THE RESOURCE MANAGEMENT ACT 1991

The transition and business

A report prepared for the
New Zealand Business Roundtable
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1 INTRODUCTION

It is unrealistic to ask at this early stage whether the Resource Management Act has been a "success". We are still to a very large extent in transition from one regime to another. Many Plans have yet to be opened for public submission and those that have been notified have still to proceed through hearing and appeal stages. In addition, both governments (at all levels) and business are grappling with the new procedures and disciplines required, and in a number of areas there is still doubt as to the correct interpretation of some of the Act's provisions.

Further, whether the Act has been a "success" or not must inevitably represent a value judgment reflecting the perspective of the observer, including a perception of the Act's intentions. Instead, this report merely represents this observer's assessment of what is actually happening under the new regime, and what may happen if present indications are confirmed.

In analysing what is happening, it is useful to refer to some of the advantages which were presented as justifications for the initial reform. By adopting this course, I do not wish to be taken as "relitigating" the reform debate, for that is a pointless exercise - the past is behind us. Rather, the purpose of this report is to provide an update on the present state of environmental regulation in New Zealand, with particular respect to its effect upon business.

The principal objective of the reform's proponents might be described as being to produce "better environmental outcomes". Such an objective would focus not only upon issues such as cleaner air and water but also encompass the removal of unnecessary or cumbersome development controls, many of which have served to advance neither economic development nor environmental enhancement. A full review of the working of the Act should properly address its effects on the quality of the nation's natural resources. Such is, however, beyond the scope of this report. Rather, the report will investigate the effect of some of the Act's provisions, especially on business activities.

Inevitably there will be those who will criticise the report for a lack of balance. By way of rebuttal, however, it should be appreciated that only the naive would expect after less than three years to reach considered views as to the effect of a piece of legislation upon natural resources, the condition or state of which reflects to such a large extent their use and abuse over a time-span measured in generations.

Nevertheless, it is possible at this stage to point to some effects which the Act has had in the area of "environmental"[1] enhancement, and reference is made to these in Chapter 2. The Act was designed to control development by reference to its environmental effects, and the extent to which this has been borne out by practice to date is addressed in Chapter 3. As well as seeking improved environmental outcomes, the Act was intended to enable applications for resource consents to be dealt with expeditiously. The experience with the consent process to date is addressed in Chapter 4. The nature of the approval process has changed markedly under the new regime. The costs of securing approval are an important factor in the establishment of any new business, and these are discussed in Chapter 5. (Some of the specific concerns of the forestry industry are the subject of an appendix to that chapter.) The use of economic instruments as a means of determining resource allocation is a matter of worldwide interest. Only limited provision is made for such instruments in the Act, and their role under the new regime is the subject of Chapter 6.

Central to the successful implementation of the Act, especially during the transition phase, is the performance of the Ministry for the Environment (MfE). That is addressed in Chapter 7. Chapter 8 sets out some conclusions based on experience gained during the transition phase and the report concludes with some recommendations.

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1 I use the term "environmental" in this context to refer only to natural and physical resources.

2 ENVIRONMENTAL EFFECTS

As indicated in the Introduction to this Report, it would be unrealistic to expect that after such a short time a definitive assessment of the new legislation can be made. Nevertheless, it is possible at this stage to point to some effects which the Act has had in the area of "environmental" enhancement.[2]

Undoubtedly one of its major effects in this regard has been a greatly heightened consciousness on the part of businesses to the need to give greater weight to environmental concerns in the planning and conduct of their operations. It would be an atypical major company which has not conducted some form of "environmental audit" of both its operations and potential liabilities. Such studies were largely unknown in New Zealand business prior to the Resource Management Act. (This new awareness is no doubt attributable at least in part to the very high criminal sanctions which may be imposed under the Act both upon those who make unauthorised discharges, and on individual managers and directors who may also be held responsible for such actions.[3]

Undoubtedly large sums have been expended by businesses in undertaking audits. Whether that expenditure has been cost effective in terms of environmental enhancement is, of course, an open question. The enforcement provisions of the RMA are much more user friendly than was the case under former legislation. The abatement notice procedure and the availability of enforcement orders from the Planning Tribunal have enabled councils to enforce their Plans with much greater

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2 I use the expression "environmental" in this context to refer only to natural and physical resources. The Act's definition of "environment" is much wider and incorporates "social" and "economic" conditions.

3 The largest fine to date is $40,546 imposed on Tasman Pulp and Paper Co arising from repetitive discharges of sulphur compounds from its Kawerau mill. The discharges exceeded permitted levels, but whilst giving rise to an undesirable smell caused no risk to health. The company pleaded guilty. Annexed to this chapter is a schedule showing the fines imposed to date. Thanks are due to Data Services Ltd and Ms Karenza Cameron for consent to its reproduction from the *Resource Management Handbook*.

ease. There are a number of examples where these procedures have been used with good effect to prevent unlawful activities harmful to the environment.[4] One possible area of improvement in the enforcement regime might be the introduction of an instant fine procedure such as I understand is in force in New South Wales and Victoria. In a number of cases of smaller breaches of the Act, councils are reluctant to embark upon lengthy and potentially expensive court proceedings. Such a procedure could well assist both to reduce the costs of enforcement and to enable councils to take a more even-handed approach to non-compliance. On the whole, however, the enforcement regime appears to be working well, and I would not suggest that investigations into this addition to it receive a high priority in the MfE's evaluation of possible improvements to the Act's operation.

The penal provisions of the Act do, of course, apply to all present discharges for which no consent was ever obtained. Many local authorities formerly operated landfills of rather primitive design (indeed the term "tip" is delightfully descriptive of such operations), which are now giving rise to problems of leachate pollution of nearby watercourses. Unless a consent was obtained, and few were, continued emission of such leachate constitutes an unlawful discharge. Local authorities all over the country are now engaged in extensive and expensive investigations as to the extent of this pollution and the steps that can be taken to mitigate its effects. This belated action is a direct result of the introduction of the RMA. The same obligations apply, and of course with no less rigour, to the activities of business. The obligations imposed by s.17,[5] when combined with the Act's enforcement provisions, constitute one of the Act's greatest potential tools for environmental enhancement. Similarly, they give rise to some

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4 Enforcement action has also been successfully taken to uphold the conditions on a discharge consent even where no evidence of environmental harm was shown e.g. *Canterbury Regional Council v Canterbury Frozen Meat Co Ltd*, Planning Tribunal Decision A14/94, 9 March 1994.

5 Section 17(1) provides that:

> "Every person has a duty to avoid, remedy or mitigate any adverse effect on the environment arising from an activity carried on by or on behalf of that person, whether or not the activity is in accordance with a rule in a plan [or] a resource consent ... ."

concern on the part of business in respect of investment certainty.[6] Their potential is perhaps best exemplified by proceedings brought by the Manukau City Council against Watercare Services Limited, the Local Authority Trading Enterprise (LATE) responsible for the operation of the Mangere sewerage treatment plant. The local residents had for many years been beset by odour problems from the plant, and at their behest the council initiated proceedings against the LATE. After lengthy negotiations, a resolution was reached whereby the company consented to the making by the Planning Tribunal of a deferred Enforcement Order which will in effect require the substantial reconstruction of the plant, at a cost in the hundreds of millions of dollars, by 1 January 2000. The plant has been working at over capacity for some years and the works required by the consent order are in accord with the operator's redevelopment plans. The proceedings nevertheless illustrate the potential strength of the Act's enforcement provisions.

The Act is also greatly enhancing the ability of governments, especially regional councils, to make more informed assessments of environmental effects. One of the difficulties facing consent authorities has been the inadequacy of the information available on the present condition of the environment and its natural resources. By requiring applicants to provide an often extensive "assessment of any actual or potential effects that the activity may have on the environment, and the ways in which any adverse effects may be mitigated"[7], the Act has enabled councils to obtain (at applicants' expense) a quality and quantity of data that were not hitherto available. While this may not yet have led to significant improvement in environmental quality, the prospects for enhancement are obviously heightened.

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6 The Act does provide that the Tribunal "shall not make an Enforcement Order ... against a person who is acting in accordance with a resource consent":

> "if the adverse effects in respect of which the order is sought were expressly recognised by the [consent authority] unless, having regard to the time which has elapsed and any change in circumstances since the ... granting of the consent, the Planning Tribunal considers that it is appropriate to do so" (s.319(2)).

There are as yet no cases decided under this section.

7 RMA s.88(4).

The Act requires extensive consultation between applicants and affected communities. This too has led to greater understanding by business of local concerns, and on occasion has resulted in mitigation measures, the desirability of which may not have been appreciated in previous times.

The Act unobjectionally defines "effects" very widely, so as to specifically include:

"(e) Any potential effect of high probability; and

(f) Any potential effect of low probability which has a higher potential impact."

The application of such expressions to any given set of facts is to a large extent a matter of subjective judgment. One case which is indicative of the force of the Act in the area of potential impacts was the decision of the Planning Tribunal to uphold appeals against the grant of consent to enable Lowe Walker (Te Aroha) Limited to establish a new beef by-products rendering plant adjacent to its export beef plant at Te Aroha.[8] The Tribunal placed weight upon the fact that the site was zoned Rural A1, which did not provide for such plants, and described the site as "relatively closely occupied for a rural area".[9]

The Tribunal held:

> "The odour from the rendering process is offensive and can be nauseating. Occupiers of properties in the Rural A and Rural B zones in the vicinity of the site are entitled to be free from having to experience that odour. Proprietors of businesses on properties in the vicinity of the site are entitled to be able to conduct those businesses

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8 *Te Aroha Air Quality Protection Appeal Group v Matamata-Piako D.C. and Waikato R.C.*, 2 NZRMA 572.

9 On page 8 of the decision it is recorded that:

> "There are about 8 houses within 500 m of the centre of the site, although five of them are owned by the applicant. (Those not owned by the applicant are between 320 m and 580 m away.) There is a racecourse about 600 m away, and facilities there are used for receptions as well as race meetings. There is a motor camp about 550 m away, a recreational reserve (currently undeveloped) about 450 m away, and a cemetery about 740 m away. There is land zoned Rural B some 700 m from the site, and that is a zone for subdivision and into small farms (particularly for racehorse training) where lots as small as 2 hectares are permitted, so relatively close settlement may be expected there."

> without their patrons or customers being deterred by experiencing rendering plant odour.
>
> Occupiers, business people and their patrons should be free of rendering plant odour at all times without condition or qualification. It would not be sufficient for the proprietor of a rendering plant to demonstrate that emission of rendering plant odour which reached adjacent properties was the result of an unforeseen or random accident or malfunction. Nor would it be sufficient for the proprietor of a rendering plant to demonstrate that the best practicable option had been taken to avoid emission of odour which might reach adjacent properties. Defences available under section 342 should not be a sufficient response where a rendering plant has been established out of zone on land where that activity is not a permitted activity.
>
> We find that there is a plausible risk (albeit of low probability) that as a result of management error, malfunction or mechanical failure, objectionable odours from the proposed rendering plant would reach other properties. We also find that if they did, they would adversely affect people and their social, economic, aesthetic and cultural conditions, and the amenity values that contribute to people's appreciation of the pleasantness of the area ... . In the context of granting or refusing resource consent under the Resource Management Act for a new plant out of zone, we are not able to conclude that the risk would be acceptable.
>
> Those who occupy property in the vicinity of land zoned Industrial D or even Industrial C may perhaps be expected to tolerate some risk of smells arising from error or malfunction from a plant on land so zoned if the best practicable options (as defined) have been taken. That might well involve duplicating all extraction and treatment systems to avoid being at risk from a single mechanical failure."

The extent to which potential environmental effects are given weight under the Act is an important factor in its ability to protect environmental amenities. The decision of the Tribunal in the Lowe Walker case illustrates the high priority accorded such considerations.

Before leaving the subject of the effect that the Act is likely to have on environmental concerns, it is necessary to refer to a debate which to date has received far less attention than it deserves. The debate centres upon the role that environmental concerns (in the particular sense of natural and physical resources) are to play in resource management issues, and its outcome could have a major influence on the role that the Act plays in

both the protection of the environment and the future development of the economy.

The Act's purpose is set out in s.5 as being:

> "to promote the sustainable management of natural and physical resources".

The section then goes on to define "sustainable management" as meaning:

> "managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while -
>
> (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
>
> (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
>
> (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment."

The debate hinges upon the word "while" which precedes the three listed items, (a), (b) and (c).

The view espoused by the Minister for the Environment in his third reading speech is that it:

> "is not a question of trading off those responsibilities against the pursuit of well-being ... . The Bill provides us with a framework to establish objectives by a physical bottom line that must not be compromised."

Another view of section 5 is that it requires a balance to be struck between, on the one hand, promoting the use of resources for the present well-being of the community and, on the other, the needs of future generations, the life-supporting capacity of air, water, soil and ecosystems and the adverse effects of activities on the environment. That is a widely held view, and one of which the Act is quite clearly capable of interpretation. Such indeed was the view put on behalf of the Minister of Conservation to the Inquiry

into the Proposed New Zealand Coastal Policy Statement which was chaired by the retired Principal Planning Judge, Mr A R Turner CMG. The former Judge is widely respected for both his legal acumen and his contributions to the development of the law in this area. His interpretation of section 5 accorded more closely with that of the Minister for the Environment. He reached the conclusion that the section:

> "Does not call for a balance to be struck between two objectives; it requires that management of natural and physical resources be carried out in a way which achieves the objectives (applies the constraints) specified in (a), (b) and (c)."

If the learned former Judge is correct in his view, that would seem to lead to the conclusion that the environmental considerations (a), (b) and (c) have a primacy over the "use, development and protection" of resources; that it is not a matter of balance; that the use and development of resources are subjugated to the environmental issues listed; and in particular that resources can only be used and developed if those environmental imperatives are met.

Section 5 and arguably most of Part II of the Act are unsatisfactorily vague. If the Minister of Conservation's submissions to the New Zealand Coastal Policy Statement Inquiry can be so at odds with the Minister for the Environment's view of the law, it is little wonder that those required to implement and administer the Act, and those affected by the regimes it establishes, are not always *ad idem* as to its underlying purposes.

Further, the environmental focus which the Minister for the Environment sees as the underlying foundation of the Act is distorted by the introduction of non-environmental concerns into Part II. The references in s.5 to "social, economic and cultural well-being", the inclusion in the definition of "environment" of "social, economic, aesthetic, and cultural conditions", and the inclusion in the definition of "natural and physical resources" of "all structures" all serve to introduce non-environmental considerations into the evaluations to be made under the Act.

The lack of clarity of Part II was one of the issues raised by Planning Tribunal Judge W J M Treadwell in an address to the New Zealand

Planning Institute's Annual Conference earlier this year. He referred to: "A welter of legislative directives, many of which are simply imprecise verbiage", and said that: "Because of detail, the RMA has lost guidance." Indeed, he went so far as to suggest that:

> "Any judge, commissioner or councillor if faced with a case of magnitude, could by careful wording of a decision set to one side the principles of the RMA which did not suit the desired conclusion. The ensuing decision could not be challenged if based on any particular element of Part II which happened to suit the views of the decision-maker. The decision-maker can thus reach a decision based on community values presently existing, and then find a section of the Act or a part of a regional or district plan which supports that subjective judgment."[10]

We can confidently expect an early Court ruling as to the interpretation properly to be afforded the meaning of "while" in s.5. The issue may well even arise in the first round of appeals to be heard by the Planning Tribunal later this year.

Although that will resolve one question, the continuing underlying problem of the lack of clarity of Part II, and the gestures it makes in all directions, will continue to inflict themselves upon those affected by the Act. The cost of this uncertainty is borne widely throughout society and is conducive neither to the preservation of environmental imperatives nor the responsible use, development and management of resources.

In my view, further consideration should be given to the drafting of Part II, and s.5 in particular, and a recommendation to that effect is made in Chapter 9.

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10 Judge W J M Treadwell, address to the New Zealand Planning Institute Annual Conference, May 1994, reported in *Planning Quarterly*, June 1994.

Case	Brief Details	Outcome	Sentence	Appeal
1. Ashburton District Council v Butterick Judge Skelton	Failure to comply with abatement notice which required defendant to complete fencing as required by resource consent	Convicted	Fined $2,000. Ordered to complete fencing pursuant to section 314(1)(b)(i)	
2. Machinery Movers Ltd v Auckland R.C. High Court Barker J & Williams JJ	Discharge of timber treatment chemicals to stream killing 100 nesting wild ducks, medical treatment required for people who assisted ducks.	Convicted.	Fined $25,000.00, together with analysts' fees of $8,785.00, solicitors' costs of $1,808.00.	The company's appeal to the High Court against sentence was dismissed, but sentence varied.
3. Auckland Regional Council v Puketutu Island Timber Company Ltd Judge Bollard	Same incident as Machinery Movers.	Dismissed.		
4. Auckland Regional Council v Kumeu Timber Treatments Ltd Judge Bollard	Discharge of timber treatment preservative solution.	Convicted.	Fined $4,500.00 with analysts' expenses of $1,215.90, solicitors' fees of $226.00.	
5. Auckland Regional Council v Horticultural Processors Ltd & Others Judge Kenderdine	Discharge of approximately 560 tonnes of kiwifruit pulp/waste.	Charge against Holst proved, Holst discharged without conviction. Charges against HPL, Smith and McCann dismissed.		
6. Auckland Regional Council v NZ Biogas Industries Ltd Gault J, Cooke P, Casey J McKay J, Fisher J	Large rubber container of decomposing waste from potat(processing factory burst, estimated 300 tonnes of waste discharged	Judge Sheppard dismissed informations ARC appealed to High Court. Temm J. dismissed appeal.		Court of Appeal allowed appeal by ARC. Remitted to District Court for further consideration of charge - District Court had not dealt with statutory defences relied upon.

Case	Brief Details	Outcome	Sentence	Appeal
7. Auckland Regional Council v Bitumix Ltd Judge Willy	Significant quantity of bitumen and water discharged.	Convicted.	Fined $10,000.00 and ordered to pay agreed costs of $23,315.10.	
8. Auckland Regional Council v Slag Reduction Company (NZ) Ltd Judge Bollard	Slurry containing trace particles of aluminium from water treatment sludge tanks and pond at steelworks dumped by defendant's employee - who had misunderstood instructions - onto land, entered Manukau Harbour. Indeterminant nature of potential effect of aluminium particles.	Convicted	Fined $3,500 prosecution costs of $500, laboratory expenses $105	
9. Auckland Regional Council v Foodstuffs (Auckland) Ltd Judge Willy	Discharge of approx 5000 litres of soya bean oil into stream, most of the oil collected	Convicted	Fined $1,500, analyst's costs of $549.90, solicitor's costs of $1,500	
10. Bay of Plenty Regional Council v Salt Judge Bollard	Discharge of between 300-400 gallons of oil onto land. Oil found in comparatively small amounts two kilometres downstream, some wildlife affected.	Convicted.	Fined $6,000.00, analysts expenses and disbursements of $928.68, solicitors fees of $904.00.	
11. Bay of Plenty v Pro Pacific Ltd and Young Judge Bollard	Disposal of offal waste from abattoir - 500 litres of blood and about three quarters of a skip bin of offal dumped and nine days later three quarters to full skip bin of offal dumped.	Pro Pacific convicted. Charges against Young, Managing Director, dismissed.	Fined $10,000.00, expenses of $203.40 and solicitors fees of $1,130.00.	

Case	Brief Details	Outcome	Sentence	Appeal
12. Bay of Plenty Regional Council v Tasman Pulp & Paper Company Ltd Judge Bollard	Four charges. Discharge of reduced sulphur compounds in excess of emission limits allowed under resource consent.	Convicted.	Fined total of $23,000.00 plus prosecution costs of $17,206.00.	
13. Bay of Plenty District Council v Anderson Judge Bollard	Discharge of stock carcasses and offal on to farm property	Convicted	Fined $12,500, solicitor's expenses of $95.00 and prosecution expenses $1,546.13	
14. Christchurch City Council v Blackett Judge Skelton	Failure to comply with abatement notice requiring defendant to stop using land for an engineering business	Charges dismissed Insufficient evidence		
15. Clutha District Council v Frews Transport Ltd and Sheila Moore Judge Skelton	Demolition of parts of a Hoffman kiln and chimney. The buildings had an Historic Places Trust classification.	Moore convicted.	Fined $4,000.00, solicitors costs of $2,000.00 and ordered to pay Clutha District Council $33,900.00 towards costs of repairing damage.	
		Frews Transport Ltd convicted.	Fined $2,500.00 and solicitors fees of $2,000.00 and costs to Clutha District Council of $22,600.00 towards costs of repairing damage.	
16. Franklin District Council v AR McCollum Judge Willy	Used land as pig farm in contravention of an order of the Planning Tribunal	McCollum convicted	Fined $5,000 and sentenced to 6 months imprisonment, order under Criminal Justice Act that prison sentence be suspended for 6 months	

Case	Brief Details	Outcome	Sentence	Appeal
17. Hamilton City Council v Roadmarkers Waikato (1981) Ltd Judge Bollard	Discharge of 30-50 litres of bunker oil to stream via Council's stormwater system.	Convicted	Fined $1,250, experts costs of $4,601.25 and cleanup costs of $750.50	
18. Nelson City Council v A.J. Hunter [14] Judge Bollard	Contravening consent by permitting more than 14 guests on property, using room at rear of garage for accommodation and accommodating guests in tent.	Convicted on 3 charges	Fined $1,500.00 for each charge and $300.00 solicitor's fee at total of $5,400.00	
19. Otago Regional Council Hall & Edgewater Adventures Ltd Judge Skelton	Discharge of 6 litres of and diesel to Lake Wanaka.	Hall convicted	Ordered to pay solicitors costs of $113.00	
		Edgewater Adventures Ltd convicted.	Fined $5,000.00 and solicitors costs of $113.00.	
20. Southland Regional Council v Waituna Farms Ltd Judge Skelton	Unlawful discharge of dairy effluent into creek and Waituna lagoon (a waterway of national signficance - scientifically important) caused by failure in pumping and piping system. Evidence of adverse effects on fish habitat. (Note: Charges also laid by DOC for damage of flora and fauna under the Reserves Act 1977. Convicted and fined $400 and ordered to pay agreed prosecution costs of $611.41).	Convicted	Fined $10,000, and agreed solicitors expenses of $1,350 and $1,750 towards Council's investigating costs.	

Case	Brief Details	Outcome	Sentence	Appeal
21. Taranaki R.C. v Chrome & & Chemicals (NZ) Ltd Judge Willy	Discharging sulphur dioxide into the air	Convicted	Fined $2,500.00 solicitors costs $500.00	
22. Taranaki Regional Council v Gawler and King Judge Bollard	Discharge of dairy effluent via breach in oxidation pond on farm.	Gawler, the farmer convicted. King, the contractor, convicted	Fined $1,500.00. Fined $1,000.00.	
23. Waikato R.C. v Anchor Products Ltd Judge Bollard	Overflow from effluent treatment ponds, unauthorised as point of discharge was in breach of resource consent	Information laid in in alternative. Discharge into water dismissed. Convicted for discharge onto land.	Fined $3,000.00, plus costs of $14,899.44	
24. Waitakere City Council v Billington Judge Kenderdine	Cleared native trees and bush.	Convicted	Fined $8,000.00 and solicitors costs of $1,600.00.	
25. Waitakere City Council v Prager Judge Kenderdine	Unlawful felling of 320 square metres of native trees and bush.	Convicted	Fined $1,000.00, solicitors costs of $400.00 and ordered to put in place strict replanting regime.	
26.. Waitakere City Council v M.M. Watt and L.A. Watt Judge Treadwell	Felling of three trees: Kauri, Rimu and Tanekaha. Rimu and Tanekaha close to, or in excess of, 100 years old.	Both defendants convicted.	Each defendant Fined $1,250.00 and costs of $552.90.	
27. Wellington Regional Council v Shell Oil NZ Ltd and Cudby Motors (1985) Ltd Judge Treadwell	30,000 litres of petrol leaked from corroded underground pipe over a ten day period.	Charges against Shell Oil (NZ) Ltd were dismissed. Cudby Motors (1985) Ltd was convicted.	Fined $7,500.000 and solicitors costs of $3,500.00.	
28. Wellington Regional Council v New Zealand Industrial Gases Ltd Judge Skelton	Discharge of lime or carbide sludge.	Convicted.	Fined $5,000.00 solicitors fees of $175.00.	

Case	Brief Details	Outcome	Sentence	Appeal
29. Wellington Regional Council v Mobil Oil (NZ) Ltd Judge Treadwell	Discharge of 300 litres of diesel.	Convicted	Fined $2,500.00 and clean up costs of $992.81 and solicitors costs to scale.	
30. Wellington Regional Council v O'Rourke and Cremen Judge Skelton	Discharge of septic tank sludge and grease trap waste.	Informations dismissed.		
31. Wellington Regional Council v Stuart & Race Judge Skelton	Interlocutory application for leave pursuant to s341(3) extending time to give notice to prosecutor of intention to rely on defence. Out of time by more than 100 days.	Application refused.		
32. West Coast Regional Council v W. McGrath Judge Skelton	Taking water without authority.	Dismissed.		
33. Whakatane District Council v Byrne Judge Bollard	Contravention of abatement notice for removal of signboa d.	Dismissed because abatement notice was defective		

There are no written decisions or sentencing notes available at present for the following prosecutions:

Case	Brief Details	Outcome	Sentence	Appeal
34. Auckland Regional Council v Forecourt Services Ltd Judge Willy	Discharge of detergent into stream. More than 100 eels killed	Convicted	Fined $10,000 plus costs	
35. Auckland Regional Council v Graham	Discharging pig effluent into stream	Convicted	Fined $5,000, analyst's expenses $788.00.	
36. Bay of Plenty Regional Council v Forestry Corporation of NZ Ltd	CCA Spill	Convicted	Fined $4,000.00, clean up costs of $1,454.48. Analysts expenses of $450.00.	
37. Bay of Plenty Regional Council v McAlpines (Rot) Ltd	Spill of timber treatment chemical onto land and then into drain.	Convicted	Fined $3,500.00 and $1,906.52 costs	

Case	Brief Details	Outcome	Sentence	Appeal
38. Bay of Plenty Regional Council v McDonald	Non-compliance with abatement notice for remedial work after logging	Convicted	Fined $1,500 plus $250.00 costs	
39. Bay of Plenty Regional Council v Forestry Corporation of NZ Ltd	Discharge of copper chrome arsenic solution. Part of sentencing notes not taped.	Convicted	Fine of $4,000.00 and clean up costs and expenses of $1,454.58.	
40. Hawkes Bay Regional Council v Napier Abattoir Ltd Judge Monaghan	Discharge of effluent to waterway	Convicted	Fined $3,500, solicitor's costs $200, analyst's fees $150	
41. Nelson City Council v Winter Hawk Wholesale Ltd	Retailing activity in industrial zone	Convicted	Fin d $5,000, solicitors costs $500.00	
42. Taranaki Regional Council v Dixon	Unauthorised land fill	Convicted	Fined $2,500.00	
43. Taranaki Regional Council v Union Galvanisers Ltd	Tape of sentencing notes lost. Record by judge of salient points of decision.	Convicted	Fined $12,000.00 plus clean up costs.	
44. Waikato Regional Council v J. Scott, McFall Enterprises Ltd and H. Basi Judge Latham	Effluent pond breached while pond was being enlarged.	Informations against J. Scott (operator of excavator) and McFall Enterprises Ltd (Scott's employer) dismissed. H. Basi convicted.	Fined $1,000.00 and solicitors costs of $300.00.	
45. Waikato Regional Council v D.C. Pollock Judge Latham	Discharge of u: 'reated cowshed effluent. No treatment system. Continuing offence	Convicted	Fined $20,000.00.	

Case	Brief Details	Outcome	Sentence	Appeal
46. Waikato Regional Council v International Fibreglass Tanks Ltd and D. Hawkins Judge Latham	Discharge of styrene into air in breach of resource consent. Continuing offence.	International Fibreglass Tanks Ltd convicted. Mr Hawkins Convicted.	Fined $5,000.00. Fined $2,500.00. Laboratory costs of $450.00.	
47. Waikato Regional Council v Cruse Judge Bollard	Discharge of 2-3 litres of diesel and petrol from trade premises - petrol station	Convicted	Fined $500, ordered to pay agreed Council expenses of $483, solicitor's costs of $113	
48. Wellington Regional Council v Hutt City Council Judge Kenderdine	Discharge of silt (significant amount of red clay) into stream as a result of cleaning of a water reservoir. HCC instructed to cease discharge, failed to comply until the next day	Convicted	Fined $1,000, solicitor's costs $300 and Council costs $400	
49. Wellington Regional Council v Daily Freightways Ltd	Discharge of blue dye	Convicted	Fined $2,000.00	
50. Wellington Regional Council v Estoril Trading Ltd	Discharge of lube oil additive	Convicted	Fined $14,000.00	
51. Westcoast Regional Council v Whitmore	Failure to comply with an abatement notice requiring removal of willows planted in bed of river without a consent.	Convicted	Fined $200 and costs	
52. Westcoast Regional Council v Crou & Dibben	Unauthorised diversion of section of river	Convicted	Fined $500 each plus costs	
53. Westcoast Regional Council v Smith	Unauthorised interference with riverbed by taking gravel	Convicted	Fined $500.00 plus costs	

3 EFFECTS ORIENTATION

The RMA was designed as effects-orientated legislation:

> "Planning under the Resource Management Act should be effects rather than use based. Rules should be developed from a performance basis. They should deal with the effects of activities, not activities as such."[11]

This orientation, together with its concentration upon matters environmental,[12] was seen as a move away not only from the "control and direction of development,"[13] but also from the rigidity of controls routinely imposed under the former District Schemes.

It is fair to say that the record so far is not good.

1. Plans and Policy Statements are still overly restrictive, often in matters of apparently marginal relevance to effects. Referring to the "rather narrow interpretation of the Act" taken by a number of councils, the MfE noted in a report in March of this year:

> "While there appears to an acceptance of the Act's philosophy at a general level, this appears to break down when it comes to the detail of planning provisions. If this trend continues in other plans, the shift in focus from the activities-centred Town and Country Planning Act 1977 to the effects-based Resource Management Act is likely to "be a slow process".[14]

The Secretary for the Environment, Roger Blakeley, noted in February:

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11 L J A Gow, Deputy Secretary for the Environment, in an address to the Australian Planning Ministers' Conference, Melbourne, September 1991.

12 I use the term "environmental" in this context to refer only to natural and physical resources. The Act's definition of "environment" is much wider and incorporates "social" and "economic" conditions.

13 Town and Country Planning Act 1977 s.4(1).

14 *Section 24 Monitoring Report*, MfE, March 1994, p10.

> "A number of Councils are using section 7(b) of the Act, 'the efficient use and development of natural and physical resources', and section 7(c) 'the maintenance and enhancement of amenity values', to justify a tightly regulated approach in the District Plans.
>
> This narrow interpretation is likely to be challenged by resource users and Government Departments."[15]

Numerous examples could be quoted in support of these findings, but two will suffice.

(a) From the proposed Auckland City Plan (Isthmus Section):

Offices in the business zones are to be limited by reference to the square meterage of other offices within a one kilometre radius. If the defined level is exceeded, the applicant is required to satisfy the council that the "excess floor area" will not, *inter alia,* lead to "an unnecessary duplication of facilities".[16] Similar rules apply to shops.

(b) From the Proposed Auckland Regional Policy Statement:

> "Any activity which is a discretionary activity with respect to an air discharge permit shall be a discretionary activity with respect to a land use consent." - Policy 11.4.4.5.

This would require the applicant to address a much wider range of issues in its environmental assessment report, issues which the district plan had already satisfactorily resolved when the activity was classified as permitted. It would also open up the possibility of the application being notified and a joint hearing being held, and would certainly involve the applicant in unnecessary costs associated with having to file the application with both the regional and district councils.

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15 In an address to the annual AIC Resource Management Conference.

16 A Council staff report has subsequently recommended that the proposed rule no longer apply to offices. The Council has yet to hear submissions, and the proposed rule is therefore still applicable.

Although it has not yet found its way into any statutory document, a recent resolution of the Ruapehu District Council also serves to illustrate the overly restrictive practices favoured by a number of local authorities. The Council has directed its planner to "examine the possibility of restricting forestry in the rural areas of the District." The reasons for so doing were expressed as:

> "1. Viability of Rural Townships.
>
> 2. Visual Change.
>
> 3. Viability of the Agricultural Sector."

2. Some Plans and Policy Statements seek to achieve unrealistically high environmental standards, formulated by reference to principles of non-degradation rather than those of sustainable management. It would seem that those responsible for the drafting of such documents equate sustainable management with zero environmental effect. The Auckland Regional Council, for example, proposes to establish a:

> "Set of standards ... that would ensure protection of existing air quality where this is already better than the acceptable level",

with the aim of ensuring:

> "No deterioration in ambient air quality".[17]

Similarly, the Proposed Auckland City Plan (Isthmus Section) contains numerous examples of objectives expressed in terms of seeking to ensure that "no adverse effect" flows from new development. (Fortunately staff reports to the hearing committee recommend moderation of such absolute language.)

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17 When I raised this provision with ARC officers it was suggested to me that it was to be regarded as a "vision" rather than a policy or objective. It is described in the Plan as an "anticipated environmental outcome", presumably of the policies and objectives.

Clearly such objectives have a major impact upon business. It is no doubt easier to write "environmentally sound" documents than it is to consider the constraining effect that they will have on development. Not only do such documents have the effect of putting in place policies which can then have the effect of thwarting investment, a serious enough complaint in itself, but they can also give rise to unrealistic expectations on the part of affected individuals or community groups.

It is expecting too much of business to contest every unrealistic policy or objective that may in the future impact upon projects that are not yet even in their formative stages.

This is especially the case during the present transition phase when there is a plethora of documents to which businesses are expected to respond.[18] The efforts of the MfE to challenge the unsound concepts promulgated to date by district and regional councils are to be applauded, and should be funded to fruition. The real answer, however, lies in achieving a better practice amongst councils, and that is not an outcome which can be achieved by legislation. As Ewen Henderson has put it:

> "it is clear that practitioners are failing the RMA more often that it is failing us."[19]

3. The Act itself is so framed as to inadequately reflect the supposed concentration on environmental effects, rather than rigidity of plan controls, with the result that the consideration of other factors is clearly appropriate in a wide range of situations.

At the heart of the problem are the Act's definitions of "environment" and "natural and physical resources". The former is defined to include reference to "social and economic" conditions; the latter expressly includes "all structures". Accordingly the courts have, I suggest with respect, quite

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18 John Hutchings, Policy and Planning Manager of the Taranaki Regional Council, has estimated that there will be well over a hundred Plans and Policy Statements produced during the transitional phase leading to the full implementation of the Act. He has also drawn attention to the difficulties flowing from a marked lack of consistency in expression in the documents produced to date. Similar concepts are often differently described and common expressions are used to describe different concepts.

19 E. Henderson, *Planners at the Coalface*, Planning Quarterly, March 1994, p7.

properly interpreted the Act so as to permit, or indeed require, consideration of a number of factors which a concentration on matters "environmental" would have led one to believe were irrelevant.

The rigidity of scheme controls was a frequent source of frustration under the former legislation. It was widely hoped that an emphasis on environmental effects would introduce a new flexibility in the consent procedure.

Despite the 1993 Amendment, the *Batchelor*[20] doctrine is still worthy of comment. That case followed from a council declining consent to an application for a retail activity in an industrial zone, even though it was found as a fact that there would be no or minimal adverse effects on the environment. The applicant was unsuccessful in appeals to both the Planning Tribunal and the High Court.

The principle represented by *Batchelor* and the line of cases that follow it is that when considering the effect of granting a consent, weight should be given to the effect on "public confidence in and the consistent administration of" the district plan, even where the activity raises no threat of significant adverse effects. In a presumed endeavour to remedy the situation, the 1993 Amendment provided that instead of considering the "effects" of approving the application, consideration was only to be given to the "effects on the environment" of so doing.

The Planning Tribunal, in its first decision since the Amendment,[21] has held that it will on occasion still be appropriate to have regard to the effects of granting the application on the consistent administration etc. of the plan, largely by virtue of the 1993 Amendment having also inserted a new factor to which the consent authority is to have regard under s.104, namely:

> "(i) Any other matters the consent authority considers relevant and reasonably necessary to determine the application."

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20 *Batchelor v Tauranga District Council*, 2 NZRMA 137 (High Court).

21 *Reith v Ashburton District* [1994] NZRMA 241.

The addition of this subsection is a potential "pandora's box", an invitation to local authorities to have regard to an unknown range of issues, and will certainly provide a good future source of litigation for the resource management bar. One would have thought that the wide scope of s.5 of the Act, the all-encompassing definition of "environment" in s.2, and the ability to have regard to regional and district plans would have been quite sufficient, without introducing yet a further uncertainty, a further invitation to *ad hoc* decision making. (The new subsection may, however, allow regard to be had to existing investment, although I would prefer that ability be specifically acknowledged rather than left to a general catch-all such as b.104(1)(ii).)

Two examples of cases where proposals were affected by non-environmental considerations serve to illustrate the importance which is still attached to district plan policies and controls, even in the absence of adverse environmental effects.

(a) Husband and wife horticulturists proposed to build a house on their 2.6 hectare block. No challenge was made by the council as to their need to establish a dwelling on the site in order to manage their rural use, or to their bona fides as committed horticulturists. The decision records that their house was to have "a living area" of 225 sq m, together with a double garage of 39 sq m, a games room of 47 sq m and verandahs of 34 sq m. The district plan provided for "dwelling houses necessary for farming" as a discretionary activity. The plan included a statement to the effect that:

> "The Council is also concerned to ensure that new dwelling houses do not result in an over-capitalisation of land to the extent that the investment in residential development exceeds that of the farming use."

The Tribunal considered that the proposed dwelling was "notably large" and "in scale and degree ... over-generous". It ruled that the application should be approved only if the size of the dwelling was:

> "reduced by 45 sq m, which will still leave ample latitude for the applicants to satisfy their personal aspirations."[22]

(b) The Dick Smith chain of electronic stores sought to open a new shop in the Wairau valley on Auckland's North Shore. The transitional district plan contained a number of objectives and policies seeking to restrict retailing, in part, "so as to uphold the role and viability of existing shopping centres." The Tribunal dismissed the appeal saying:

> "Although allowing the proposal to proceed would not, in itself, create any significant effect on the environment, it would nevertheless signal the introduction of a new form of retailing to the area, thus rendering it more difficult for the council to maintain public confidence in the plan."[23]

Also on the wider question of non-environmental considerations, the Tribunal has acknowledged a willingness in appropriate cases to consider the effects of a proposed activity on employment in another town altogether.[24]

Furthermore, in clear contravention of the Act's objectives, the statute continues to be abused by trade interests seeking to delay and prevent the establishment of competing businesses.[25]

Any amendment to the Act to reflect a more explicit concentration on "environmental" effects would, however, need to be carefully crafted. As is noted elsewhere,[26] it may often be appropriate that regard be had to

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22 *Donnithorne v Christchurch City* [1994] NZRMA 97, 107.

23 *Kaimahi 1 Partnership v North Shore City*, Planning Tribunal Decision A37/94, 17 May 1994.

24 See e.g. *Affco New Zealand Limited v Far North District Council and others (No 2)*, [1994] NZRMA 224.

25 See Chapter 4 for a discussion of "trade wars".

26 See Chapter 4.

existing investment when considering applications for renewal of resource consents.[27] Further, as has been argued on behalf of the Minister of Conservation, "environmental" considerations may need to be balanced against employment needs and the requirements of industry.[28] A good example of the possible desirability of retaining some ability to refer to "non-environmental" factors in the consideration of consent applications is to be seen in the Tribunal's decision in *Cook Island Community Centre v Hastings D.C.*[29] That case involved a funeral parlour which the applicant proposed to locate out of zone and opposite a cultural/community centre operated by the appellant.

Similar "non-environmental" considerations also apply, for example, to the development of housing in the vicinity of established vineyards reliant upon their ability to conduct a variety of activities, ranging from the application of chemical sprays to the operation of noise generators (to alarm avian predators), which residential neighbours may find intrusive.

In short, whilst it is tempting to immediately conclude that factors having no relationship to commonly understood environmental considerations have no place in deliberations under the RMA, in truth the answer may well be somewhat more complex. A "quick fix" amendment is unlikely to do more than further confuse an already confusing situation.

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27 For the sake of clarity I would emphasise that in expressing this view I am referring only to renewals. I am not suggesting that any consideration be given to existing investment when considering applications for new proposals.

28 That view of the legislation was propounded by the Minister of Conservation's representative at the Inquiry into the Proposed New Zealand Coastal Policy Statement. That interpretation was, however, not accepted by the chairman, former Principal Planning Judge A R Turner CMG. Nor is that the interpretation of s.5 favoured by a highly experienced and respected Christchurch barrister, J R Milligan; see his article "Pondering the 'While' ", *Terra Nova*, May 1992. No opportunity has yet arisen for the Courts to give a definitive interpretation on the question. This issue is discussed further in Chapter 2, pages 8-10.

29 Tribunal decision of 31 March 1994, W19/94.

4 THE CONSENT PROCESS

Although the Act may not have had as one of its primary objectives the easing of the consent process, it was hoped by many that the Act's reforms would serve to remove many of the impediments that had confronted business under previous legislation.[30] Indeed a number of features of the legislation have no other purpose. Consistent with the Act's objective of achieving better environmental outcomes, the ability of local government to regulate activities has been limited so as to focus upon their actual and potential effects. This Chapter examines the application process and its effects on business.

PROCEDURES

The issue of the delays inherent in the approval process was one of the major complaints about the previous regime. Delays are costly not only in terms of those projects that do proceed, but also of course in relation to the projects that do not proceed, the investment that is not made, or made overseas because of delays in this country.

The RMA was promoted as a streamlining of the system and in many respects it has been successful in this regard. The requirements for joint hearings and pre-hearing meetings have reduced the time taken to gain approvals. Most major projects involve discharges, often to both air and water, each of which required approvals from different bodies under the former regime. They also require land use approvals from the territorial local authority, and many require a consent from the Minister of Conservation due to their coastal location. The hearing of the application at a joint sitting of the relevant authorities is a distinct improvement. Three examples cited recently[31] illustrate how well the system can work:

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30 In moving the introduction of the Resource Management Bill, the Rt. Hon. Geoffrey Palmer said that the Bill "will provide for considerably greater efficiency in the planning and consent processes. ... The Bill will ensure that major projects can be dealt with speedily and effectively." Hansard Vol 503, p14,166-67.

31 D Nolan, *The Resource Management Act 1991 - Super Highway or Farm Track?* a speech to the Property Management Institute, 5 May 1994.

the Auckland Airport extensions were approved in 25 weeks, a New Zealand Dairy Group milk factory at Waitoa was approved in 20 weeks and the Auckland Maritime Museum in 10 weeks. (All times are taken from the date of filing of the application, and in no case was there an appeal to the Planning Tribunal.)

The Act gives a greater weighting to environmental factors than was required under some of the statutes it repealed. This has given rise to the need for a much more detailed assessment of environmental effects to be presented with applications than was formerly the case. Thus while some applications may be being more speedily resolved, the time spent in gathering the necessary information which is required to accompany the application necessarily slows down the process in its initial stages. Unfortunately, as is noted in Chapter 5, the costs associated with the informational requests of the Act are high, and further study of local government's performance in this area is necessary.

The administration of the Act is firmly vested with local government. All projects, whether they be of national, regional, local or merely even neighbourhood significance, are required to obtain the necessary approvals from the relevant local government agencies. The applications for consents are considered in the light of the relevant local plans and policies.

In the absence of national policy statements, local government is faced with the task of weighing national considerations against purely local concerns. This potential conflict is a necessary consequence of the hierarchical regime upon which the Act is based, and is not a departure in any significant respect from the former legislation.

The Act does enable the Minister for the Environment to call-in projects which he/she considers to be of national significance, but the importance of this provision should not be over-emphasised. All the Act does is to substitute the minister for the local-decision makers, but the policies and plans against which the proposal is judged remain the same and there is still an appeal to the Planning Tribunal which conducts an entirely fresh hearing of the application.

It remains to be seen whether the system is capable of satisfactorily

accommodating the competing demands of national and local interests, and only experience will provide the answer. The MfE will no doubt be closely monitoring the situation.

A related issue is one echoed by some national operators of facilities which are replicated at a number of locations around the country: electricity generation and transmission facilities and communication installations are examples. There are suggestions that different councils are making different information requests, applying differing standards and imposing different conditions in relation to installations the effects of which are no different from location to location. This is a problem arising from administrative practice rather than the Act itself, and one which may be resolved as experience is gained. It is a matter which the Ministry is aware of, and to an extent is one which the operators themselves are best equipped to deal with. The Ministry should, however, monitor the situation with a view to ensuring that additional unnecessary costs are not imposed upon the community.

The Act introduced a variety of new procedures and techniques for the processing and evaluation of application consents.

(i) Deadlines for Processing

Councils are now required to process, evaluate and determine consent applications within specified time frames. They do, however, have the power to extend the limits, by up to as much again as those set by the Act. For notified applications, the initial deadline does not even begin to run until any further requests for information have been met. [s.92(2)]

It was inevitable that there would be occasions when local government officers used this latter power to evade the requirements for processing within time, and to no one's surprise that has been the case. To what extent this practice is current is, of course, impossible to determine. It was also inevitable that councils would on occasion extend time limits in order to overcome problems caused by inadequate resourcing on their part. That too has occurred, and once more it is impossible to judge the extent of

this practice. To what extent the frequency of such requests represents inadequate preparation by applicants or an inability by local government to comply with the Act can at best be a matter of speculation.[32]

There is no limit upon the number of separate requests a consent authority may make of an applicant. Serial requests are often made, with the effect that the starting of the clock is again delayed by a further request once each request has been met.[33]

Since the Act's coming into force, the processing time for applications has not been met in a high proportion of cases. An MfE study of the Act's first year of operation[34] showed widespread failure to achieve the initial (i.e. unextended) time limits. In most cases the median time for processing was just within that permitted, obviously suggesting that a significant number exceeded these limits. It is noted in that report that 90 percent "of most consent application types were processed within double the time frame specified under the Act - non-notified subdivision and discharge permits were exceptions."[35]

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32 An indication as to the extent of requests for additional information may be gained from the ARC's experience. To date 83 applications for discharge to air have been made, and in 65 of them (i.e. over 78 percent) requests for further information have been made.

33 In an earlier draft of this report I suggested that MfE should consider amending the Act to prohibit such serial requests. I am grateful to John Duthie (Manager, Planning and Regulatory Services, Auckland City) for his criticism of this suggestion, which has accordingly been deleted. His comment was to the following effect:

> "I agree entirely with your sentiments that any abuse of this practice needs to be stopped. However, some Councils have a practice of having various aspects of an application worked on concurrently to try and speed up the processing time. The consequence of this is that you either wait until the last component of the check has been done and then seek the information in one comprehensive list or you open up communication with the applicant as issues become known. In this latter case, you must accept the possibility of multiple discussions and multiple requests for information. Again, there is a balance to be found here. I am not sure very straight legislative direction at this stage of the process is the correct approach."

34 *Time Frames for the Processing of Resource Consents*, MfE, Wellington, February 1994.

35 *Ibid.*

No more recent studies are available, but it is fair to assume that the situation has improved somewhat since the period covered by the MfE report. Essentially the time taken to process applications is an issue of management or practice rather than philosophy, and there are limits to the extent to which one can legislate for good practice. The MfE is monitoring local government's performance in this area, and it is to be expected that further improvements will occur as local government professionals are appraised of the results of that monitoring.

There is, however, one respect in which the Act's deadline procedures could be improved. Although councils are required to make a decision on applications for consent within 15 working days after the conclusion of the hearing (s.115), no equivalent obligation is imposed in respect of decisions on proposed plan changes. Councils can, therefore, delay indefinitely the issuing of a decision. There would seem to be no policy rationale for such a distinction.

(ii) Non-Notified Applications

The Act has placed a greater emphasis upon the non-notification of applications,[36] particularly after the passage of the 1993 Amendment. The available evidence, limited though it is, suggests that local government has responded positively to this reform. The MfE survey[37] of the first year of the Act's operation revealed that territorial authorities notified fewer than 10 percent of applications, and regional councils fewer than half. The practice is, however, variable as between different councils. One territorial authority in the MfE survey notified "most applications". The Auckland City Council, on the other hand, notifies only 8-9 percent (as against 22 percent before the introduction of the Act). There is undoubtedly much scope for further reduction.[38] No doubt MfE will continue to

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36 This applies even to non-complying activities, a distinct advance on the previous law.

37 *Op. Cit.*

38 The latest figures from the ARC, for example, show that for the year to 31 March 1994, excluding applications for bore construction (none of which were notified),

monitor performance in this regard.

To the extent that local government is not availing itself and business of the benefits of this procedure, it is to be hoped that improvements will result from practice and added familiarity with the Act.

There is particular concern in the mining industry at the number of applications which are required to be notified, when the effects of the proposed activity are no different from those of many other works for which notification is not required. Some councils regard notification as justified on the sole grounds of public interest in the subject matter of the proposal. It is unfortunate that the Act makes no provision for an applicant to appeal against a council's decision to notify. Were such a procedure available it would, hopefully, require but a few test cases to bring home to councils the limited range of circumstances in which notification should be required.

(iii) Private Plan Changes

One of the major impediments to development under the previous regime was the rigidity of Plan controls coupled with an inability of private agencies to promote Plan changes. The Act sought to remedy this by introducing an ability for owners to seek changes to the Plan. Given the novelty of the procedure, and the fact that every local authority has either notified or is in the course of preparing a new Plan, it is only to be expected that applications should have been few and far between to date. There have, however, been a number of successful applications of this innovation, and it could well prove helpful in overcoming the rigidity which so often afflicts Plan documents. It would be potentially even more helpful if councils were required, as they are with consent applications, to produce a decision within a set period following the conclusion of the hearing.

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only 110 of 484 applications were notified.

(iv) Consent of Affected Owners

An important but scarcely heralded reform was the introduction [s.104(6)] of a prohibition upon consent authorities having regard to the effects of a proposal upon a "person [who] has agreed to the proposal ... ". Although criticised as availing applicants of the opportunity to "buy consents", this change has eased the path of a number of development applications. (This provision is also referred to elsewhere - see Chapter 6.)

(v) Declarations

Under the former legislation there was no mechanism for resolving doubts or differences of opinion as to whether a particular activity was one permitted by a District Scheme.

The RMA provides for any person to make an application to the Tribunal for a Declaration to determine such questions. This procedure has been extensively used and has proven of positive benefit in the enhancement of certainty as to owners' rights under the Act.

I turn now to consider some specific issues in the consent process that impact upon business.

RENEWAL OF CONSENTS

The Act makes no provision for the renewal of a consent. Once a consent expires a new consent has to be obtained. A difficulty facing some business sectors is that the Act does not expressly enable account to be taken of existing investment when the fresh application is evaluated. Some would contend that the application is to be considered as if the plant/facility were not there. MfE on the other hand takes the view that the Act does allow for the existing investment to be recognised. This difficulty is particularly significant in the case of discharges to air as, under the Clean Air Act, permits were annually renewable under somewhat different criteria than are applicable under the RMA. It is also significant for the holders of former water rights, especially discharge rights, under the Water and Soil

Conservation Act, consents for which were usually limited in duration.[39]

The timber, freezing, chemical and dairying industries are amongst those to which this issue is of considerable concern. ECNZ is also affected by virtue of its being required by the terms of its purchase from the Crown to obtain resource consents for all of its facilities.[40]

MfE has agreed to consider the need for an amendment to the legislation "to require the consideration of existing capital investment and infrastructure on any renewal consent".[41] To my mind, the issue is of an importance that warrants such an amendment rather than allowing the present state of uncertainty to prevail pending an eventual court ruling. At the same time, and notwithstanding that there is an apparent justification for recognising the very existence of substantial facilities, there is another side to the issue. *Carte blanche* renewal of existing rights on existing terms and conditions could readily represent a barrier to new entrants to an industry - they could hardly expect to receive the benefit of any concessional treatment. If the effect of any amendment were to protect established polluters, the entry into that industry of new, cleaner competitors who would internalise their costs could well be discouraged.

"MATTERS OF NATIONAL IMPORTANCE"

Section 6 lists a number of matters of "national importance" which those "exercising functions and powers" under the Act "shall recognise and provide for". The question arises as to when those matters of national importance can be set to one side in favour of permitting development.

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39 By contrast, land use rights under both the RMA and the Town and Country Planning Act were usually of unlimited duration. It should also be noted that the RMA allows for discharge consents to be granted for longer periods than was possible under the former legislation, up to a maximum of 35 years.

40 Interestingly, the Act does require consideration of the "financial implications for the applicant" in the context of a review of the consent during its lifetime. [s.131(2)] Such reviews are clearly appropriate. Scientific or technical advances may justify more stringent conditions than were originally justifiable, or monitoring of the impacts of a discharge may show the original conditions to have been unnecessarily restrictive.

41 *Investment Certainty Under the Resource Management Act 1991, A Discussion Paper*, MfE, Wellington, March 1994.

Clearly the imperatives of s.6 cannot be regarded as absolutes, and indeed the first and second matters listed[42] are expressed in terms of "protection ... from inappropriate subdivision, use and development ... . "What is the standard by reference to which the activity is to be adjudged "inappropriate", bearing in mind that the matters at issue are of "national importance"? The answer to that question is to be found in a Planning Tribunal decision arising from a proposed port development in Marlborough.[43]

The Tribunal emphasised that the development is required to be nationally suitable or fitting before preservation of the natural character of the coastal environment could be set aside. That is to say, it was appropriateness in the national context that is to be considered rather than, for example, its appropriateness in the regional or local context.

In the case at issue, the Tribunal found that the proposed port works were nationally appropriate. There are, however, numerous projects of less significance where such a finding could not be made. The point is yet to be argued in such a context, and it is fair to say that the Tribunal's interpretation of the Act is not widely supported. However, it does not take great imagination to envisage that an exotic forest, coastal resort development or mussel farm could have difficulty meeting that test. The present state of the law suggests that modest developments which could by no means be viewed as being nationally significant, but are nevertheless entirely appropriate in a local or regional sense, could find this decision an insuperable hurdle to approval.

It is appreciated that in the longer term, when new policies and plans prepared under RMA are in place, this concern may be moderated. That will, however, not be for some time and, in any event, there will always be instances in which those plans and policies fail to satisfactorily assist in the resolution of an issue in a particular context. Clearly there is a need to

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42 The first two items listed are: (a) the "natural character of the coastal environment, wetlands, and lakes and rivers and their margins", and (b) "outstanding natural features and landscapes."

43 *NZ Rail v Marlborough District Council and Port Marlborough NZ Limited;* Decision C36/93. The decision of the Tribunal was upheld by the High Court in a judgment of Greig J [1994] NZRMA 70.

amend the Act so as to remedy this state of affairs.

TRADE COMPETITION

Trade competitors continue to use/abuse the process in endeavours to thwart or delay developments proposed by their opposition. Indeed, the supermarkets and service stations have now been joined by at least one freezing company and a waste disposal company. At this year's Planning Institute annual conference, a Mobil representative estimated that the cost of establishing new service stations is routinely inflated by around $300,000 on average due to objections and appeals by trade competitors. Some had hoped that the insertion of s.104(8) in the Act would put a stop to the "trade wars".[44] That was never likely, however, both because the section is imperfectly worded in two important respects, and because of the reference in s.2's definition of "environment" to "social [and] economic conditions...". As to s.104(8) itself, it clearly applies only to the consideration of applications for consent, and councils may still, therefore, take account of trade competition when preparing their Plans.

Secondly, s.104(8) refers to the "effect of trade competition on trade competitors". That quite clearly enables regard to be had to the effects of trade competition on other people. The effects on consumers and employees of the affected "trade competitor", together with other persons having an interest in the affected party's premises (e.g. landlord or mortgagee), would not be excluded by s.104(8). As the Planning Tribunal has held:

> "The reference in the defined meaning of 'sustainable management' in section 5(2) to managing resources in a way which enables people and communities to provide for their social and economic well-being supports the view that consent authorities should have regard to effects of proposals ... on social and economic conditions, though not taking into account effects of trade

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44 Section 104(8) provides:

"When considering an application for a resource consent a consent authority shall not have regard to the effects of trade competition on trade competitors."

> competition on trade competitors. We hold that it is generally appropriate for consent authorities to have regard to the effects of trade competition on other than trade competitors."[45]

This reference by the Tribunal to "social and economic well-being", in what was clearly a case brought for the purpose of protecting established economic interests, highlights still further the desirability of clarifying Part II, which sets out the "Principles and Purposes" of the Act. Meanwhile, the wars continue unabated, no doubt at significant cost to the community. That cost of course is not confined to the occasions when trade competitors participate in the process. There is no doubt also a deadweight cost from the projects that are not initiated because of the inevitability of the expensive litigation which they would provoke and the delays inherent in the objection process. Some amendment to the Act may assist, but so long as resource consents of the kind that provoke trade conflict require public notification, and the statute concerns itself with "social and economic" conditions, the wars will continue to be waged.

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45 *Affco New Zealand Limited v Far North District Council and others* (No2), [1994] NZRMA 224.

THE FORESTRY INDUSTRY

The forestry industry is amongst those with particular concerns about the implementation of the RMA. The major issues raised are the lack of certainty as to the right to harvest and the lack of equal treatment received by the industry.

It is not the purpose of this report to deal with each sector of the economy, and the following brief discussion is intended only as a preliminary introduction to the special problems of the industry. I am, however, satisfied that its concerns are sufficiently real to warrant further investigation by MfE, with a view to ensuring that the ability of the industry to contribute towards economic growth is not unduly impaired.

As to the right of harvest, it should first be noted that the industry has never been guaranteed a right to harvest. That does not mean, however, that its concerns over the implementation of RMA are groundless. The Act's greater emphasis upon environmental issues such as landscape values, soil conservation and water quality does potentially introduce different priorities into the consideration of applications to harvest.[46]

This issue is of importance in both the long and short term. In the short term, it could cause a reduction in the value of yields from existing forests into which considerable investments have been made over a lengthy period. To an extent, therefore, the industry's concerns are similar to those of other industries which are troubled that the Act does not explicitly recognise the fact of existing investment. In the long term, uncertainties as to the right to harvest could jeopardise further investment. It would only take a handful of unfortunate decisions to have a major impact in this area.

I understand that there may be one or two examples from the West Coast

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[46] It should be acknowledged that the s.34 Notice procedure under the former Water and Soil Conservation Act required safeguards against, *inter alia*, soil erosion and flooding. The new Act, however, enhances the priorities to be given such considerations.

of rights to harvest being granted at the time of planting. However, given that the environmental effects of such applications, and the details of conditions to be imposed, can at best be only generally predicted so far in advance, it is not surprising that few councils will be prepared to consider such a course.

I have given some preliminary consideration to whether the uncertainties might be resolved by a combination of the controlled activity procedure (which essentially provides that the activity can be conducted as of right, subject to conditions) and the acceptance of something akin to the industry codes of practice which are now being widely developed. The adoption of a nationally approved standard with provision for appropriate regional supplements appears particularly worthy of further consideration. Certainly, if properly implemented, there is room for a much greater application of the controlled activity procedure, thereby conferring greater investment certainty for the industry without impairing councils' ability to promote environmental objectives.

The industry's concerns over equality go the heart of one of the Act's central tenets, namely its concentration upon effects. The industry is commonly subject to controls designed to preserve water quality and minimise soil erosion. These requirements can often impact significantly upon harvest operations. However, immediately downstream, and/or on adjoining properties, customary farming operations continue unaffected by such controls, often to the detriment of the very environmental qualities that are the subject of stringent regulation in the case of forestry. This is patently unequal treatment.

There is a further aspect of the unequal treatment that I apprehend is little appreciated. By not imposing controls on over-intensive farming operations, local government is inadvertently distorting the relative economics of farming as against forestry as a land use. One sector is required to largely internalise its costs, the other is not.

The value of rural land obviously reflects in large part its economic potential. In many cases that value is higher than it would be were farming operations subject to restrictions of a kind that would, for example, protect the land from the erosion caused by stocking at excessive

levels. The land therefore remains in agricultural production when an even-handed application of regulatory controls could see the land value lowered to a level at which forestry would represent a more economic utilisation of the resource.

Not only are the relative economics distorted by the uneven application of controls, but that distortion is also often to the detriment of the very environmental qualities that the council seeks so strenuously to protect by the imposition of controls on foresters.

It is clear to me that the implementation of the Act is causing new and partly justified concern in significant sections of the industry. Moreover, the industry is one which has the potential not only to make a major contribution towards our nation's economic growth but also an equally important contribution to many of the environmental goals which are central to the concept of sustainability upon which the Act is based. It would, therefore, be doubly unfortunate if the Act and practices under it were to undermine either of these objectives. The industry itself is both well advised and well equipped to make its own recommendations to both local and central government as to the resolution of the difficulties facing it. Indeed I understand that a further report is expected shortly. It is to be hoped that such appropriate solutions as it advances from time to time are recognised and implemented.

5 COSTS OF CONSENTS

Given the greater emphasis on environmental effects, it was always probable that business would face higher costs under the RMA than were common under previous legislation. The Act's move towards internalisation of costs has also led to businesses bearing costs that were formerly borne by society as a whole or the community directly affected.

Almost universally, those contacted for the purposes of this report spoke of higher costs associated not only with the obtaining of consents but also with the monitoring of the effects of the activity once operations commenced. These were particularly evident in the areas of discharges to air and water, where what can only be described as "horror stories"[47] were relayed. Both of these are, of course, within the purview of regional councils. In a survey conducted of 33 planning consultants "almost all respondents [agreed] that the costs to applicants are significantly greater now than under previous legislation."[48]

It is difficult to quantify the additional costs, let alone distinguish between those now met by business which were formerly met by other agencies, or to determine the environmental good arising from the added expenditures. To some degree the increases arise from cost recovery having been a feature of government policy during the course of the reform of local government in the latter half of the 1980s.

It is also pointless to compare present day costs with those formerly incurred. There is, however, a very high degree of scepticism in business as to the justification for much of the expensive research required by local authorities.

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47 Unfortunately it was typically the case that those who had been forced to incur what can only be described as extraordinarily high costs were unwilling to allow their experiences to be referred to in this report. They placed a high value on safeguarding their future relationship with the council involved. I have, therefore, been unable to obtain from the councils concerned any explanation for or confirmation of the charges as relayed to me. For that reason I have not considered it appropriate to do more than refer to them in this way.

48 Ewen Henderson, *Planners at the Coalface*, Planning Quarterly, March 1994.

Councils are also empowered by s.36 to implement a fixed fee regime to recover the costs of monitoring resource consents. This enables them to charge for inspectorial visits to a site, even in the absence of complaints.[49] There is a potential for councils to adopt an over-zealous inspection schedule, without any ability for the business concerned to challenge or question the costs which would be charged to it. Indeed, a limited number of complaints about activities of this type were drawn to my attention.

I apprehend, however, that to some degree there is a lack of appreciation by some in industry as to the importance of monitoring. Just as it is imperative that councils monitor the effect of the controls they impose on various activities, so too it is important that conditions imposed on consents be enforced. Without enforcement, for which monitoring is often essential, there is little point in imposing controls in the first instance. That monitoring is a cost, and it is appropriate that a part of it be charged to the party being monitored.

Given the extent to which the scepticism referred to above and the high costs of obtaining consents could affect investment decisions, it would seem highly desirable, if not imperative, for MfE to conduct a survey of a representative sample of businesses with a view to establishing, *inter alia:*

(a) the degree to which the costs of obtaining and monitoring consents are a significant issue;

(b) whether the expenditure is producing worthwhile environmental enhancements;

(c) the reasons for the high levels of expenditure required; and

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49 Environment Waikato's Annual Plan for the year 1993-94 records:

"Where there is a greater potential for adverse effects to occur as a result of activities associated with a resource consent, more frequent supervision by council staff may be required. In these situations where additional monitoring and supervision is carried out, or where further follow-up to routine visits is required, consent holders will be charged directly for the work undertaken." (p.59)

(d) the desirability of introducing into the Act some form of appeal or referral to the Tribunal in relation to information requests.

There are, however, a number of features of the costs issue which do warrant mention, even in the absence of the kind of research results that such a survey would reveal.

Undoubtedly there is a component of the costs which reflects the inexperience of local government in administering a new and highly sophisticated piece of legislation. Transition costs were always to be expected. To some degree too, the force of complaints can be expected to lessen as local government becomes more familiar with the legislation, and as the law becomes more settled from the establishment of precedent case law.

To some degree also the costs borne by local government and associated with the processing of applications reflect unfortunate practices of central government during the transition period. Obviously large areas of responsibility have been devolved to local government. In the air pollution area, for example, the Health Department, which was formerly responsible for the issue of clean air licences, no longer has a role in the issuing of discharge consents. It has been reported to me that two regional councils faced difficulties in that the equipment formerly used to monitor air pollution was removed by the department, and that the department not only retained its files on Clean Air Act licences issued in the regional councils' areas but in one case also sought to charge a regional council for the information contained in those files. Inevitably the costs borne by the councils in making their own arrangements were passed on to the community in one form or another.

A particular transition cost arises from the requirement of the Act that a resource consent be obtained for activities not permitted in a regional plan. As no regional plans are yet in force, consents are required much more frequently than will be the case when the plans are completed.

However, not all aspects of the costs issue which cause concern can be seen as transition problems. As noted in Chapter 4, a number of businesses are

required to obtain consents for their existing operations. In many cases these plants have been operating for lengthy periods and their effects are either known or have not given rise to complaint. Yet their proprietors are now faced with the need to commission expensive studies of the effects of their operations, often running into tens of thousands of dollars and in some cases well over $100,000.[50] One must question whether that money, even assuming it were to be devoted to improved environmental outcomes, could not in some cases be better spent.

Many businesses will be faced with undertaking costly environmental improvements if unrealistically high outcomes sought by some local government agencies are retained in their final operative plans. The Act's focus upon the sustainable management of resources is being interpreted by some agencies as requiring no deterioration of environmental qualities.[51] To an extent, this is a transition problem that may be alleviated as Plans and Regional Policy Statements are subject to the submission and appeal process. However, it should not be assumed that present day business has the inclination or the resources to challenge every overly ambitious policy or rule. (Nor, so long as some *de facto* - if not *de jure* - recognition of the existence of present operations is given by consent authorities, should it be overlooked that unrealistically high standards could well serve the interests of established operators by increasing the entry costs borne by would-be competitors.) Despite the desirability of empowering local communities to set standards appropriate to their region or district, there is justification for greater leadership and advice from central government than has hitherto been evident.

Many of the information requests made by local government agencies involve the analysis of data beyond their own ability to interpret. The skill base is, unsurprisingly, lacking. Accordingly, the applicant's reports are frequently referred by councils to another set of consultants for review. The costs of this review are charged to the applicant who essentially pays twice for the same work. There is often a high degree of public benefit involved in the review procedure, and that is recognised in s.36(4)(b)(i) of

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50 ECNZ estimates that the cost of renewing approvals for its existing facilities will include some $20 million for the application process alone, i.e. excluding the costs of meeting new conditions that may be imposed.

51 See e.g. the ARC's endeavour to ensure "No deterioration in ambient air quality."

the Act. Nevertheless, the rights of objection and appeal in relation to charges apply only to charges made by the consent authority over and above those fixed as being appropriate in the normal course. If consent authorities were liable for the public benefit element of their charges, it might be reasonably anticipated that some of those now borne by business would be seen as unnecessary.[52]

Accordingly, one of the recommendations in Chapter 9 of this report is that a right of appeal be conferred in respect of fixed charges.

There are as yet no decisions of the Tribunal arising from appeals against additional charges. One of the reasons for this may well be that successful applicants are loathe to appeal against such charges as to do so would delay their ability to exercise the rights granted by the consent. A similar difficulty exists in relation to appeals against financial contributions required of successful applicants.

It is, therefore, further recommended that the Act be amended so as to allow the exercise of rights conferred by a consent where the only appeal is against a condition fixing a financial contribution of an additional charge.

It is of interest to recall that, in the building consent context, Parliament has seen fit to provide a procedure whereby local government is obliged to accept a certificate from an independent certifier that the proposed structure meets the required standard. The matters at issue in that certification process can involve vital areas of public safety, and yet local government is required to accept the certificate and authorise the work.[53] There may perhaps be room for some variant of this procedure in the RMA context.

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52 Many local authorities do, in consultation with applicants, discount their charges to reflect this public benefit element. As the Tribunal has yet to have the opportunity to consider any appeal under s.36, it is still too early to make any judgment as to the need to amend the Act in relation to additional as distinct from fixed charges.

53 Local government does, of course, retain in such cases all its normal enforcement powers. The certifier procedure merely provides a private alternative to the use of the public agency in the obtaining of the required certificate.

The Act places a high priority on consultation. The costs associated with this democracy are borne very largely by applicants, and it would be difficult to construct any regime in which that were not so. Nevertheless, the actual costs both in terms of executive and consultant time are often very high.

By requiring greater consultation, the Act has legislated for what is essentially good practice, and indeed there are many examples of the consultation process easing the path of an application. (ECNZ is well known as a company which has adopted a policy of very wide consultation, often with very satisfactory results from both its own standpoint and that of the affected communities.) It is to be hoped that as experience with the Act develops, and as local government increasingly adopts a policy of very wide consultation while being sensitive to the costs of consultation, less rigorous demands will be made of applicants.

One matter worthy of specific comment in this area is the greater involvement under the RMA of the tangata whenua in the consultation process. The demands of the process have placed stress upon the tangata whenua's human and financial resources, leading to a number of reports of applicants being charged for consultative services. It should perhaps be appreciated that the Resource Management Bill was drafted at a time when the government was proposing to fund tangata whenua interests through the Runanga Iwi Act 1990, which was repealed upon the change of government later that year. To an extent, business and local government are bearing some of the costs of that decision.

The cost of obtaining development approvals is often an important consideration in the preparation of feasibility studies preceding the establishment of new businesses. If practice under the Act were to be responsible for the imposition of unnecessarily high costs at this very sensitive stage of a project's life, it could well represent an impediment to investment and economic growth. The monitoring costs for which business remains liable over the life of a consent also present a potential for high ongoing costs.

It is, therefore, of considerable importance that MfE investigate, as a matter of high priority, what improvements can be made to the manner in which councils are exercising their statutory powers.

6 ECONOMIC INSTRUMENTS

The Act makes provision for a limited range of economic instruments. No provision is made, for example, for resource rentals,[54] the transfer of discharge permits between unrelated businesses or the transfer of water permits for damming or diverting water. Nor does the Act provide for clubs of the kind apparently in use in South Australia and New South Wales in the areas of soil conservation and water quality on which there have been positive reports.

It is important too to realise that there is scope outside the RMA for the adoption of economic instruments for environmental purposes. A case in point would be any carbon tax regime implemented to curb CO_2 emissions. Recently the Franklin District Council was involved in an innovative agreement by which a conservation covenant applies only so long as the council continues to impose zero rates on the land. The recent amendments to the Conservation Act also operate independently of the RMA.

Given the fact that we are still very much in the transitional phase between the old regime and the new, it is not surprising that there is only limited experience to date on the application or implementation of economic instruments.

Reviewing the district plans open for submission as of March 1994, the Ministry has noted that:

> "Little use is being made of alternative techniques such as economic instruments. (Examples include charges, rates relief, levies, rents, bonds, contributions and subsidies.) While some councils have investigated different approaches such as transferable development rights, none of those approaches have found their way into notified plans.
>
> It must be acknowledged that there is a lack of information of alternative approaches available for councils to evaluate. The type

54 The charging regime established under s.36 is only for "Administrative charges."

> of detailed research of alternatives required is often beyond the resources of individual councils.
>
> Clearly there is an unfulfilled demand for research into alternative approaches. A number of councils are looking to the Ministry to provide assistance in this area."[55]

- **Tradeable Rights**

Much of the success of the implementation of the Act depends, as the minister has often remarked, upon the skill base of the professionals in both the public and private sectors. Economic instruments are, as the Review Group commented, poorly understood in this country, and indeed in the important area of tradeable permits:

> "Caution is certainly justified in view of the relative lack of international experience in dealing with such instruments and the potential for poorly designed instruments to create distortions, inequities and workability problems."[56]

Such caution and early warnings should not, however, cause us to overlook the fact that there are "distortions, inequities and workability problems" arising from the traditionally preferred regulatory controls. The problems that would inevitably flow from "poorly designed [economic] instruments" are no justification for inaction, for there are clearly costs associated with regulatory intervention.

It is, therefore, somewhat heartening to note that the Tasman District Council is proposing to establish, as a trial, a tradeable water rights regime in part of the Waimea basin. It is to be hoped that its experience will be followed with interest and provide lessons from which others will benefit.

The poor understanding of economic instruments such as tradeable rights is, however, not the only impediment to their wide adoption. In many cases a lack of information is cited as a difficulty. Further, the experience of

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55 *Section 24 Monitoring Report*, MfE, March 1994, p9.

56 *Report of the Review Group on the Resource Management Bill*, p81.

most local government officers and elected members is in the context of a "control and direction"[57] regime. Like most New Zealanders, they have been raised in a culture in which major decisions were largely the preserve of, or dependent upon, government. (Indeed one frequently hears complaints from elected councillors that the delegation provisions of the RMA have already acted to remove many decisions from their agendas.) It would then be an optimist who would expect them to lead a rapid advance into the relatively unknown.

- **Financial Contributions**

One of the most promising reforms is the Act's use of financial contributions by developers. Clearly there will be cases where the charges levied will be greater than was formerly the case; equally there will be others where they will be less. Importantly though, the contributions will be devoted to environmental enhancement, whereas in days gone by the contributions too often were expended in unrelated fields. At present, however, it is too soon to form a judgment as to the manner in which councils are giving effect to their powers to require payment of financial contributions.[58]

The Ministry for the Environment has published a helpful booklet[59] which should assist local authorities in the formulation of policy in this area. Most usefully, it contains model plan provisions which local authorities can incorporate into their own documents, just filling in the blanks.

- **Section 32**

Section 32 of the Act requires councils (and ministers) to undertake a rigorous analysis of any proposed objective, policy or rule.[60] To the extent

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57 Town and Country Planning Act 1977, s.4.

58 Under the transitional provisions of the Act, the *status quo ante* applies until the new Plans become operative; s.409(5).

59 *Resource Management IDEAS - No.9: Developing Financial Contributions Policy under the Resource Management Act,* MfE, April 1994. (The material was originally funded by, and prepared for, ECNZ.)

that this section can be seen as an economic instrument, it is appropriate to comment at this point on its implementation to date.

Unfortunately a degree of misunderstanding of the section's requirements has arisen as a result of the recent High Court decision. The question at issue is whether a council is required to prepare an actual report setting out the findings of and factors considered in the course of its s.32 evaluation. The Finance (No. 2) Bill now before Parliament contains a proposed amendment to s.32, the effect of which is make it clear that no such formal report is required.

As there have been no appeals heard in relation to any regional policy statements or district plans prepared under the new Act, there has as yet been little opportunity for any extensive testing of the degree to which councils have adhered to the section's injunctions. Nevertheless, there is widespread criticism not merely of some of the controls proposed by territorial authorities and regional councils, but also of the lack of justification given for them.

By way of example, two passages from the Auckland Regional Council's Draft Section 32 Report are set out in the Appendix at the end of this chapter.

In his third reading speech, the minister described the section as requiring "rigorous consideration" of proposed controls, which would "greatly reduce the amount of regulation or other intervention." My own observations of councils' efforts would confirm that the anticipated "rigorous analysis"[61] has not been the universal hallmark of the s.32 analyses conducted to date. There is a need for great improvement in practice if this reform is to bear fruit.

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60 The section requires that, before adopting any control, the council is to examine the extent to which the control is necessary in achieving the purpose of the Act, whether other measures might be used, and the reasons for and against adopting the chosen techniques as against the alternatives or of taking no action at all.

61 *Section 32: A Guide to Good Practice*, MfE, August 1993, p14.

- **Section 104(6)**

A little heralded economic instrument which the Act provides for is to be found in s.104(6), whereby councils are prohibited from having regard to the effects of a proposed activity upon "a person who has agreed to the proposal." This has enabled intending objectors to negotiate their own protection with applicants rather than rely upon the council to either decline the application or impose conditions to their satisfaction.

This provision has been criticised as enabling applicants to buy consents.[62] Such sentiments are commonly held by planning professionals, and appear to reflect an unwillingness to empower people to make their own choices rather than rely upon the professionally dominated system to meet their needs. Such sentiments also represent a harkening back to control rather than choice as a means of achieving satisfactory environmental outcomes, an unfortunate reflection on the degree to which some of the principles underlying the RMA have not yet gained acceptance in the professional community.

Although the section has so far worked as intended, it is in my view imperfectly worded and may well not survive the rigours of judicial examination. It does not preclude having regard to the "actual or potential effects" on the land of the consenting "person", or any future inhabitants of the property in question. It also permits account to be taken of the effects upon others with either an interest in the land, or an economic interest in the business being conducted on the land.

It would obviously be desirable to clarify any uncertainties as to the intent and meaning of the section before the usefulness of the device is upset by Court determination and attention should, therefore, be given to amending it at the next available opportunity.

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62 In his speech to the Planning Institute's 1994 Conference, Planning Judge W J M Treadwell said:

> "I suspect that a time may be reached when resource consents can to a degree be bought by payments made to prospective submitters ... such an approach could severely inhibit application of the philosophies of this Act to a particular land use development."

The use of economic instruments, more than any other aspect of policy and plan preparation, is perhaps one in which there is a need for greater leadership by the Ministry. While the Act makes limited provision for the use of economic instruments, even the opportunities it does afford are unlikely to be avidly pursued by local government agencies whose resources are already stretched and who are predictably cautious by nature. The Ministry is aware that this is so. Unfortunately, however, unless it devotes further resources to the issue, little progress is likely in the foreseeable future.[63]

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63 In the MfE's "Post Election Briefing" document, it was noted that the minister would "need to decide on the priority" the work in this area "should have in relation to existing programmes". However, the issue was not referred to in the "Future Work Priorities" section of the Ministry's March 1994 Monitoring Report.

APPENDIX

RE: AUCKLAND REGIONAL POLICY STATEMENT - SECTION 32

1. The RPS contains a policy that:

> "Adequate separation distances shall be maintained between industrial or trade premises that discharge contaminants to air and adjacent land uses."

The RPS cites in para 11.4.6 the reason for this policy being as follows:

> "Where the sensitive land uses are not sufficiently separated from industries, amenity and quality of life in the adjacent area may be reduced due to odour or dust emissions. Good pollution control technology and sound practice are not an adequate substitute for buffer distances to segregate noxious and offensive industry from other sensitive land uses. Equipment failure, accidents and unusual weather conditions can lead to emissions affecting properties beyond the boundaries of the source premises. Also, costs of control equipment can sometimes be prohibitive. Provision of an adequate separation or buffer distance allows uncontrolled episodic emissions, which occasionally occur despite consent conditions and pollution control technology, to dissipate without adverse affects on sensitive land uses. Such buffer distances must be preserved after the industry has been built."

The published section 32 analysis[64] of this control is as follows:

> "**Separation Distances**
>
> **Disadvantages:** There will be economic costs for industry in having to purchase larger sections of land in order to comply with separation or buffer distances. There will be economic costs for TLAs in implementing the separation distances.
>
> **Advantages:** There will be economic benefits for the TLAs and ARC (and therefore for ratepayers) in that complaints are likely to be less frequent than if there were no separation distances around noxious industries. There will be environmental benefits in that

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64 I use the term "published section 32 analysis" because it was put to me by ARC officers that the report available to the public did not contain the full extent of the analysis and research undertaken in the preparation of the RPS.

nuisance and toxicological effects of early discharges from noxious industries will be reduced."

The published analysis of the "principal alternative means" for this control reads as follows:

"I have carried out an evaluation of the likely costs and benefits.

I have had regard to the reasons for and against the PAMs:

...

Separation Distances in District Plans:

Disadvantages: There will be economic costs associated with formulating the separation distances and with implementing them in district plans. There will be economic costs for industry in having to purchase larger sections of land in order to comply with separation or buffer distances.

Advantages: There will be economic benefits for the TLAs and ARC and (therefore for ratepayers) in that complaints are likely to be less frequent than if there were no separation distances around noxious industries. There will be environmental benefits in that nuisance and toxicological effects of air discharges from noxious industries will be reduced."

The published analysis then concludes:

"I am satisfied that the selected means:

(a) Are the best means having regard to the above.

(b) Achieve the purposes of the RM Act.

(c) Are the most appropriate having regard to efficiency and effectiveness."

2. The Statement also has a policy that:

"Any activity which is discretionary with respect to an air discharge permit shall be a discretionary activity with regard to a land use consent."

The reason for this is stated at para 11.4.6 as being:

> "Designed to ensure that activities which require air discharge consents do not become established 'as of right' as permitted activities in a district plan. Consistency of treatment of such activities is necessary in order to achieve integrated management."

The section 32 analysis, as with the above, merely records:

> **"I have carried out an evaluation of the likely costs and benefits",**

> and then sets out the reasons for and against the proposed control as follows:

> **"Activity which is discretionary for air discharges to be discretionary for land use consents.**

> **Disadvantages:** There will be economic costs for industry in having to obtain air discharge permits as well as land use consents.

> **Advantages:** There will be economic benefits for the TLAs and ARC (and therefore ratepayers) in that if proposed air discharges are dealt with on a discretionary basis in terms of the land use consent, appropriate planning inputs can be provided to minimise the adverse environmental effects of the discharge. This, in turn, will result in fewer complaints about discharges and thus reduced costs for regulatory authorities."

7 MINISTRY FOR THE ENVIRONMENT

The minister has a number of functions under the statute, and these are set out in section 24 of the Act. It is useful to report by reference to those functions as listed. As we are still very much in the transition phase from the old regime to the new, and the focus of this report is on the implementation of the Act, the discussion in this chapter will centre upon the Ministry's activities to date, rather than its longer-term role.

The first-mentioned responsibility of the minister in s.24 relates to national policy statements. To date only one has been formulated, namely the New Zealand Coastal Policy Statement developed by the Department of Conservation. It has been widely criticised as lacking in specificity and priority setting - criticisms similar to those made by the MfE of numerous district plans and regional policy statements. One would have hoped to find, for example, statements as to the national importance of particular stretches of coast line. Instead the document is general in the extreme, and of little practical guidance to the lower tiers of government whose responsibility it is to give effect to its policies. While I have not investigated the depth of the s.32 analysis undertaken by DoC prior to the preparation of the statement, I would have to question the extent to which the section's requirements were adhered to in its preparation.

The second responsibility of the minister is that of making regulations under the Act. In an endeavour to remedy some of the inconsistencies in the Act as originally passed, some of the first regulations that were made purported to recast Parliament's words. The regulations may well have been, to put it mildly, constitutionally suspect, but they did demonstrate a willingness on the part of Ministry to avoid unnecessary confusion and its associated costs.

Thirdly, the minister is responsible for the call-in of projects for decision "where the proposal is of national significance". To date only one project, the proposed Taranaki combined cycle power station, has been called in, and the hearing has yet to be held. Too much importance should not, however, be placed upon the minister's powers in this regard. All the Act

does is to substitute the minister for the local government decision makers, with the Planning Tribunal still exercising final powers on any appeal that may follow.

Fourthly, the minister is to make recommendations concerning the approval of requiring authorities. A number of bodies have been accorded this status, and I am aware of no contentious issues arising in that regard.

Fifthly, the minister is to make recommendations on the issue of water conservation orders. There is insufficient experience to date for any judgment to be formed as to the adequacy or otherwise of the Ministry's performance in this regard.

The sixth, seventh and eighth responsibilities of the minister all relate to the monitoring of the Act's implementation, and it is to these tasks that much of the Ministry's resources have been devoted.

It is in the area of monitoring local government's performance that the Ministry has produced some of its best and most valuable work. Its surveys of local government's performance on, for example, its adherence to the statutory time frames for processing of applications, and the depth, quality and quantity of its submissions on proposed district plans and regional policy statements are to be applauded. Its s.24 Monitoring Reports have also proven to be of value.

The transition phase of the Act's implementation always promised to be an expensive and trying period. It is proving to be just that. The Ministry is in a unique position to speed the transition and ameliorate some of its less satisfactory aspects.

It is, therefore, disappointing that there is some justification in an oft-repeated criticism, namely that having passed a novel and highly sophisticated piece of legislation, central government has walked away and left much of the hard work to be done by local government. The costs of the transition are borne locally, by both consumers and administrators of the regime. The same mistakes, when repeated by many local authorities, represent an unnecessary multiplication of costs. Many territorial local authorities in preparing a district plan have struggled to formulate rules

based upon the effects of activities rather than the activities themselves. It would have been extremely helpful if the Ministry had produced some draft rules which could have served as examples or models for local government in the performance of its obligations. The Ministry's publication on financial contributions is a good example of the kind of assistance that could have been more widely forthcoming.

It is imperative that the Ministry's work on proposed district plans and regional policy statements continues and that it be funded to fruition, including, when necessary, Planning Tribunal and High Court appeals. The costs of transition are high, and the sooner doubts as to the efficacy and legality of many documents' techniques are resolved, the quicker those costs will be behind us and the promised benefits of the Act achieved.

Business cannot be relied upon to test every perceived deficiency in councils' documents. Some of the deficiencies may be to the advantage of well-funded commercial interests with the resources to pursue the necessary procedures. More particularly, however, the veritable plethora of documents emerging from local government necessarily confine business's responses to those which are of most immediate and direct concern. In addition, of course, some of the proposed controls and techniques will impact upon projects which are only at the stage of being contemplated by investors.

There are some issues which are of national interest - that of economic instruments is obviously one - in which individual councils are naturally reluctant to experiment, in part because of the developmental costs involved. The Ministry could most usefully fund or subsidise pilot studies on some of these, thereby both hastening their likely adoption and reducing the national cost of the same work being undertaken many times over, possibly to an inferior level of performance.

The monitoring work undertaken by the Ministry has been helpful to local government in enabling each council to judge its own performance by reference to that of others, for example in the area of non-notification of applications for consent. It is, therefore, disappointing to learn that the March 1994 Monitoring Report may be the last.

Another useful service which the Ministry has performed is bringing together on a regular basis a few senior resource management professionals from the public and private sectors to participate in a sharing of experience. I apprehend, however, that the findings have not been widely disseminated throughout the professions. Much of the day-to-day implementation of the Act is in the hands of persons with whom the privileged few have no regular contact. The sharing of advice as to mistakes and successful outcomes is of the utmost importance to the speedy and efficient passage through the transition to the full implementation of the Act.

The final responsibility of the minister is the consideration and investigation of the use of economic instruments to achieve the purpose of the Act.

As is stressed in Chapter 6, the use of economic instruments, more than any other aspect of policy and plan preparation, is perhaps one on which there is a need for greater leadership by the Ministry. The Act makes only limited provision for such techniques. Given the uncertainties naturally associated with these novel (to New Zealand) devices, the natural conservatism of local government and the heavy demands already made by the Act on local government resources, it is no surprise that few local government agencies have proceeded far down this road.[65]

The Ministry has published a fine booklet (originally funded by and prepared for ECNZ) on the use of financial contributions, incorporating very useful model plan provisions. It has also commissioned a very good guide on the preparation of s.32 analyses.

However, the cost to the nation of each local authority undertaking its own research into the design and adoption of economic instruments (even

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65 In a letter responding to a draft of this report, the senior planner of a metropolitan council wrote:

> "Even a Council of our size and with our resources has struggled to resolve these matters. We were, and are, looking for significant assistance and direction from Government at a national scale as a first step to assist us in resolving these issues ... ."

if that were occurring) would be both high and unnecessary. Such techniques have much to offer both in terms of administrative efficiency and improved environmental outcomes and it is, therefore, highly desirable that progress be made in this area. For this reason it is unfortunate that the issue is not referred to as one of the Ministry's work priorities in its last monitoring report.[66] The Ministry needs to accord a much higher priority to the performance of its statutory function to consider and investigate the use of economic instruments to achieve the purpose of the Act.

The Act also makes provision for the development of national environmental standards [s.43]. It is a matter of frequent criticism from local government that the Ministry has been less than assiduous in this area of its responsibilities. Any such standards would, of course, have to undergo a thorough s.32 analysis before their adoption. Both for this reason and the desirability of trialling draft standards before committing the whole country to a less than satisfactory regulatory regime, the Ministry has adopted the practice of producing draft standards as guidelines for discussion with both industry and local government and appropriate interim application. This approach is eminently sensible and may have avoided the imposition of onerous burdens on industry.

Nevertheless, it is unfortunate that the guidelines themselves have taken so long to appear. The guidelines for standards on water quality (biological growths in water) were issued in August 1992, nearly a year after the Act was passed. Draft guidelines on water quality (colour and clarity) were released only this year, and although a draft set of guidelines on ambient air quality has been available since mid-1993, they have still not been finalised.

Ironically, work on a statement of "Principles and Priorities for Standards under the Resource Management Act" has not yet resulted in even a draft being available for discussion. Ideally that might have been the first paper produced. Its publication is awaited as it will provide business with an opportunity to have an input into a variety of issues of national significance.

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66 *Section 24 Monitoring Report*, MfE, March 1994.

In summary, much of what the Ministry has done it has done well. No doubt many of its resources were consumed in the preparation of the extensive amendments made to the Act last year. Nevertheless, it is unfortunate that it has not done more and that its resources have been directed towards more longer-term concerns rather than being focused upon the immediate need to facilitate the transition. As the minister has remarked, the success of the Act will be seen in its implementation. If that goal is not pursued with diligence and the application of the necessary resources, the presently muted calls for the dilution of its powers can be expected to become still more strident.

8 CONCLUSION

As indicated in the introduction to this report, it is unrealistic to ask at this early stage whether the Resource Management Act has been a "success". We are still in the early to middle stages of the transitional phase.

It is, however, not too early, after nearly three years, to ask what is happening, how the transition is proceeding and what are the signs for the future. Nor is it too early to reach conclusions, some still tentative, as to the impact of the new regime on the well-being of New Zealanders, and especially (given the focus of this report) on business.

The Act has certainly worked well in a number of areas. The joint hearing procedure provides decision makers with the opportunity to adopt an integrated approach to environmental considerations and makes it possible to obtain development approvals for major projects within time frames that could rarely have been achieved in days gone by. The requirement to provide an environmental assessment report with applications is assisting in this regard. The increased availability of non-notification of procedures has been a distinct advance. Enforcement is easier and more effective in achieving environmental protection, and business is responding to its new responsibilities.

Unfortunately, it must also be concluded that in some other respects, probably more numerous in number and in many cases of at least equal significance, the Act is not working well.

The following brief discussion concentrates on areas of difficulty. This is for the positive purpose of achieving some improvement or amelioration rather than offering criticism for its own sake.

The cost of securing approvals is, on the evidence available, higher than was widely anticipated, even allowing for the fact that some in business fail to appreciate that there is now a degree of internalisation of costs previously met by the community. To a large extent this is due to poor practice on the part of local government. The professionals who advise

business are, of course, not exempt from similar criticism. The informational requirements of local government are also a source of major concern in this regard. The costs of obtaining approvals for existing operations are particularly worrying.

Although the Act has provided procedures for speeding up development approvals, the record of local government in meeting the Act's compulsory time frames is not as good as might have been hoped. This too is a practical and resourcing problem, and one which experience will hopefully ameliorate.

The greater use of economic instruments to enable market mechanisms to allocate resources more efficiently was seen by some as likely to emerge from the resource management debate. The Act, however, makes very limited provision in this area and the procedures it contains are unlikely to be widely adopted. The concepts are novel, at least for New Zealand, beyond the experience of most resource management professionals and inconsistent with the mindset established under the former direction and control regime. If advances are to be made towards greater use of market mechanisms, more leadership is required from central government.

Section 32 was introduced into the Act as part of its concentration on regulating effects rather than activities and in an endeavour to introduce an analysis of the tools to be employed in achieving its objectives. It is too early to form any conclusive view as to the extent to which the requirements of the section have influenced council decision making. The available evidence would suggest, however, that the analyses conducted to date would rarely meet the Ministry's interpretation of the "rigorous" review required by the section.

An examination of documents produced to date suggests that local government is having considerable difficulty in framing controls which focus upon effects. In many respects some proposed district plans are barely distinguishable from district schemes under the old legislation in the manner in which activities are regulated. I have no doubt that local government has struggled in its attempts to meet the Act's intentions in this regard, and it is unfortunate that central government has not been more forthcoming with advice and assistance. Some of the devices

adopted by the Act to assist in its implementation are not well drafted to achieve the desired result. The worst example is the trade competition section (s.104(8)), which can only be described as a woeful attempt to meet the expectations outlined by the minister when introducing the bill.

The Ministry has performed much sterling work in its endeavours to promote a responsible application and implementation of the Act. Especially important to the success of the Act are the submissions (and no doubt eventual appeals) made to local government plans and policy statements. The future management of our nation's resources is primarily a matter of local government responsibility and the performance, levels of resourcing and availability of skills varies greatly between local government agencies. There is also, of course, a lack of appreciation in some agencies of the importance of the Act's having stripped local government of its power to direct and control development, in favour of a concentration upon effects as a basis for regulation. If the Act is to succeed, it is of the utmost importance that the Ministry's efforts in the making of submissions and pursuing of appeals be given appropriate priority.

The Ministry's monitoring of the reforms has also been of value, and should be continued. Its work in this area is particularly helpful to local authorities seeking to measure their own levels of achievement. Much of the success of the Act will depend upon the skills of those charged with its administration. It is a highly sophisticated piece of legislation, often described as a world first. It is too much to expect that the skill base of the professionals responsible for administering and working with the Act will be enhanced by osmosis. The costs, not only of the transition to the new regime but also of the new regime itself, will to a large extent be borne by those seeking to invest in future development.

Clearly the rate of economic development will be adversely affected by higher costs and longer delays than are necessary and by the application of inappropriate regulation. Each of these is directly related to the level of skills of those administering the Act. Obviously, as experience is gained with the operation of the Act, some of the present problems will become less of a burden than they are now, but that experience must be shared and communicated. It must also be further enhanced by research and assistance of the kind which central government is not only the best

equipped to undertake and provide, but which can most efficiently be performed at that level.

The Ministry has a vital and continuing role in the implementation of the Act. There is still more it could do. At the heart of the responsibility of central government is that of ensuring that any legislation is so framed as to achieve the desired outcome. Presently there is uncertainty as to the meaning of section 5, the section that defines the very purpose of the Act. That uncertainty should not be allowed to prevail any longer than necessary.

This concluding chapter has emphasised the areas in which the Act has not operated as well as might have been hoped. If superficially measured by the number of words or paragraphs, that emphasis would give a misleading view of the first years of the Act's operation. The transition was always going to be long and expensive. That is proving to be the case. Lessons have been learnt as experience has been gained, and no doubt as the first documents are held up to the searching examination of the Planning Tribunal more lessons will be imparted. The learning process and the transition to the full implementation of the Act's new directions should not be unnecessarily prolonged or impaired by an unwillingness or inability to recognise where failings have occurred to date and where improvements can be made both to the Act itself and to the practice of those responsible for its administration and implementation.

9 RECOMMENDATIONS

PART A

Experience to date suggests that some amendments to the Act are desirable if it is to fulfil its purposes and the expectations to which it gave rise. Those which can be implemented with relative ease, and therefore with at most a modest delay, are set out below:

1. Remedying the absence from the Act of any express requirement to have regard to existing investment when considering applications for consents in lieu of expiring approvals.

2. Amending the Act so as to make it clear that projects which affect the environmental concerns which the Act declares to be of national importance need not themselves be of national significance before consent can be obtained.

3. Providing for appeals against local body charges which are fixed in accordance with s.36 of the Act.

4. Introducing a right of appeal against a local body's decision to require public notification of an application for a resource consent.

5. Introducing a right of appeal against fixed charges and providing that the filing of an appeal against charges or financial contributions shall not affect the right of the grantee to exercise any consent.

6. Amending s.104(6) so that it does not enable regard to be had to any interests associated with the land of those who have signified their approval to a proposed development.

7. Replacing s.104(8), which relates to trade competition, with a suitable provision to ensure:

(a) That the policy reflected by the present section applies to both the formulation of plans and policies as well as the consideration of applications; and

(b) That no regard may be had to any of the flow-on social or economic effects associated with trade competition.

8. Requiring local authorities to issue a decision on proposed plan changes within a fixed period similar to that which applies in the case of applications for consent.

PART B

There are a number of steps which the MfE should pursue with some urgency with a view to improving practice under the Act. Although practice is a subject largely beyond the control of the Ministry, it is well within its ability to influence standards of performance.

9. The Ministry should, at the earliest opportunity, undertake a survey of business with a view to establishing, inter alia:

   (a) The degree to which the costs of obtaining and monitoring consents are a significant issue;

   (b) Whether the expenditure is producing worthwhile environmental enhancements;

   (c) The reasons for the high levels of expenditure required; and

   (d) The desirability of introducing into the Act some form of appeal or referral to the Tribunal in relation to information requests.

10. The Ministry should as a matter of high priority devote greater resources to the development of economic instruments which can be widely incorporated into regional and district plans.

11. The Ministry must be prepared to fund research, trial and pilot the introduction of new control mechanisms, including but not confined to economic instruments.

12. The Ministry should develop standards or guidelines on acceptable environmental outcomes.

13. The Ministry should enhance still further its service to the local bodies and professional groups upon whose skill base the success of the transition relies.

PART C

Further changes to the Act should be investigated. As these may require some more detailed consideration than has been possible in the context of this report, they will not be able to be introduced immediately. Nevertheless, they warrant early attention:

14. There is a pressing need for the principles and purposes of the Act to be stated with greater clarity. Their restatement should desirably proceed after a process of consultation, which should be commenced promptly.

15. The Ministry should consider whether there is cause to restrict the permitted range of economic instruments to those presently provided for.

16 The Ministry should consider whether it is desirable to retain s.104(1)(i), which enables consent authorities to have regard to any issue they consider "relevant and reasonably necessary to determine the application."

PART D

A number of the Ministry's present programmes should be continued or enhanced:

17. The Ministry must continue its present high level of involvement in the submission process to local government's proposed district plans and regional policy statements, and where necessary proceed with appeals to the Planning Tribunal and High Court, in an endeavour to properly resolve the efficacy and legality of control mechanisms which do not appear to meet the requirements of the Act.

18. The Ministry should continue its present level of monitoring of local government performance in its adherence to the procedural requirements of the Act.

19. The Ministry should monitor the conditions attached by local government to the grant of resource consents in relation to standard projects which are replicated in many locations throughout the country.

PART E

Over a slightly longer term, consideration should be given to two other matters.

20. The Ministry should consider whether the introduction of some variant of the Building Act's certifier procedure may assist in the efficient conferring of resource consents.

21. The Ministry should consider whether the introduction of an instant fine procedure would enhance the present enforcement regime.