

The case for RMA Reform

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Where did the RMA come from?

- It was a response to the National Development Act 1979 that provided for the suspension of Acts of Parliament by Cabinet for any national development project.
- Delays were intolerable and there were too many separate statutory processes, were the reasons given
- The “Think Big” programme connected with energy projects-the controversy over the High Dam at Clyde and the Aramoana smelter proposal
- Contrapuntal harmonies of New Zealand politics in those days meant finding an alternative approach

New Policy directions

- Abolition of the Ministry of Works
- Creation of the Ministry for the Environment
- Adverse report on the functioning of the 1977 Town and Country Planning Act
- Repeal of the National Development Act in 1986

Policy Development Process

- Bruntland Report “ Our Common Future” called for policies that sustain and expand the resource base—*sustainability the key--*
- Aim of the New Zealand project was to operationalize that concept in a statute
- The RMLR Law Reform project cost more than \$8 million-extensive communications and consultative process- very open
- 32 substantial working papers produced and made available
- Core Group of officials set up to run the process-MFE, a Māori issues person from MFE, Treasury, an expert lawyer from private practice

Bill introduced December 1989

- Special Select Committee established, although 3,500 submissions had been made during the policy development process
- Bill reported back but not passed by 1990 general election.
- New Government and Minister Simon Upton instituted a review process that resulted in changes to the policy and Bill but preserved the approach in essentials and passed the Bill after amending it.
- Bi-partisan attitude between the the two main political parties for quite some years afterwards.

The essential purpose?

- The integration of many statutes into one framework of sustainable management because New Zealand had:
- No consistent resource management objectives
- Arbitrary differences between management of land, air and water
- Too many agencies with overlapping responsibilities and insufficient accountability
- Complicated and costly consent procedures causing undue delays
- Unsatisfactory pollution laws and environmental protection
- Too much prescription, uneven monitoring and difficulty of enforcement
- How many of these issues are still with us?

Fundamental agreement on one principle

Both Ministers told Parliament that the objective of sustainable development through Part 2 of the Act. This drives all the processes in the rest of the Act to establish environmental bottom lines or limits

The force of this principle took many years to be understood. It was not until the Supreme Court decision in *Environmental Defence Society v New Zealand King Salmon* [2014] NZSC 328 that proper legal tests were finally established.

Environmental protection is an essential element of Act's purpose and an overall judgment approach was the wrong one.

What happened?

- Central Government and local governments have not performed as well as they might have done.
- Not enough central government guidance by the use of the instruments provided in the Act of policy statements and environmental standards
- Environment cannot be left to the market because costs of pollution are often externalized
- Lack of evidence-based research
- Most environmental indicators have become worse since the Act commenced--OECD Reviews have pointed out the weakness in New Zealand's performance
- Weakness in local government--too many complicated interlocking plans of Wellington

New Zealand Law-making

- The RMA after the massive 2017 amendments is now 796 pages in length
- It began life in 1991 at 382 pages
- It has now reached a level of incoherence and complexity that raises serious issues as to whether it is workable. The long legislative process before the 2017 amendments was chaotic and led to many strange changes; see for example ss58M to 58U.
- This may tell us something about the weakness of New Zealand law-making methods-a pronounced tendency to pass a multitude of amending Acts over the years without re-examining the framework
- A lack of transparency in the Executive branch about the design of legislation which is done in secret and often introduced to Parliament with demands that it be soon passed.
- Who is responsible for legislative quality? Cabinet or Parliament?

Local Government

- There is confusion and some duplication between the responsibilities of territorial authorities and Regional Councils.
- The processes of the RMA need to be better integrated with land transport planning, the Local Government Act and the provision of infrastructure
- On these matters the Productivity Commission is correct
- A serious need exists to cater better for urban development, cities and housing
- The processes under the RMA are now far too complex and various, they need to be drastically simplified.
- Some drastic reform of local government is overdue

The jurisprudence

- After developing jurisprudence under the Act over a long period of time, it would be a mistake to throw all that out and start again.
- After all Part 2 that drives the whole Act and all decision-makers is only four sections of the Act. The rest is process.
- The position of the Environment Court is important and its role should be enhanced not diminished.
- The Act needs to be more rigorously enforced and that should not be left to local government who seem often to be conflicted

How to go about fixing the RMA

- New Zealand has lost its mojo for managing big statutory reforms
- The reasons are many
- . The necessary reform cannot be done within a conventional departmental framework, and the RMA was not devised that way in the beginning.
- What is needed are clear principles that will work in the real world
- Will take a very long time to do properly and recent efforts may need to be undone
- The enemy of good legislation is the short parliamentary term of 3 years. Cannot fix the RMA in one big hit. Will never be done by next election.

What to do?

- Set up a small expert group, including some officials, planners, lawyers and local government people, supply a Parliamentary Counsel, and ask them to produce a draft Bill. Remember this Government is already approaching 6 months into its term
- Remember the RMA is one of the PCO's most in demand statutes, it affects many people in many ways. There is no way the whole reform job can be achieved quickly. It took years to make the present mess.
- We need a bifurcated process
- The reference in Stage 1 should be to make the existing Act simpler, less congested and clearer by stripping out much of the material that has made it near to unworkable.

Immediate Issues to address

- Reduce drastic ministerial and centralised controls that override councils
- Take out fast tracks that do not work anyway and give some capacity to deal with climate change
- Remove collaborative planning
- Reinforce and refine a national planning template
- Ensure proper notification takes place and public participation in decisions is restored
- Ensure the Environmental Court has capacity to decide on environmental bottom lines and is not restricted as it has been recently
- Produce a new National Policy Statement for water

Long Term

- There are other detailed corrections that should be made in the short term.
- The big issues that required a more detailed and complete policy process that comprise Stage 2 include:
 - How to integrate RMA with Local Government Act and to reform local government
 - How to integrate transport and infrastructure decisions within the RMA
 - How to deal better with urban development, a need that is urgent
 - How to deal with climate change in an effective manner so New Zealand's international obligations can be properly implemented

Long term issues must be addressed

Addressing the long term issues will require the Minister for the Environment to devise and announce some clear and concrete means for addressing them.

- The capacity of the Government machine to do it all immediately is not practicable.
- Politics is the language of priorities.

Illusions of power

- Ministers like to control things but their intervention is often not optimal
- Efforts to produce fast-tracks under the RMA and give more power to ministers is not going to enhance the workability of the framework.
- Reduced opportunity for public participation will not produce better outcomes nor will reducing the jurisdiction of the Environment Court.
- that there is a Post RMA world – this is an illusion if one takes environmental issues seriously. But there can be a much improved RMA world.

Summary

- A stripped down Act that will work is urgently needed. At present the RMA resembles now in some respects the National Development Act that it was designed to supplant
- A long term rethink is also urgently needed.
- New Zealand has a three year parliamentary term. It is not reasonable to expect the New Zealand Government now in office could design and pass a totally new Act before the date of the next election.;
- That is the reality.
- The last government spent two years working on a replacement for the RMA and we never saw it.
- The integration challenge must be tackled, but properly