordinary if they had behaved any differently.

But writing contrary claims about Maori behaviour into District Plans only serves to remind those who are ill disposed towards Maori of these historical truths. They will then read into such documents either hypocrisy on the part of the Tangata Whenua who were consulted or "Disneyfication" by Pakeha academics who appear to have hijacked old Maori beliefs to suit their own ends and agendas.

No matter how well meaning the intention, the end effect is more division and increased racial tension, which we presume is contrary to the intentions of the councils who prepare these documents.

Religious beliefs are a personal matter for each individual to determine, to hold to, and to act out as they see fit. All New Zealand citizens are able to hold any religious belief they wish, but it is central to the maintenance of a free and open society that no one group should be allowed to impose their religious or spiritual beliefs on others.

6.3 Spiritual Values and *mauri*

Many planning documents contain long sections which introduce (Maori) **spiritual values** into the plan. References to "spiritual values" then occur frequently throughout

the rest of the document. The body of the Act makes no reference to “spiritual values”, Maori or otherwise, and for this reason alone these references may well be *ultra vires*. The implication is that only Maori have such spiritual or cultural values and that Maori have a special regard for the land, and landscape, with the implication that non-Maori do not. This is divisive and we all surely be attempting to reduce division rather than increase it.

Simon Schama’s *Landscape and Memory* clearly establishes that western culture is dominated by the highest regard for land and its fruits – landscape and nature play a major role in Western art, including painting, film, music, poetry, prose and drama. Many art works reflect a high level of admiration for nature in all its forms, and express a wide range of emotional responses to landscape and nature, ranging from Vivaldi’s *Four Seasons* to Colette’s *Earthly Paradise* to the book of *Genesis*.

Those who wrote the legislation appear to have been careful to imply no connection between spiritual values and any group or individual. Those who prepare Planning Documents should maintain this position or risk increased division and tension.

6.4 “Spiritual Value” is in the Fourth Schedule – where it belongs.

The Fourth Schedule to the Act includes a reference to spiritual value when it says, under

2(d) – Matters which should be considered when preparing an assessment of effects on the environment –

Any effect on natural and physical resources having aesthetic, recreational, scientific, historical, spiritual or cultural or other special value for present or future generations.

This statement refers to **any** spiritual or cultural value, not just those of Maori, or of anyone else for that matter. It also refers **only** to an effect on those “natural and physical resources which have special value for present or future generations.” It is not the spiritual value *per se* but “the effect on natural and physical resources” which has the special value which must be considered. This is a critical distinction.

The RMA is carefully crafted and means what it says, and reflects deep thought and analysis by those who crafted it. The Fourth Schedule refers to the special values of **all** sections of the community. It does not select, or focus on, the special values of any one ethnic, religious or racial group. History warns us that to do so promotes divisiveness and oppression.

The Fourth Schedule indicates that if someone wants to build a crematorium or an abortion clinic next to a Catholic church then the congregation of that church (the

natural or physical resource) has grounds to object because of their shared cultural and spiritual values which have been invested in that location. Similarly, if someone applies to build a pork-sausage factory next to a Jewish Temple or a Muslim Mosque then they can expect resistance on similar grounds. Equally, if some farmers want to dump their cowshed waste into a waterway which the local Maori hapu hold sacred then they too can expect resistance on these grounds.

In other words spiritual, scientific, aesthetic and historical matters can all be taken into account within a specific decision on a specific application by having regard to the effects on natural and physical resources.

However, the Fourth Schedule provides no justification to extract one of these values, and then give it special treatment, and to apply it to only one ethnic or religious group within the totality of the District Plan.

By making spiritual and other values specific to time, place, community of interest and application the Act avoids turning the resource management process into a battle ground for competing religious and other beliefs as abstract principles.

When the terms “spiritual values” and *mauri* are built into the plan as a whole we open the door to a future plan being written so as to allow Catholic groups to demand that no crematoria or abortion clinics should be allowed **anywhere** in the District as opposed to the Fourth Schedule which allows them to protest against these activities when it occurs next to a church or convent or other place of spiritual significance to them.

Similarly this avoids making blanket claims about the beliefs of any group within the District or Region. Councils have no business assuming that all New Zealanders of Irish descent are Catholics and hence believe in the physical resurrection of the dead.

Equally, Councils have no business in assuming that all Maori believe in the animism of their ancestors, and hence believe in the *mauri* or the life force.

This belief in the *mauri* or “life force” is a religious belief. Modern science finds no evidence of a life force and certainly none can be measured.

Anyone in New Zealand is entitled to believe in the *mauri* or life force, just as anyone has the right to believe in the soul, in heaven and hell, or even astrology.

But how does a council monitor whether the *mauri* of water has been degraded by a development or activity alongside a stream? Council can monitor any change in BOD

(biological oxygen demand), or water clarity or other forms of contamination, because these can all be measured.

But no one can measure the *mauri* of water hence no one can give evidence as to whether it has changed or not. Similarly no one can measure the quality of the soul or the existence of the Holy Ghost. Hence such concepts have no place in a planning document. The Environment Court has consistently ruled that **perceptions** (unsupported by evidence of real effect) are not a valid basis for objection to a proposed activity, use, or development.

During the consultation process which precedes the preparation of planning documents some Maori will no doubt have expressed concerns based on uniquely Maori values and beliefs. No doubt many non-Maori will have expressed concerns based on their own spiritual values and religious beliefs. But this is no basis to build these concerns or beliefs into the body of a District or Regional Plan.

6.5 Section 8 – The Treaty obligation

Article Three of the Treaty guarantees both Maori and Pakeha the same rights and duties as the people of England. The rule of law and separation of church and state, the rights to property and freedom of religious and political beliefs are all part of those rights and duties.

If the District Plan is to uphold the principles of the Treaty then surely the third article needs to be upheld because its meaning is so clear.

But many reports to Council draw on the claimed Treaty “principle” of “active protection” to justify the insertion of Maori spiritual values into the plan. The plan preparation process is governed by the Resource Management Act and the Act itself determines how the Treaty principles are to be enacted.

The Act does not give Councils or their consultant’s power to roam freely into constitutional areas which are quite clearly excluded from the RMA itself.

6.6 Consultation with Maori

The general **obligation** to consult with Maori falls on Council. The Act and the case law make this clear. There are times when an applicant for a consent may well **be encouraged to** consult with tangata whenua because they are an affected party to an application. However, the Environment Court has ruled frequently that the obligations generated by the Treaty fall on the Crown not on the individual.

The RMA does not **REQUIRE** any citizen or applicant to consult with anyone. Many do not bother to consult and prefer to go straight to public notification.

Of course it can be useful and sensible to consult with those affected because it can avoid the need to notify. **But there is no legal requirement to consult under the RMA.**

Quarantine Waste v Manukau City (CP306/93) makes this quite clear when the court found that:

Where an issue requires consultation with the Tangata Whenua the statutory and Treaty obligation of consultation is that of the consent authority – as the local government agency – not that of the applicant.

It may be sensible to consult. It may be useful to consult. It may be highly advantageous to consult. But there is no compulsion because the writers of the Act knew that when parties are **forced** to deal with each other, then bribery and corruption is encouraged.

Two other decisions of the court make the position clear:

Ngatiwai Trust Board v Whangarei D.C. a080/95 4 NZPTD 610 says.

Although the RMA does not specifically require consultation with Tangata Whenua by applicants for resource consents, it is recognised good practice that applicants consult where proposals may affect matters in s6(e) or s 7(a), Where an applicant has not consulted or not sufficiently consulted with Maori in a case involving matters of Maori interest and concern it is good practice for the planner preparing a report to carry out such consultations.

This general position is endorsed by *Hanton v Auckland CC* and which concluded that:

Where it is known that natural and physical resources, which are the subject of a resource consent application, are the object of a valued relationship by Maori people, any advisor preparing a report on the application for a consent authority should investigate and report on the extent to which the proposal would affect that relationship.

These and other cases make it clear that the obligation to consult falls almost entirely with Council, and that therefore Planning Documents should be written to reflect this, by including a statement to the effect that:

Council will consult with tangata whenua over any matter that may affect their taonga or their use, development or protection of natural resources.

Case law makes it clear that Council does not have the power to force anyone else to do so. Therefore no such a power should be implied within a document which has the force of regulation under the law.

6.7 Waahi Tapu and other Taonga

We should all strongly endorse and support the major effort which some councils (most notably the Far North District Council) have taken to clearly identify *waahi tapu* and other taonga on the planning maps. This represents a major effort by iwi, hapu, individual Maori and council staff and consultants. (Of course councils have an obligation to ensure that these sites are genuine – regardless of when they are introduced into the process.)

Even the “secret sites” of the Far North have had their general area identified and the details are lodged with the Council and hence will presumably be available to applicants on request. (Some of details relating to these matters wait on final resolution of the Proposed Plan. However, the general direction has been well established.)

All District Plans should declare that any such “secret” sites will be revealed, with the necessary conditions of confidence, to anyone seeking a LIM report on a piece of land so affected. However, the vast majority of such sites should be identified on the planning maps.

Someone buying land anywhere in New Zealand – say the Far North – from a remote location – such as Christchurch – has to be able to depend on the District Plan and LIM reports to identify such *waahi tapu* on regular title. In an open society there can be no “sealed envelopes”.

There is nothing which discourages investment as much as a fear of the unknown and unexpected.

6.8 Proposed Remedies

6.8.1 Local

- (i) All references to spiritual values should be removed from the “general” section of District Plans.

- (ii) All references to *mauri* be removed from the “general” sections of District Plans.

- (iii) District plans should make it clear that the duty to consult with Maori (as Treaty signatory) rests with the council not with applicants.
- (iv) All councils should identify all waahi tapu and taonga within the planning documents and on the planning maps.
- (v) Any “secret sites” should also be identified on files held by council and be disclosed to anyone seeking a LIM report relating to that site

7. COMPENSATION AND THE RMA

7.1 Public agencies believe in public ownership

Too many public agencies come to believe, or persuade themselves, that private ownership is the environmental “problem” and that public ownership, or control, will solve it. The experience of the Soviet Union, which effectively committed “ecocide” should have proved this theory wrong.

Furthermore, within any society, those resources which are owned by everyone, and hence owned by no one, are the most likely to be abused and polluted. We dump sewage into rivers rather than on our neighbours’ land because our neighbours are likely to toss it right back – with interest. We find rubbish dumped from cars on the public roadside rather than on private front yards.

The RMA recognises this when it requires consent authorities to focus attention on discharges to air, water and soil. It does not draw our attention to private gardens, our living rooms, or the floors of shopping centres.

The “tragedy of the commons” has long been recognised as reflecting the public ownership of those commons. Tribal hunter-gatherers kill off large species such as the moa or the mastodon rather than small species such as the chicken and the pig. Chickens and pigs can be fenced in and “owned”. Large animals are more difficult to fence. (Also when a hunting band brings home a mastodon or a moa the end result is a feast. When a hunting band brings home a single rabbit, the end result is a fight.) Our tradable fishing quotas have created private property rights in fish as a far-sighted means of promoting sustainable management of our fisheries.

Yet many public policy documents continue to take the view that private ownership is *the problem* and that all manner of problems would be solved if everything was owned by the State – and managed by the good people who write such documents.

This seems naive at best. The Soviet bloc was the greatest polluter in Europe. West Germans are having to spend billions cleaning up the environmental mess left behind by decades of public ownership of the means of production, distribution and exchange in East Germany.

Also the works of historians such as Pipes, and more recently de Soto, have established the firm connection between private property rights and the generation of wealth. We also know that our concern for the environment increases with wealth, as does our ability to do something about it.

Hence, the argument that we can promote an environmental Utopia by the widespread destruction of property rights will need to be convincing. History, theory and general experience suggests the more probable outcome will be a degrading of the environment.

My position is that the threat of takings of private property is likely to be detrimental to the environment. Certainly, vegetation rules which punish those who plant trees seem wrong-headed to say the least.

Rules which make property rights less secure will deter the most enthusiastic environmentalist from heavily investing in environmental benefit. We accept that people who own their houses are more prone to look after them than those who rent, but fail to transfer this lesson to the ownership of land.

Against this general background I will now discuss my regulatory takings, compensation and the RMA.

7.2 Land is different – but just a little.

I do not know of anyone who believes that landowners should be free to do whatever they like with their land. The courts have always recognised that landowners are not free to pollute their neighbours' land or deny neighbours the right to reasonable enjoyment of their property.

The RMA extends this principle of “internalising externalities” into a wider and more comprehensive definition of the environment – reflecting the recent understanding that the environment extends beyond our neighbours' boundaries.

The traditional regulations were very much “tit for tat” and imposed mutual restraints for mutual advantage. I would agree not to build within 3 metres of the boundary, on the understanding that you would accept a similar constraint. This underpinned the understanding that regulatory “takings”, which mutually protected neighbours' property rights, (or “the amenities of the neighbourhood” as the TACPA put it) were not subject to compensation.

More recently this presumption of “no compensation” has been extended to include zoning restraints and has been extended into the RMA even when regulations are restraining actions in a much more “public” realm – as in protection of wetlands, riparian edges and so on.

7.3 The American Response

Environmental law has been developing along similar lines in America where the judges found themselves left in a difficult position. Their legislation gives little guidance as to when a regulatory restraint crosses the line and becomes a “taking” and hence subject to the “just compensation” provisions of the US constitution. The US courts have had to deal with a “continuum” and make a case by case decision as to where any particular case falls on that continuum and when and where the line has been crossed.

Until recently, the US courts have ruled against landowners’ rights to compensation even when the regulations have extended into some of the territory we are now occupying within District and Regional Plans under the RMA.

However, in *Palazzolo v Rhode Island* (USCC No 99-2047, 28 June 2001) the US Supreme Court decided it was time to turn the tide. In this decision the US Supreme Court appears to have sent a message that all of society – not just a few unlucky landowners – must be prepared to bear the cost of environmental regulation. (My last web search based on *Palazzolo v Rhode Island* turned up 1520 references – the decision has generated considerable debate, for obvious reasons.)

Anthony Palazzolo, an 80-year-old retired auto wrecker, wanted to build on coastal property in Rhode Island that he had owned for 40 years. At some point in his tenure the land had been designated “protected wetlands”. Mr. Palazzolo's many requests for building permits were denied and so he finally sued for compensation. The state courts said he had no case. The U.S. Supreme Court disagreed, and ordered Rhode Island's courts to revisit the question of whether he is owed “just compensation” for the lost value of his property.

The US Constitution prohibits the government from taking a citizen's land for public use, such as bridges or roads, without just compensation. But regulatory “takings” are trickier: The state doesn't actually grab your land; it just bars you from doing anything with it. Some politicians and environmental activist groups in America soon figured out that regulatory takings were a speedy – and extremely cheap – way of delivering on environmental promises.

The difficulty is not that US society is passing laws to save the environment. Rather, it's that one group of people – individual property owners – are footing the bill for everyone else. Owners who have the bad fortune of landing in the (protected) US silver rice rat's “natural habitat” find themselves barred from commercial enterprise and watch their land values plummet. Property-rights groups estimate that owners have shouldered hundreds of billions of dollars’ worth of “the nation's” environmental good.

Property owners who fight back run into a steely opposition. US state politicians complained (without irony) that the government could never afford to compensate

landowners for all the property it takes each year (by one state's own reckoning, \$5.4 billion annually).

But the courts are bringing these takings to a halt.

In California, farmers and ranchers in the Tulare Lake Basin sued the state after being cut off from water between 1992 and 1994 because of endangered fish: (*Tulare Lake Basin Water Storage District v US*, US Ct of Federal Claims No 98-1011, Judge Weiss,, 30th April 2001). The Court held that the loss of water constituted a clear government “taking” of property, and that the farmers must be compensated. The court noted that the Fifth Amendment is intended “to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” (my emphasis)

These cases have set the stage for a new era of environmental responsibility. The key problem in America's environmental debate is that most people have no concept of how much it costs to protect natural resources, and so feel there's nothing to lose from more regulations.

This might start to change. The Tulare farmers say the damages for the loss of water come to \$25 million. Mr. Palazzolo – should he now win in Rhode Island – says his lost economic opportunity is more than \$3 million. Up to now, the public and environmental pressure groups have enjoyed a free ride on the backs of individual landowners.

In the future American councils may have to set some environmental priorities. The spectre of spiralling tax bills to compensate innocent property owners may cause some long overdue second thoughts about environmentalist overreaching.

Economists have long known that **underpriced goods are prone to be over consumed**. And if regulations cost the regulator nothing then they will be cast about without care or responsibility.

7.4 The New Zealand law

In October 1995, within a submission on the Maori Reserved Lands Bill, Sir Geoffrey Palmer strongly argued that these United States decisions draw on constitutional principles which apply equally to our British Tradition. For example:

There is a strong common law presumption that Parliament will not interfere with private property rights, and if it does so, it will provide adequate compensation

In paragraph 199, Sir Geoffrey quotes from Lord Radcliffe in *Belfast Corporation v O D Cars* [1960] AC 490, 523524, “which applies equally in New Zealand”:

Acquisition of title or possession was “taking”. Aspects of this principle are found in the rules of statutory interpretation devised by the courts, which required the presence of the most explicit words before an acquisition could be held to be sanctioned by an Act of Parliament without full compensation being provided

In paras 202, and 203 Sir Geoffrey refers to the New Zealand Bill of Rights Act 1990 and points out that the long title identifies as one of its purposes:

To affirm, protect, and promote human rights and fundamental freedoms in New Zealand

Which leads him to argue that the Bill requires that the courts adopt “a positive commitment to human rights and fundamental freedoms”.

After referring to international constitutions, the *Magna Carta* and several other charters and judicial rulings, Sir Geoffrey concludes in para 219:

The right to property is extensively recognised throughout the World. Property rights can only be taken in special circumstances generally required to be in the public interest. Adequate compensation is invariably required.

Hence, it seems that if New Zealand landowners are to lose a significant portion of their property rights to provide for others who seek some form of public park, or an extended conservation estate, then their land should be purchased, or compensation should be payable for such a “taking”.

The RMA does not provide for interest groups or councils to gain benefits while expecting private citizens to bear all the costs. In *Povey vs Waitakere City Council* (W66/92), Judge Treadwell’s Tribunal commented as follows:

If the Council wants to acquire land for reserves (and this comment applies also to the Regional council), then it may designate the land for that purpose and buy it from the owner at a price reflecting the use as to which the land could be put in the absence of such a reserve designation.

Similarly if a special interest group like the Royal Forest and Bird Society wishes to acquire land for reserves then it should either purchase the land itself or petition the appropriate council to do so.

Of course some will say that Sir Geoffrey Palmer did recognise that “the presence of the most explicit words” in legislation could override this principle, and that the courts have ruled that the RMA does override common law rights in land.

Many councillors and practitioners seem to have persuaded themselves that section 85 supersedes any rights to compensation, and that, provided they claim to be acting under the RMA, the rights granted under *Magna Carta*, the Imperial Laws Application Act 1988, and the New Zealand Bill of Rights Act 1990, have somehow been expunged.

7.5 The Relationship between Section 85 and Section 32

The section 85 premise that compensation is not normally payable and that takings to achieve the purposes of the Act may be legitimate depends for its validity on councils' obligations to fulfil their duties under Section 32. But any section 32 analysis which reveals that excessive private costs will be imposed in order to achieve some public benefit will suggest that either:

- (i) The rule is too oppressive, or
- (ii) Compensation should be payable.

Proper Section 32 analysis prevents the abuse of the apparent presumptions that compensation is not payable. Section 85 must be read in conjunction with Section 32. If you like, Section 32 established the threshold test for the presumptions of Section 85.

The RMA makes a useful distinction between:

- (i) The imposition of rules which internalise externalities, and which normally do not generate a need for compensation (Parts IV and V), and;
- (ii) "Takings" in the public good, and for which compensation is due. (Part VIII).

Section 85 falls within Part V of the Act which deals with *Standards, Policy Statements and Plans*, and which controls the contents of plans and the procedures for establishing those contents.

Part VIII of the RMA deals with designations and heritage orders.

Section 189 says:

- (1) *A heritage protection authority may give notice to a territorial authority of its requirement for a heritage order for the purpose of protecting –*
 - (a) *any place of special interest, character, intrinsic or amenity value or visual appeal, or of special significance to the tangata whenua for spiritual, cultural, or historical reasons.*

(2) *For the purposes of this section, a place may be of special interest by having special cultural, architectural, historical, scientific, ecological, or other interest.*

After setting out the notification and hearings procedures relating to such heritage orders, Part VIII then says, in section 185

(1) An owner of an estate or interest in land (including a leasehold estate or interest) that is subject to a designation or requirement under this Part may apply at any time to the [Environment Court] for an order obliging the requiring authority responsible for the designation or requirement to acquire or lease all or part of the owner's estate or interest in the land under the Public Works Act 1981.

and

(7) The amount of compensation payable for an estate or interest in land ordered to be taken under this section shall be assessed as if the heritage order or requirement had not been made.

In effect, Part VIII of the RMA says that if “the public” wants to protect any place because of its special interest, character, intrinsic or amenity value or visual appeal, or for spiritual, cultural, or historical reasons, then the land should be so designated by a heritage order. If the heritage order prevents reasonable use of the land then the land shall be purchased and compensation paid.

This seems quite clear to me.

Yet I continually read declarations that the RMA makes no provision for compensation. Indeed, on page 63, the Report by the Parliamentary Commissioner for the Environment *Weaving Resilience into our Working Lands* says:

The RMA by virtue of Section 85(1) expressly recognises the concept of a regulatory taking but excludes the possibility of it occurring as a result of the operation of the Act.

This is surely a massive overstatement of the “exclusion”, especially given that *An Application by Steven* (125/97, 4 ELRNZ 64, 3 NZED 52) records that this applies only to RMA rules, and Section 85(5) points out that:

a “provision of a plan or proposed plan” does not include a designation or heritage order or a requirement for a designation or heritage order.

In other words Part VIII of the RMA makes quite specific provision for compensation for “takings” which are directed at the protection of places of special interest. I believe that SNAs and similar areas designed to protect ecosystems etc., fall into this category.

It is also clear to me that precisely because Part VIII embodies compensation provisions, plan writers, and special interest groups, and even government departments, attempt to use the provisions of Parts IV and V to effect “takings” by the use of rules.

Remarkably this is justified by the claim that the council and organisations such as DoC cannot afford to pay compensation because they are underfunded.

But not compensating landowners for such takings does not avoid or eliminate the costs. It simply imposes all the cost on the landowner. The public gets all the benefit while the landowner pays all the costs. (This is what moved the Judges to rule in favour of Mr Palazzolo in the United States Supreme Court.)

This approach is unlikely to earn the co-operation of landowners, wherever they may be.

7.6 The Distinction between Part V and Part VIII of the RMA.

Part V of the RMA provides the framework within which someone makes an application for a resource consent because of a requirement of a rule in a plan. The application process is intended to ensure that any adverse effects generated by the proposed activity are “avoided, remedied, or mitigated” as required by Section 5(2)(c).

The Act is clear that rules which have survived the Section 32 analysis are presumed to be effective and efficient and hence fairly allocate costs and benefits and meet the other requirements of Section 32.

Hence the “regulatory takings” which might result from these rules do not attract compensation. In other words an applicant cannot expect to be compensated for agreeing not to pollute or otherwise adversely effect the environment.

Most landowners accept this principle, provided it is applied with reason and supported by evidence.

However, too many rules go much beyond the requirement to “avoid, remedy or mitigate”.

A farmer may own a piece of land, some of which is native bush or on a fine headland. The land has been valued on the basis of the potential productivity of the whole property and the farmer has borrowed against this asset.

Let us assume that this landowner has no intention to apply for any change in use but is content to work the farm as it is, but with the comfort that the lending ratios are low and so the bank has a high level of comfort.

Then the landowner wakes up one day to find that a proposed plan has declared that over a third of the farm is a Significant Natural Area because it is kiwi habitat or similar.

The landowner has made no application for a change in use and hence has no adverse effects to “avoid, remedy, or mitigate”.

And yet such landowners find that their land has dropped in value, they have lost their “headroom” with the bank and the bank manager starts muttering about calling in the loan.

The difference is surely clear. And this situation is surely not covered by Section 85. Such a “taking” in the public good, falls within Part VIII of the Act and requires a designation as a heritage order and compensation is due and payable.

The use of rules to avoid the requirements and procedures of Part VIII cannot survive the test of “allocative efficiency” embodied in the tests of Section 32.

7.7 Costs piled on takings

Not only do many plans offer no compensation for these takings, but frequently the rules require that landowners accept the burden of maintaining and protecting these new additions to the ‘conservation estate’. They are required to fence out stock and provide buffer zones which can add up to many hectares of land. These impositions are not the result of an application to carry out new work or development but are imposed on landowners who have not themselves contributed in any way to the loss of native species or clearance of the native forest.

These rules have nothing to do with “internalising externalities” but are simply about seizing land for the public benefit at no cost to the public but at significant cost to the owner.

If the public genuinely wants to prevent any significant development of a piece of land, in whole or in part, so as to bring the land into the public domain, then the owner should be able to demand an ‘injury assessment’ and then, if some alternative cannot be negotiated, the owner should be able to demand immediate compensation from the court without further reference to the RMA process. This would impose a cost on those who write such regulations and would lead to more careful regulation.

Compensatory takings legislation may actually improve the quality of regulation, not ‘gut it’, by encouraging government agencies to design rules more carefully and maximise the environmental benefits of regulatory investments. A former General Counsel of the

US Environmental Protection Agency, Donald Elliott, argues that greater sensitivity to property rights actually achieves better regulation without sacrificing environmental goals.

Public choice theorists argue that any activity which imposes no costs on the person undertaking the activity will tend to be over-consumed, because that person will be able to enjoy the benefits while passing on the costs. This argument applies equally well to both the discharge of wastes onto public property, and to the seizure of other people's property for the public good. The general aim of the RMA is to prevent such unpaid 'over-consumption' by developers by requiring them to meet the costs of their pollution or other forms of environmental damage where the market fails to do so.

Public choice theory applies the same argument to the regulators. If government regulators can appropriate the political credit for their regulatory actions but are able to externalise most of the costs as uncompensated losses to property owners, they will have incentives to over-consume regulation in the same way that polluters have an incentive to over-consume air, soil or water.

7.8 The Poor are hit the hardest

An immediate riposte to these arguments in favour of compensation is that "the greedy rich developers will benefit at the expense of the general public". However, Peter Davis and Chris Cocklin argue that the costs of present 'takings' for environmental gains fall most heavily on those least able to pay. The affluent middle class who belong to Forest and Bird Societies and the like win the benefits, while the poor, mainly Maori, landowners pay the costs. Davis and Cocklin say in their abstract:

Those with the highest proportion of the land providing habitats; marginal landowners and Maori, are least financially able to carry these additional responsibilities. Reducing habitat loss by placing additional responsibility on habitat owners penalises the very landowners who are providing the desired public good.

[Davis, Peter, and Cocklin, Chris; Who Pays? Habitat protection on private land, a paper presented to "The Nature Conservation in Production Environments Conference", 1997, Taupo, NZ.]

Later in the paper they point out where the benefits arise and the costs fall. The Far North has the third lowest per capita income for the whole country and yet the greatest demands for takings fall on the private property owners of the Far North.

They point out that the councils in Northland collect around one million dollars of rates from the 200,000 hectares of significant habitats on private land. DoC has identified key sites of international and national significance covering 70,000 hectares which they

consider are in greatest need of protection. If DoC acquired that land the rates currently collected from that land would be foregone because the DoC currently pays no rates. This alone would necessitate the redistribution of some \$300,000 across the ratepayers of this low income region. Therefore there is good reason to ask whether the costs of protecting these habitats should rest with local government and finally the local ratepayers, or whether the national interest should be paid for from the national purse.

Davis and Cocklin conclude:

The current approach to reducing the loss of habitats on private land is based on the premise that those with habitats on their properties have obligations to provide public environmental benefits, obligations which owners of cleared land avoid. By penalising those who, intentionally or otherwise, provide conservation benefits, the current approach creates injustices, provokes unnecessary conflict and undermines the potential of achieving the desired goal. The fact that income levels and habitat levels tend to show opposite trends exacerbates these inequities and undermines the potential to achieve the goal of no net habitat loss.

A combination of a takings regime which recognised real damage and a policy whereby the national benefit was paid for out of the nation's purse would encourage a more efficient and a more equitable approach to the management of the environment.

The present approach is both inefficient and inequitable. Nothing much worse can be said of any public policy.

7.9 The Need for Care

Although many conservationists see landowners' interests as a threat, ignoring these interests simply generates widespread hostility and is counterproductive. There is widespread support for conservation values in New Zealand. Clumsy "takings" can destroy this goodwill overnight. Many ill-conceived rules turn landowners' heritage assets into liabilities. Nothing has done so much to discourage the planting of indigenous species as rules which seek to protect them.

Public agencies need to harvest the goodwill of private landowners if we are to achieve our shared conservation goals.

7.10 Proposed Remedies

I do not see any changes to the Act making any difference and councils are not about to spend their ratepayers' funds on compensating for takings.

The most likely remedy will come through court actions similar to those which have succeeded in the United States.

With no appeal to the Privy Council the chances of success may be diminished. But there are cases out there just waiting to be taken.

8 THE RIGHT OF COUNCIL STAFF TO ENTER PRIVATE PROPERTY

8.1 An important issue

The administration and implementation of the Resource Management Act is raising important issues regarding property rights and privacy in New Zealand.

Farmers are becoming highly sensitive regarding entry onto their property.

Federated Farmers New Zealand (Northland) Inc. has received many complaints about council officers entering property and leaving gates open which can cause considerable costs and inconvenience to farmers – especially around breeding times.

Furthermore, in many parts of the country, drug growers are entering farmers' property to plant, maintain and harvest their crops. If the crops are found on the farmers' land they are presumed to be guilty parties and can have their assets confiscated. If someone is injured on a farm property the farmer may be prosecuted by OSH.

It seems that urban based enforcement officers may be unaware of these sensitivities and run the risk of being hurt or injured themselves if found trespassing. Certainly unauthorised entry by resource management enforcement officers does nothing to foster the goodwill necessary to achieve the purposes of the Act.

Most New Zealanders are aware that one of the key elements of a democracy is that police and other parties seeking to enter a property to collect evidence must have suitable warrants. The right to enter property and search without a warrant is severely constrained in all democracies.

8.2 The Key Sections of the Act

8.2.1 Section 332

Section 332(1) of the RMA says:

Any enforcement officer, specifically authorised in writing by any local authority or consent authority to do so, may at all reasonable times go on, into, under, or over any place or structure, except a dwelling house, for the purpose of inspection to determine whether or not – [etc.]

(my emphasis)

However, s332(3) says:

Every enforcement officer who exercises any power of entry under this section shall produce for inspection his or her warrant of appointment and written authorisation upon initial entry and in response to any later reasonable request.

(my emphasis)

s332(1) refers to a specific authorisation in writing while s332(2) refers to both a warrant of appointment and a written authorisation. This suggests that the legislators had in mind two separate documents being necessary, not one, otherwise the reference to both the warrant and the authority would be unnecessary. We must presume the words are there for a reason.

Then s332(4) says:

If the owner or occupier of a place subject to inspection is not present at the time of the inspection, the enforcement officer shall leave in a prominent position at the place or attached to the structure, a written notice showing the date and time of the inspection and the name of the officer carrying out the inspection.

When council staff have been confronted by landowners (around the country) on these matters they typically respond “When we receive a complaint we have to be able to enter the property to see if the complaint is justified and to properly frame the abatement notice or enforcement order.” This may be so. But the police must gain a specific warrant for each property search and they must follow these legal restraints, even though they are dealing in matters which may involve life and death.

Many local authority staff around the country appear to be unaware of the requirements of s332(3) and 332(4) and believe that such formalities apply only once the enforcement order or abatement notice is in place. While it is clear that they have acted unlawfully they may well be acting in some measure of ignorance. However, just as ignorance is no justification for unlawful acts by the citizen, it similarly does not justify unlawful acts by local authority officers. Indeed they or their advisors should exercise a higher duty of care and responsibility.

8.2.2 Section 333 – Power of entry for survey.

Section 333 makes similar requirements of local authority officers seeking to enter property to collect survey data as part of the preparation of a plan etc.

8.2.3 Use of Police

While many local authority officers appear to be unaware of the requirements of s332(2) and 332(4), they do appear to be aware of s332(6) which reads:

An enforcement officer exercising any power under this section may use such assistance as is reasonably necessary.

For example, in a fax dated 21 August, 2000, the ARC advised a landowner in Rodney that:

We have contacted the Warkworth Police to obtain their assistance to ensure that the persons referred to in my fax of 16th August will have access to the site from 2pm tomorrow 22 August 2000.

8.3 Need for Warrant and Specific Authority

Section 332(1) and s332(3) refer to both a warrant of appointment and a specific authorisation in writing.

One interpretation of these sections is that just as sworn police officers need a specific search warrant for each and every specific entry, so too do enforcement officers of councils need a specific authority for each and every entry for inspection and search and collection of evidence.

However, one has to say that the drafting of the section does not make this interpretation particularly clear. It seems that officers are acting under the presumption that they need only their warrant of appointment and that this warrant gives them general powers to enter, search and collect.

Certainly the Act fails to lay down who grants any specific authorisation and leaves open the possibility that an enforcement officer, once holding a warrant of appointment, could feasibly authorise his or her self.

It can be argued that the Act does not require written authorisation relating to an abatement notice. But if an abatement notice is the outcome of the collection of evidence relating to the activities on the property, and if this evidence has been collected using the powers of entry and search then the written authority is a necessary precondition to the abatement notice.

While the Act may lack clarity, there is nothing in the Act or its regulations, which prevents councils adopting their own standards. Indeed the Act provides a framework within which councils are left with considerable powers to make their own decisions in relation to policies, objectives, methods and rules.

Late last year, several parties joined to seek a direction from the Court on this matter. Judge Whiting's interim decision seems to walk a sensible and practical given the vigorous submissions he received from both sides. As the Judge said in his opening paragraph:

It is apparent from the affidavits filed, that there is a considerable divergence between the expectations of Councils and the expectations of many property owners, as to the extent of enforcement officers' powers, when entering private property.

Judge Whiting brought down an interim decision which leaves some of the questions raised unanswered for the time being. He was in a difficult position given the lack of clarity of the legislation but by careful reading of the Act and by frequent references to case law from a variety of sources he came down with what seems to be a sensible “middle ground”.

Essentially he found that all officers who enter private property in the course of Administering the Act needed a proper authorisation.

He also found that this general authorisation was sufficient if the entry was to gather information for the general collection of information in the preparation of a plan or similar survey reasons.

However, he also found that if an officer is entering private property to collect evidence to promote a prosecution then a special warrant was needed.

In all cases the officers must obey the requirements of the Act and contact the owners beforehand, and if this proves impossible to leave a “note on the door.”

One can only hope that councils take note and ensure their staff comply with the Act.

8.4 The use of information for other purposes.

Another issue which is beginning to surface as councils become more prone to prosecute their citizens is the collection of information for one purpose which is then used for another.

Many councils use information gathered for one purpose (and which is frequently out of date) to draw lines on maps which have massive consequences for the landowner. To date landowners have done little more than complain and seek to have the boundaries drawn correctly using section 292 or 293 of the Act.

In particular, many councils plot Significant Natural Areas or wetlands on property using photographs from aerial surveys. Clearly this information has not been gathered by warranted officers and hence its use to prepare planning documents may be unlawful. In many cases this information has proved to be out of date and has burdened landowners with major financial burdens and delayed resource consents because of the inaccurate boundaries. In one case a resident found that a large area of his property had been designated as a significant natural area (from an old aerial survey) even though the area included his recently constructed dwelling and gardens. Technically he is not permitted to even mow his lawns under the rules in the plan.

I suspect that eventually someone will bring a action before the High Court and test this use of information against some of the other relevant statutes such as the Bill of Rights.

Councils may then be forced to take more care.

8.5 Suggested remedies

8.5.1 Local

Given Judge Whiting's decision and the obvious abuse of powers taking place on a daily basis Councils should take a firm stand and adopt the following resolution (or something similar) and make it clear that failure to follow these directions is a dismissible offence:

(i) That Council staff be made aware of their obligations under section 332 and 333 and 334, and in particular staff should make every attempt to make contact with the landowners or their representatives before entering such property, and

(ii) That if Council officers are unable to make such contact but are required to enter private property because of an emergency officers must "Leave in a prominent position at the place or attached to the structure, a written notice showing the date and time of the inspection and the name of the officer carrying out the inspection" as required by the Act.

(iii) That all such officers entering private property carry with them and produce on demand their general warrant, and their specific authorisation, when this specific authorisation is also necessary.

(iv) That officers entering a property to collect evidence intended to lead to or support prosecution must also present the specific authorisation relating to that specific entry.

(v) That such specific authority must be signed by the CEO of Council and a councillor, or, in the event of the absence of the CEO, the Deputy CEO and a Councillor, or two councillors. In the event that neither the CEO or Deputy or any Councillors are available then the authority must be obtained from a Judge of the District Court, or any duly authorised Justice or Registrar following the procedures described in part 334 of the Act.

(vi) That if officers intend entering any place or vehicle to collect evidence relating to a crime or offence against this Act which is punishable by imprisonment then they must secure a warrant signed by a District Court Judge or any duly authorised Justice or Registrar.

(vii) That it is the duty of staff, before entering private property, whether they are there for the purposes of inspection (s332) or for the purposes of survey (s333) , or for or for the purposes of search and collection of evidence, (sections 334, 335) to make themselves fully informed of their duties and obligations under the Act and the rights of the landowner.

8.5.2. Central

(i) Amend the Act to make it clear who has to provide or sign off on the specific warrant.

9 EDUCATION AND THE RMA

9.1 Old radicals and young conservatives

While I was writing Think Piece 1 many people I interviewed expressed the optimistic view that while the “old guard” were still hanging on to the planning principles of the Town and Country Planning Act the RMA would finally prevail as a new younger generation came through the Universities with an understanding of the RMA and with the none of the baggage of the past.

Even then, my experience suggested otherwise. Those most sympathetic towards the RMA tend to be practitioners of my own age or thereabouts. Even then, I found that the grand planners tended to be young graduates – and they seemed to be even more enthusiastic planners than the “town planners” of my time.

The problem lies within the Universities. For some reason, although we make much of our “world leading” legislation we seem convinced that only foreigners can interpret it for us and train our students. The results are bizarre to say the least.

9.2. What they learn at Lincoln

Dr Stefanie Rixecker is a Senior Lecturer within Lincoln’s *Environmental Management and Design Department*. She teaches ERST101 which is a compulsory first paper for the Bachelor of Resource Studies degree. This course aims “to enable students to identify and explain the relevance of three systems dimensions (i.e.,biophysical, sociocultural, and economic) for resource studies.”

Unfortunately for her students, this approach is completely hostile to the concept of resource management, as defined in the RMA. These Lincoln students are off to a great start.

The text for the course is “The Lorax – Dr. Seuss.” This may surprise you, but it shouldn’t. The publisher’s blurb tells us:

Long before saving the earth became a global concern, Dr. Seuss, speaking through his character, The Lorax, warned against mindless progress and the danger it posed to the earth's natural beauty.

The Lorax character warns us that:

UNLESS someone like you cares a whole awful lot ... nothing is going to get better ... It's not.

I suspect you won't find Lomborg’s “The Skeptical Environmentalist” anywhere in this department.

Anyhow, when not searching through such hefty works for her compulsory course material, Stefanie occupies her spare time with her research interests which include (inter alia):

- * Gender, development and environment
- * Cultural studies and the environment
- * Queer theory and (bio)technology

This will no doubt be a great help to Councils trying to write their district plans.

Jean-Paul Thull, Dipl-Ing (TU Karlsruhe) lectures in Transport Studies within the *Environmental Management* stream. He tells us that during a cycling holiday in New Zealand in 1994/95, he learned, first hand, of the problem of stock effluent spillage on NZ roads. He must have got a faceful because this topic totally dominates his recent publications.

Now we concede that this may be a problem to a visiting cyclist from Germany, especially if he tries to ride the slip-stream behind a stock truck on its way to the yards. But this is hardly high on the list of transport issues facing our rural economy.

Ask any forest owner.

I have long wondered why our District Plans display such a woeful ignorance of the way the New Zealand rural economy actually works. So I turned to the only course I could find which appeared to address rural development in New Zealand.

Our students of “Resource Studies” at Lincoln are asked such useful questions as:

- * *Has ‘development’ been a good thing for all rural*
- * *What is the ‘new paradigm’ of development?*
- * *Will the new paradigm lead to more sustainable rural development?*

Global issues such as free trade and national debt are covered in order to explain the impact of national and international policy on rural communities both in NZ and less developed countries. Students are asked to consider:

- * *What have the recent riots against the World Bank and WTO*
- * *How do the policies of global organisations like the World Bank and WTO impact on people in rural communities?*

All is clear. The problems facing our rural Councils and communities, in trying to meet their obligations under the RMA, are all due to the WTO, the World Bank and free trade. The reading list did not include a single publication about, or from, New Zealand.

I hasten to add that if you investigate the courses given at Lincoln University under topics such as transport, engineering, economics and the like, you will find high quality academics, providing useful courses which actually relate to real issues facing New Zealanders in New Zealand.

But once the word “environment” or “resource” is attached to any qualification, or course, then we enter the land of the fruit-loops, whose courses focus on such useful matters as (and I quote):

- * Symbolic Interactionism,
- * Feminist Epistemologies
- * Hermeneutics/Phenomenology
- * Dramaturgical Analysis

My advice to councils is to avoid staff who have graduated from any course with “environment” in front of the topic. Councils should

- * Employ “soil scientists” but not “environmental soil scientists.”
 - * Employ “transport engineers” but not “environmental transport engineers”
- And so on.

Our planning and environment schools are actually schools of strange theologies, heavily subsidised by the taxpayer of course.

9.3 What they learn at the University of Auckland

Michael Gunder, Head of Department of Planning at the University of Auckland, and secretary and treasurer of the New Zealand Planning Institute, has nailed his colours to the mast in a paper ominously titled “Do We Risk Obscuring the Good Through Teaching Effective and Efficient 21st Century Planning Process?”

He is unhappy with the RMA because:

“... this sub-set of planning manages to displace from [planning] what many would consider the most positive value of the activity – creating change in an ethical manner towards the societal and environmental good.”

I don’t know of any legislation which gives undergraduates, with heads full of PC ideology, the powers, or the right, to change society to meet their own ideas of what constitutes the “societal and environmental good.” Certainly the RMA does not – which is of course what makes Dr Gunder so unhappy.

This does not trouble the Professor. He argues that the absence of such power is the result of “established order” gaining control over the rest of us. He explains:

“The RMA simply attempts to maintain – or sustain – the environmental status quo, with any socioeconomic creativity strictly removed. ... Short of a future socialist utopia, this rationality will seldom be serving the socioeconomic interests of the vast majority of New Zealanders, even if it does achieve some environmental benefit for all.”

It's easy to get frivolous when faced with such stuff. But we have to remember that students are entering these departments presuming they will learn something about how to administer environmental law in this country. Instead the courses are hostile to the RMA and where they do recognise its existence they attempt to undermine it.

9.4 Proposed Remedy

9.4.1 Local

(i) Parties who have an interest in the sensible and informed implementation of the RMA should assist Universities and Technical Institutes in setting up courses which accept the policy intentions of the RMA, preferably within departments of engineering, commerce or geography.

(ii) Local authorities who want the RMA to be sensibly administered within their district by staff who are sympathetic to the aims of the RMA should examine the University courses on offer and simply refuse to employ graduates from those schools who are attempting to subvert the RMA rather than put it into effect.

(iii) Local authorities should train their staff in house until there are sufficient graduates from RMA oriented courses available. Once students learn that their employment opportunities will depend on the content of their courses they will soon put pressure on the Universities to teach them about our own legislation rather than import European ideas of sustainable development and the corporate statism into New Zealand.

9.4.2 Central

(i) Amend the Act to remove all reference to plans, district, coastal or regional and instead refer to Environmental Standards Manuals or similar.

(ii) Remove the subsidies from universities which refuse to train students about our own legislation.

10. CONCLUSION: THE NEED FOR AN RMA OMBUDSMAN

There is widespread agreement among those who have to deal with the RMA processes on a day-to-day basis that the transaction and compliance costs are so high as to be doing more harm than good to both economic growth and development and to the environment itself. Too many applicants find that by the time they have gained their resource consents they have nothing left in the bank to carry out the enhancements they had originally planned.

However, the other major problem with the administration of the RMA is the abuse of power, and corruption of the rule of law, routinely practised by some local authorities.

I receive letters, reports and telephone calls from people from all over the country who have been absolutely dismayed by their treatment at the hands of bureaucrats who seem to believe that the virtue of their mission allows them to exercise whatever power suits their ends.

There should be no need to document this claim by writing up case studies. I am confident that we are now at the stage where nearly every person in New Zealand has either experienced such treatment personally or knows, or is related to, someone who has.

I could list the names of the worst offenders of the local authorities but this could mislead readers into believing that their own local authority may not be at fault. Certainly, some local authorities are easier to deal with others, and these are normally characterised by having elected representatives who have made it their business to know the Act and to maintain control over their staff. Equally, those local authorities where the abuse of power is routine are often governed by elected representatives who have never exercised any real governance and see themselves as advocates or even 'spin doctors' for whatever their staff decide to do.

The ordinary citizen can do little in the face of such abuse of power. Any complaint against administrative process must be dealt with in the regular court. Many cases end up in the Environment Court because of the frustration over the process rather than the decision itself. This frustration is often exacerbated when the appellant learns that the Environment Court has no interest in what has gone on before.

The other reason applicants are reluctant to take legal action in the face of such abuses is that they fear further retribution. They are right. They are dealing with a monopoly supplier who can store up any grudge and make life much more difficult the next time.

The only answer I can see to this problem of widespread corruption, which in the long run is even more damaging to society than excessive costs, is for the Government to appoint a specialist RMA Ombudsman.

The existing Ombudsman is reluctant to take on RMA cases probably because the workload would overwhelm the office. Furthermore it is a specialist field.

Naturally, such an Ombudsman would not become involved in the actual decisions on consents. That is best handled by existing processes. But many abuses would be nipped in the bud if the applicant or submitter had the right to call on an RMA Ombudsman to test the validity of the processes.

The very exposure to such an external examination would probably do as much to deter such practices as the examination itself.

The problem is real and is eating away at the fabric of our society. The victims are the most helpless members of society. Bullies always chose their victims carefully. For some reason many of these bullies seem to have a particular hatred of the aged.

Our old people expect to be treated with some respect and are dismayed when they are treated with contempt and with a total disregard for their needs and aspirations.

The most obvious example is the apparently nation wide campaign against minor household units or "granny flats." We should be encouraged to look after our elderly in a domestic environment for as long as possible. This is not only humane but saves health costs – rest homes and hospitals demand high subsidies and as the population ages they will demand an ever greater share of the national health budget.

And yet for some reason councils, from one end of the country to the other, have written minor household units out of the District Plans or made them much more difficult to provide. One could go on – and on. But as I have explained I do not believe the case for action needs to be argued. The only argument is how best to rein in these bureaucrats who appear to take such pleasure out of destroying peoples' lives.

I believe that an RMA Ombudsman is worth a try. If such an office works to curb the widespread abuse of power we may find that many other problems associated with the RMA will disappear too.

Owen McShane
March 2003.

