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THE RESOURCE MANAGEMENT AMENDMENT ACT:  
IS IT TOO LITTLE, TOO LATE?

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## **THE RESOURCE MANAGEMENT AMENDMENT ACT: IS IT TOO LITTLE TOO LATE?**

My topic is the Resource Management Amendment Act 2003, something you are all no doubt familiar with to one degree or another.

Those hoping for a significant re-write of the Resource Management Act 1991 RMA were dealt a blow by parliament with the passing into law of the Resource Management Amendment Act 2003 in May this year.

These amendments have been a long time coming and, as many feared, they do not go far enough to address the problems with the Act.

Rather controversially, the Bill was referred to the Local Government and Environment Select Committee (headed by Green Co-Leader Jeanette Fitzsimmons) without providing the opportunity for submissions. The National, ACT and NZ First parties held unofficial hearings in protest, with support from United Future. While useful submissions were made and reported on by media, the effective forum, the select committee, remained unmoved.

The Amendment Act was significantly watered down from the Bill originally introduced in 1999 by the then National government. Its passing has left New Zealand's business community highly frustrated.

I will first cover some of the shortcomings of the RMA and how it is not working in practice. I will then discuss some of the amendments introduced by the Resource Management Amendment Act 2003 and the implications of these changes. These amendments are inadequate and do not address the basic problems with the RMA. More far reaching changes are needed to make the statute more effective in practice, and I suggest some.

So let's start with the RMA 1991. The Act was ground breaking. It was a unique piece of planning and environmental legislation which replaced a jumbled mess of around 50 natural resource and planning statutes and modified or repealed more than 150 other laws and regulations

There was considerable opposition to the proposed legislation. The Business Roundtable's submission (in 1990) on the Bill reported that the business firms it represented were unanimous that the Act would lead to a "retarded economy, poor environmental decisions and dwindling options for subsequent generations".

The Resource Management Act was 'sold' to the New Zealand public on the basis that it would provide a one stop shop for the resource consents required for any particular activity. The Act provides for district and regional councils to have joint hearings where matters relate to essentially the same subject matter, and this does provide a more efficient way of dealing with complex applications. However, the expected advantages of a one stop shop have not eventuated, as the sheer number of consents required for any one activity are such that, even though they may all be required by either the same consent authority or two consent authorities, the associated technical work required and the evidence to be given is such that the process is no faster, no simpler and no cheaper, than it was under the previous system.

The main areas of concern to the business community have been the costs, delays, uncertainty and the inconsistencies in approach between local authorities and regional councils in the resource consent process.

This process has held up development and has scared off investment. By way of example, there is very little exploration activity now in the hard rock mining industry in this country. This is an industry where the two large open pit gold mines in Macraes Flat and at Waihi together generate \$180 million in overseas dollars each year and provide 350 jobs.

The costs, delays and uncertainty associated with the resource consent process have caused investors and companies to move off-shore. Gary Paykel of Fisher and Paykel has talked about building a new manufacturing plant in Australia rather than alongside the existing facilities at East Tamaki because of concerns over poor roading infrastructure and the delays in obtaining resource consents. This is serious stuff for a country supposedly intent on getting back into the top half of the Organisation for Economic Cooperation and Development (OECD).

Let me now give you examples of large projects that highlight the shortcomings of the Resource Management Act and the costs involved. One example is the extension of the Martha mine.

I have been acting for the company which operates the Martha Gold Mine in Waihi. After almost two years of technical studies, reviews by experts appointed by the councils and extensive consultation with the community, the company applied in July 1997 for consent to extend the existing operation

The resource consents were granted by the Hauraki District Council and Waikato Regional Council in March 1998 following 3 weeks of hearings which were spread over four months. To that point, the company had spent in excess of \$2.5 million on obtaining the consents made up of \$1.5 million on consultant and legal costs, \$550,000 on council staff and outside consultants who reviewed the work of the consultants reporting for the company, and \$550,000 on internal company costs directly related to the consent process.

Then followed appeals with the main appellants being an environmental group incorporated only two days before submissions closed. Their 'evidence' at the Council hearing had consisted largely of extracts from the internet, delivered by power point over a day and a half. The appeals were finally disposed of in December 1998 at a cost to the company of about a further \$500,000. It is rather hard to convince an offshore head office to commit the funds necessary for further developments when such uncertainties and costs exist.

The Winstone Aggregates Pokeno Quarry's history of events is a prime example of how objectors can unduly and unreasonably hold up consent applications. An incorporated society became a 274 party to the Pokeno Appeals. That is, they only joined in at the appeal stage. In the Environment Court hearing, 10 witnesses gave evidence on behalf of the society, none of whom were an expert on environmental effects, supposedly their concern. The Environment Court granted full consent to the Quarry. The society then appealed this decision to the High Court but the appeal was struck out on the grounds that the appeal was a frivolous

attempt to abuse the processes of the Court. The society then issued judicial review proceedings which have subsequently been withdrawn, leaving Winstone to exercise its consents after six years and \$2.5 million spent in gaining them.

Too much scope is given to vexatious parties to hold up the resource consent process and in many cases thwart development. These complainants and those objectors who object for the sake of objecting need to be weeded out.

You may remember one iwi that developed a blocking tactic which came to light earlier this year, when a document outlining the stance of the iwi on resource consent applications was released by National's Nick Smith. The document from the iwi's environmental management committee claimed that the iwi's first rule on consent applications is to object and if in doubt, the second rule is to go back to rule one. The grounds of objection were given as lack of consultation, the Treaty of Waitangi, the RMA or "anything else anyone could think of". Needless to say, the iwi concerned have objected to, and held up, many developments in the Whangamata area.

I hasten to add I am not iwi bashing, and I have examples of iwi exercising their rights responsibly and actually achieving results.

There are so many examples where competing businesses have used the Act to restrict competition, despite section 104(3)(a) which purports to prevent this. This can be seen in the heavily contested applications for petrol stations and supermarkets where competitors object under the guise of environmental grounds and put their muscle behind lay objectors.

Standing is an old hobby horse of mine. The requirement for standing, which meant that a person had to show that they were more affected by the proposal than the public generally, was removed in the Resource Management Act. This has meant that anybody from anywhere can object to any proposal. This leads to delays and extra costs for the applicant and for councils.

In a speech to the New Zealand Planning Institute's annual conference this year, minister for the environment Marian Hobbs provided statistics of the time taken for some major projects to go through the resource consent process. On average they take 24 months from the date of lodgement of the applications to the final Court hearing. This generally included 6 – 8 months to obtain a council decision, a 12 – 14 month wait to obtain an Environment Court hearing, and a further 3 – 4 months delay prior to the release of a final Environment Court decision. Such time frames are unacceptable but unfortunately they are the norm.

The Environment Court has also contributed to the lengthy delays. According to a study conducted by the Ministry for the Environment, in September 2002 there were 2500 cases on the Court's books with an average waiting time of 23 months from filing to disposing. This problem lies not in the hands of the judges and their lay members, but in the lack of resources provided to the Court by successive governments. In fact, Principal Planning Judge John Bollard is committed to reducing delays to hearing time down to about 6 months, and waiting time is already reducing.

It has been interesting recently to see what has happened as Project Aqua, Meridian Energy's \$1.2 billion project, has come up against the RMA barriers. This scheme proposes to divert more than two thirds of the Waitaki River's flow into a 62km canal from which electricity would be generated through a series of six low-profile power stations. There is competition for the water resource from farmers and irrigators. The project is possibly the biggest yet under the RMA and would provide about 8 percent of the country's energy needs.

Cabinet has determined that the normal RMA process will be bypassed. The government has decided to introduce special legislation which will establish an independent statutory body that will consider the applications and develop a water allocation framework for the Waitaki. The expectation is that this will reduce time delays associated with the usual RMA process. Appeals against the allocation will only be on points of law.

Now that the RMA looks like causing problems for a state-owned enterprise project, it seems the government may be realising just how problematic the RMA is in practice for large projects.

Councils, too, are well aware of the difficulties faced by developers, as a result of the significant costs and delays occurring in the processing of major council infrastructure projects such as landfills, sewage treatment works and roading projects.

Jim Eagles, business editor of the *New Zealand Herald*, recently hit the nail on the head in an editorial which discussed the difficulty of getting the message through to the government that the RMA is impeding vital investment in New Zealand. He said a message had been delivered recently by the Ministry of Agriculture and Forestry, which is particularly concerned about the Act's stymieing effect on expansion of the wood industry.

Over the years he said that same message had come from a wide range of business associations such as Federated Farmers, but to no avail:

... down in the basement of the Beehive, the elves stick their fingers in their ears so they can concentrate on making life easier for cyclists and unions and harder for motorists and employers.

So let's now look at the Resource Management Amendment Act 2003 ('RMAA'). How far does this Amendment Act go towards addressing the fundamental flaws of the RMA?

- One of the most controversial amendments is the elevation of the protection of historic heritage to a matter of national importance and the definition of the term "historical heritage". Although the amendment will clarify the status of historical heritage under the Act, it will introduce another potential hurdle for applicants as it will be a new matter to be recognised and provided for. This is likely to prove to be a further barrier to development.
- Regional and territorial authorities must now "take into account" iwi planning documents when preparing or changing their plans rather than the lesser requirement "to have regard to" such documents.

This gives iwi more authority to participate in the planning process, and I question the appropriateness of requiring councils to take into account documents which may not have been subject to careful legal analysis and/or public participation.

- The Environment Court no longer has the power to award security for costs. This is unfortunate and does little to assist investment and development. The RMAA removes a useful method of ensuring that parties carefully consider the merits of their cases and of bonding them to pay any costs incurred unnecessarily by other parties. In the past this power has acted as a deterrent to some otherwise unmeritorious litigation. It is likely that vexatious litigation will increase with associated costs and delays to applicants and councils.
- There are new provisions restricting participation in Environment Court proceedings. These are supposed to go some way towards reducing the number of vexatious complaints and will avoid parties being involved in a hearing at the last minute, but they do not go far enough. The amendment requires that parties wishing to join an appeal give notice of their intention to join within 30 days of the appeal being lodged with the Environment Court. However, there is the ability to apply for a waiver of the 30 days and experience says waivers are likely to be granted to iwi and environmental groups who join in late in the process. Moreover, everyone who joins in an appeal is now a 'party' to the Environment Court hearing and given greater status than previously. Another backward step.
- A number of provisions relating to national environment standards have been introduced by the Amendment Act. Although the minister is able to list some advantages such as national consistency across councils, I believe that in practice these amendments will provide an added layer of bureaucracy and will add complexity in consent processing. The new provisions will allow the government to override rules in regional and district plans which have been subjected to public process. The ability of new standards to trigger a review of

existing consents will be an area of uncertainty and a matter of concern for existing consent holders.

- The new "limited notification" process is an alternative method of processing resource consent applications with minor adverse effects. The application is only notified to the parties that the consent authority considers "affected". Public notification is not necessary. If notification is required, because not all "affected" persons give their approval, the council will have to serve notice on all persons adversely affected even if some have given written approval.

Therefore, there remains a presumption in favour of notification and limited notification does little to reduce delays and costs of resource consent applications.

So the Amendment Act introduces a mixed bag of potentially useful provisions and some that may prove less than useful. The changes are far from the fix-all that many users of the Act hoped for. Indeed the minister and the United Party are already talking about the next Amendment Act. A continuation of the piecemeal approach is not what is wanted.

The amendments are disappointing in that they have failed to address business concerns. The fundamental issues of cost, uncertainty of decision making and inconsistencies amongst local authorities have not been adequately dealt with. Rather than reduce costs and delays I believe the amendments will lead to increases in both. This will continue to impact on the economic development and growth of this country by impeding such vital projects as the construction of major roads and power plants and major private developments.

The government needs to face reality and look at the state of our economy, and make some hard and fast decisions. The Act needs fundamental reform not a minor tinkering piecemeal process. A streamlined and cost effective process for gaining resource consents is needed.

In order to overcome some of the RMA obstacles to investment and growth I believe the following amendments are needed:

- some reference in section 6 (dealing with the matters of national importance) to national and regional economic growth targets;
- the recognition of the importance of infrastructure, roads, energy etc;
- a better managed and procedurally less restrictive process for projects of national and regional significance (like Project Aqua). Perhaps hearings could take place before a suitably qualified Board of Inquiry rather than elected council members. This Board would be given a power of decision. Appeals from these decisions would be on points of law only;
- alternatively, if appeals on the merits continue, hearings before the Environment Court should be a rehearing rather than *de novo*, so that regard would be had to the decision of the Board;
- as a further alternative, reintroduce the option of direct access to the Environment Court for hearing submissions to major projects. (This provision was in the original 1999 Amendment Bill);
- establish a register which determines which local iwi should be consulted in different areas;
- reintroduce the requirement for standing. Please note I am not trying to exclude genuine environmental groups from being involved in the RMA process. They were also able to be heard under the previous legislation. I am trying to get rid of the 'busybody' and new groups created specifically to oppose a particular project;
- reintroduce security for costs;
- provide for further limited notification of resource consents; and
- introduce further provisions to prevent trade competition.

Plainly the amendments to date are too little. Are they too late? Well, I guess it is never too late, but the millions of dollars and months of time expended, and the projects shelved, over the past 12 or so years are lost forever.

In the *National Business Review* recently there was an article on Project Aqua. It referred to the decision of cabinet to bypass the normal RMA process and said finance minister Michael Cullen had denied the government was attempting to fast track the scheme. It was more concerned with providing an orderly process for handling the applications, he said.

Well, doesn't everyone want that?

The article also referred to agriculture minister Jim Sutton saying last month that normal RMA processes could take years and benefit only lawyers.

Jim Eagles, in the editorial I mentioned, approves of the proposed process for Project Aqua and says:

Now there's nothing at all wrong with having a sensible process for approving power stations. It would be absurd to let the country grind to a halt for lack of electricity while any new generation remains trapped in the thickets of consultations, submissions, hearings and appeals. But what about all the wood-processing plants, factories, motorways and warehouses which get caught in the same thickets. Aren't they entitled to the same speedy, reliable, consistent consideration as power stations? If the RMA is too cumbersome to deal with major energy projects maybe it is just too cumbersome.

I rest my case for a major overhaul of the RMA.