RESOURCE MANAGEMENT LAW ASSOCIATION SEMINAR TO CELEBRATE THE 10TH ANNIVERSARY OF THE ENACTMENT OF THE RESOURCE MANAGEMENT ACT

HON. JUSTICE A P RANDERSON
28 AUGUST 2001

Introduction

[1] I am delighted to be invited to speak at this function and express my congratulations and best wishes to the Resource Management Law Association on this occasion. I also wish to thank those who have been involved in the preparation and organisation of the seminar tonight.

[2] What I have to say to you will be divided into four parts:

[a] A discussion of the extent to which the aspirations and recommendations of the 1991 Review Group have been realised.

[b] Possible amendments to the Act currently under discussion.

[c] Process issues.

[d] The relationship of local government structures to the administration of the Act.

[3] I should say at the outset that the comments on this paper are entirely personal and I give the usual disclaimer that any views I express are not necessarily those which I would adopt in my judicial capacity.

A. Realisation of the 1991 Review Group's recommendations

[4] I was fortunate to have the experience and expertise of people from a wide range of disciplines to assist with the task of reviewing the Resource Management Bill in late 1990, culminating in our report of 11 February 1991. The other members

of the Review Group were Prue Crosson (now Prue Kapua, a lawyer then employed by Russell McVeagh, Solicitors, Auckland); Guy Salmon (a well known environmentalist); Ken Tremaine (then a planner in local government with very substantial experience); and Dr Brent Wheeler (a very capable economist who also has experience as a planner).

[5] The time frame in which we were to report was, in retrospect, impossibly short. The review was announced by the then Minister for the Environment Mr Simon Upton on 16 November 1990 and we reported on 11 February 1991, just under three months later.

[6] In that period we considered a large number of submissions as well as conducting hearings and attending public meetings in various parts of the country.

[7] We noted in our report that there was no real argument about the need to secure a high standard of environmental outcomes. Those views were expressed not only by conservation groups, but also by industry and resource users. There was no concern about meeting high environmental standards so long as they were clear. As we noted in our report:

> "A frequent theme expressed to the Review Group was the need for certainty in the environmental standards required to be met so that appropriate investment decisions could be made in the light of that knowledge."

[8] In general terms, we endorsed the Bill's approach of securing a high standard of environmental outcome while encouraging the use of alternative methods to achieve those goals. We noted this would require a shift in approach by administrators in central, regional and local government. We drew attention to submissions which were critical of the prescriptive pattern of controls affecting land use which, it was said, placed an unnecessary straitjacket on the ability to pursue legitimate development interests. We also noted concerns about the cost of undue prescription and the need to consider alternative use of other instruments (including economic instruments) either as alternatives or in combination with rules.

[9] The major themes of our recommendations were:

[a] To endorse the concept of sustainable management and the intention to bring the consent process for natural and physical resources under a single umbrella.

[b] That less emphasis should be placed on the direction and control of development, moving instead to the control of any adverse effects of activities on the environment.

[c] There was a need to separate resource allocation and regulatory functions.

[d] A recognition of the economic cost to the community of over-regulation on the one hand and lack of certainty on the other.

[e] An acceptance of the role of economic instruments to be developed in the future.

[f] The importance of an appropriate means for promulgating national policies and standards.

[g] The importance of retaining appropriate local government structures to administer the Act.

[10] It was recognised, given the complexities of the Bill and the major reforms being implemented by it, that subsequent amendments to the Act would be inevitable. It is therefore important that there be on-going debate about any such amendments. It is equally important however that any such discussion be on an informed basis and that a proper distinction be made between the Act itself and the way in which it is administered.

[11] My personal view is that much of the criticism of the Act is not well informed and such difficulties as there may be, have much more to do with process rather than the basic concepts and provisions of the Act.

[12] It is important to remember that there does not seem to be any significant challenge to the concept of sustainable management which has wide international recognition. As well, I do not detect any general unhappiness with the proposition that we, as a nation, need to ensure that high standards of environmental quality are maintained.

[13] So before one turns to criticism of the RMA, its original architects can be well pleased that it has at least achieved two of its major objectives namely the legislative enactment of the concept of sustainable management and the bringing of all resource consent applications under a common process.

[14] In a paper delivered in April 1999, I canvassed at some length the legislative history of the statutory predecessors to the RMA, drawing attention to the highly fragmented approach which characterised that earlier legislation. I do not repeat what I said on that occasion but I emphasise again the need to ensure that fragmentation does not re-occur by splitting off some aspects of resource management from the RMA. That would have the effect of destroying the ability to consider the effects of development in a holistic way and would be plainly undesirable.

[15] My impression is that the hoped-for reduction in prescriptive controls has not been achieved. Indeed, some district plans which I have read appear to have become substantially more prescriptive than previously. The development of alternatives envisaged by s 32 does not seem to have been generally realised. Of course, it is always more simple to make a rule than to consider, for example, whether a system of incentives might be more effective. Perhaps a lack of time and resources in some local authorities has made it difficult to focus effectively on s 32 and it may be desirable for the operation of that section in practice to be reviewed.

[16] Similarly with economic instruments. The Act enables the use of economic instruments although it was always envisaged that their development would only be achieved over time. As far as I am aware, there have been no significant developments in that field. It is another area which could benefit from further study.

[17] It has been generally recognised that it is desirable to separate allocation and ownership functions from regulatory control. That has been achieved in relation to minerals through the Crown Minerals Act but current difficulties on the West Coast suggest that not everyone is happy with this regime insofar as it relates to land administered under the Conservation Act. Another major area where the separation of ownership and regulatory functions has not been achieved is in relation to the seabed. The Review Group made a number of suggestions in that area for later consideration. Those issues should not be lost sight of.

[18] Before moving to discussion of some possible amendments to the Act, there are two final points in my paper of April 1999 which deserve repetition here:

[a] The RMA adopts an enabling rather than a prescriptive approach and does so with the use of broad language, just as its predecessors did. So it is not the RMA which dictates or requires the prescriptive rules evident in some district plans.

[b] The RMA represented a deliberate stepping back by central government in its involvement with the implementation and administration of the legislation. In particular, Ministerial control over the contents of regional schemes under the 1977 Act was abandoned. The Review Group envisaged that central government would retain an important role in resource management via the process of national policy statements and the setting of national environmental standards.

[19] I will refer to these issues in the sections which follow.

B. Possible amendments to the Act

Economic and social factors

[20] One of the issues discussed in my paper in April 1999 was the possibility then floated by others that economic and social matters should be removed from the definition of "environment" in s 3 of the Act. I do not need to dwell on this subject at length except to indicate my personal view that economic and social factors are an integral part of the management of resources, whether considered in the context of regional or district plans or in relation to specific development proposals. In view of the complex and inextricable links between the management of natural and physical resources as contemplated by s 5 and the economic and social well being of the community, any tinkering with the definition could have major and disastrous impacts. I would urge that great care be taken before amending the Act in those respects.

[21] If any such amendment were intended to limit the raising of economic issues by competitors, I doubt whether any amendment to the Act is necessary in the light of existing law and practice. It is an objective likely to be difficult or impossible to achieve in practical terms as I discussed in my earlier paper.

Subdivision

[22] From time to time there have been suggestions that subdivision should either not be dealt with by the Resource Management Act at all or that there should be an amendment to treat subdivisions differently than at present. One suggestion has been that there ought to be a presumption that land may be subdivided unless there is a rule to the contrary.

[23] In my paper of April 1999 I drew attention to the vital influence the pattern of subdivision has always assumed in the development of New Zealand and its potential to create adverse effects on the environment. The argument that a subdivision is no more than lines drawn on a plan is simplistic and ignores the real

and significant effects on the environment which can occur from uncontrolled subdivisions.

[24] The subdivision of land within towns and cities has potential impact not only for the physical environment but also social, economic, and infrastructure impact, particularly given the trend towards high density housing in major cities such as Auckland. It is important that adequate controls be maintained to ensure these impacts are addressed.

[25] However, the impact of subdivision may be even more important in the rural environment. Real concerns are being expressed about the effects of the subdivision of rural land, particularly in those areas adjoining the greater Auckland area. In simple terms, there is little point in putting a ring around the city to control the extent of residential development if rural land beyond that boundary can then be subdivided with little difficulty.

[26] I appreciate that the control of subdivision in rural areas is a difficult one to resolve given the pressures which are inevitably placed on territorial authorities and regional councils by land owners and developers. Nevertheless, it is my personal view that this issue must be addressed, particularly given the obvious potential for major economic, social, and physical impacts which the unrestrained subdivision of land will inevitably engender. In my 1999 paper, I referred to the transport and infrastructure requirements for subdivision which require detailed planning, often many years in advance of actual development on the ground. I also discussed the need for planning to provide an appropriate level of certainty for land owners, developers, local authorities, infrastructure providers, and all those who would be affected by the decisions made.

[27] Associated issues include the economic effects of rising land values through subdivision and capital intensive development, the effects on the farming and horticultural sectors of the economy, as well as the effects on the natural environment. When the latter are considered, one naturally thinks about the effects on water resources and areas of indigenous bush. However, rural landscape issues may be just as important. We are fortunate in this country to have the opportunity to

consider how we want our landscape to look. Do we wish to preserve an essentially rural landscape beyond our city boundaries or are we willing to accept increasing residential, commercial and other development on our farmland? That brings me to the next topic.

National policy statements and environmental standards

[28] The Review Group envisaged that central government would retain input into the sustainable management of resources through three principal means:

[a] The powers of the Minister of Conservation in the coastal environment.

[b] The use of national policy statements stating policies on matters of national significance.

[c] The making of regulations imposing national environmental standards.

[29] While a national coastal policy statement has been promulgated, no other national policy statements have been issued and no regulations have so far been passed establishing minimum environmental standard. I am aware that some attempts have been made but none has yet come to fruition. It seems to me that there are several current issues which could benefit from nationwide consideration at the present time. These include not only the rural subdivision and landscape issues already mentioned but also the effects of the subdivision and development of coastal land (particularly in the upper half of the North Island) and the currently sensitive issue of mining on conservation or other publicly owned land.

[30] These issues have been current for at least the last 20 to 30 years. Some progress has been made but it is my impression that decisions are generally made on an ad hoc basis with no certainty for the environment or those who may wish to develop it. They are the kinds of issues which we still have time as a nation to grapple with. My view is that time is running out and the kind of national

consultation and discussion which is possible through the national policy statement process should be started sooner rather than later and followed through to its conclusion.

C. Process issues

[31] There has been public debate about a number of process issues, much of which appears to extend from a history of significant under-resourcing of the Environment Court. This has been addressed in part in recent times by the appointment of additional Judges and Commissioners but unless current delays are significantly reduced, more may need to be done. The huge economic cost of delays in the consent process and uncertainty arising from the failure promptly to conclude changes to plans and policy statements needs no emphasis.

[32] There are a number of specific process issues calling for discussion.

Notification of resource consent applications and the status of submitters/objectors

[33] These two topics have been perennial issues of debate since the RMA came into force. Those seeking consent naturally wish to proceed on a non-notified basis or with some more limited form of notification. It must be recalled at the outset that only a very small percentage of consent applications are actually required to be notified. The great majority are dealt with on a non-notified basis. My impression is that those which are required to be notified generally deserve notification.

[34] Second, it is necessary to recognise the purpose of notification. It is to enable those who may potentially be affected to have appropriate input into the decision making process. Experience shows that it is more likely a better decision will result from an informed and participatory process than from one which is not.

[35] A suggestion has been made that some form of limited notification could be possible. I understand such a proposal could involve notifying the owners of those properties who might be directly affected by a proposal but without requiring any

wider notification through public advertising. This raises the issue of the open standing which currently exists for people to make a submission in opposition to a proposal even if they cannot demonstrate any direct or indirect effect upon them.

[36] There has been substantial criticism of the open standing regime but, in my experience, it does not normally lead to any greater delay than would occur with a more limited form of notification or limiting standing requirements. Generally speaking, those directly affected are likely to be involved in any event and the decision maker is unlikely to give significant weight to submitters who are not directly involved unless, perhaps, they represent some relevant aspect of the public interest. In that case, their involvement is more likely to be helpful than not.

[37] It should also be borne in mind that much time and ink was spilt under the previous regime deciding whether objectors had any status to appear. Under the current regime, those arguments have disappeared with resulting savings.

[38] A related issue is the present lack of any ability to challenge a decision not to require notification except by way of judicial review. One possibility would be to permit such a challenge upon application to the Environment Court for a declaration. Such a course is unlikely to be welcomed by the Environment Court given current pressures on scarce judicial resources and my personal view is that the status quo is adequate.

Leap-frogging the initial decision maker

[39] I have previously advocated an amendment to the Act which would give the Environment Court a discretion to grant leave to leap-frog the preliminary hearing before the relevant consent authority and move directly to the Environment Court. Such an application could be made upon the application of the applicant, submitters, or the consent authority. That would be appropriate for significant projects where it is inevitable that the matter will reach the Environment Court whatever the outcome.

Iwi consultation

[40] I am aware that difficulties have arisen in identifying the appropriate iwi or hapu when consultation with tangata whenua is required. There is an associated difficulty on occasions with identifying the persons within the iwi or hapu who has authority to speak on behalf of that particular group. I am aware that some territorial authorities and regional councils have gone to some lengths to establish a consultation process with representatives of the tangata whenua in their area. It may be a difficult process and will obviously raise sensitive issues. Nevertheless I consider it is something which ought to be tackled in a systematic way so that a practical means of carrying out consultation can be achieved. I am also of the view that consideration should be given to the idea of local authorities taking responsibility for the consultation process to ensure it is carried out in a consistent and adequate manner.

Costs

[41] The issue of costs awards in the Environment Court has long been one of difficulty. It seems to be generally accepted that hearings before the relevant consent authority at first instance should be free of any award of costs. However, given the lengthy delays being experienced in the Environment Court, the lodging of frivolous or vexatious appeals or references may need to be dealt with more firmly than at present. It is well known that a project may be significantly delayed by submitters filing an appeal and then withdrawing it shortly before the hearing without any resulting costs award. I am also aware that a number of appeals proceed when they have little or no substance. It may be that the Environment Court will need to be more robust about making costs awards in these situations, partly for its own protection from an increasing workload, but also in order to compensate those who are forced to incur unnecessary costs and suffer unreasonable delay by the conduct of a frivolous or vexatious party.

[42] On the other hand, public participation in the Environment Court should not be discouraged in the case of parties who have acted in good faith, are not frivolous

or vexatious, have conducted the hearing in an expeditious manner, and where no other sound reason exists for an award of costs. This is particularly the case with regard to public interest submitters whose input into the decision making process may have been beneficial and helpful to the Court.

[43] As I have mentioned on previous occasions, it may be that the Environment Court could be given a discretion to declare that a proposal is of such significance that an applicant should meet the reasonable costs of submitters in opposition.

[44] Finally on the issue of costs, the Environment Court could consider the possibility of requiring security for costs where there is good reason to believe that an appeal has been brought for the purpose of delay and has no or little substance. Any discretion of that kind would need to be exercised carefully so as not to shut out a party who had genuine and proper matters to raise.

Case management

[45] I am aware that the Principal Environment Court Judge, Joan Allin, is actively considering a new system of case management for the Environment Court and I endorse her efforts in that respect.

Evidence recording

[46] Although there are a number of resource issues affecting the Environment Court, the importance of a modern recording system cannot be under estimated. The FTR system now widely used in criminal trials in the District Court and to a lesser extent in the High Court ought to be made available forthwith for the Environment Courts throughout the country. Experience in the criminal Courts is that the ability for witnesses to speak at a normal pace under the FTR system has reduced trial length by as much as a third. That can only be of major benefit to the important work of the Environment Court.

Use of Commissioners and alternative dispute resolution

[47] On the subject of resources, it may be that consideration should be given to appointing independent Commissioners to take responsibility for specific hearings. I have in mind the appointment of senior experienced resource management lawyers who could, for example, take responsibility for deciding all references in relation to a new district plan for a major city. Inevitably there would be a cost involved, but the saving to the community which would result from the prompt disposal of the references and the freeing up of an Environment Court Judge and his or her Commissioners for other work, could more than offset the additional cost of appointing an independent Commissioner.

[48] Even greater emphasis should be placed by all concerned on alternative dispute resolution. In that respect, I am surprised that the power to have cases determined by an arbitrator is not more commonly utilised where the parties agree and are anxious for an early decision.

D. Significance of local government structure

[49] I mentioned this topic in my paper of April 1999 with specific reference to the situation in Auckland where we have a regional council and a number of major cities. I do not repeat what I said on that occasion but I notice there has been discussion recently about the possibility of establishing a single council for the Auckland area which would combine all the present territorial authorities and might also become a unitary authority assuming the functions of the regional council as well.

[50] I have not given any detailed consideration to this matter and do not express any views upon it. However, given the major issues which Auckland is attempting to address at the moment (particularly transport, infrastructure and regional growth), it may be that the time has come for a long hard look at the proposal for a single city with or without a separate regional council. The major difficulty has always been the need to ensure accountability and representation at a local level. These would

remain very important issues to be addressed in any local government reform proposals.

[51] I raise these issues because of the importance of local government structures in the administration of the RMA. It may be that some of the difficulties, delays and uncertainties which have resulted from the present number of territorial authorities could be resolved or ameliorated by local government reforms of this kind

Conclusion

[52] I very much appreciate the opportunity to express these personal views at the 10th anniversary of the introduction of the Resource Management Act. It is a major piece of legislation with far reaching consequences and I urge all those concerned to continue an informed and robust debate of its future.

[53] I believe it has represented a major and beneficial reform but it will only achieve its purpose if adequate resources are available for regional and territorial local authorities and the Environment Court to ensure its processes are prompt and effective.