



Engineers New Zealand

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*IPENZ Informatory Note Nine*

# Improving Resource Management

December 2002

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*IPENZ ENGINEERS NEW ZEALAND:*

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ISSN 1176-0915

# Improving Resource Management

## Introduction: Perceived Issues

The Resource Management Act (RMA), with the extended title of “an Act to restate and reform law relating to the use of land, air and water”, has occasioned much debate. It has already seen many amendments since enactment in 1991. This Note discusses the engineering-relevant issues the Act raises and considers whether changes might usefully be made.

The consensus is that the Act is a valuable tool for promoting sustainable management of the environment and of resources, but it does not fully address the goal of sustainable development. Of its nature it is bound to generate controversy, given its purpose of managing competing demands on finite resources. The values attaching to given resources – economic, social, ecological, heritage and amenity values among others – may be diverse, conflicting and open to dispute. Some of the issues involved can be judged only subjectively, and some impacts are highly personal.

The Act's stated purpose is “to promote the sustainable management of natural and physical resources”. The meaning of “sustainable” in this context was the subject of legal debate at its introduction, and how to strike a balance between environmental and social responsibility is still debated.

The Act characterises sustainability as “*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”*

In popular perception and sometimes in practice, the issues tend to resolve into a polarisation of economic and all “environmental” values. This is to ignore the fact that the Act is about resource economics – about allocating finite resources among competing claims – and that sustainability is an economic value as well as an ecological one.

Anecdotal evidence is mounting that the Act tends to defeat economic common sense, to the point where proposals are abandoned in advance if they will impact on large numbers of potential objectors, regardless of environmental or economic consequences. As a result infrastructure planning is hampered, and urban change becomes increasingly difficult to effect. Ironically, applications for major projects in environmentally sensitive but unpopulated areas are more likely to survive the process than those for lesser works in urban environments.

## Addressing sustainable development

The Act purports to promote *sustainable* management of resources, but whether this is an accurate representation of its purpose, let alone its effect, is open to question. The RMA moved New Zealand from mere pollution control to a regime for controlling environmental impact, or keeping adverse effects on the receiving medium within acceptable limits. But this still falls short of sustainable development, which extends to considering national and sometimes global impacts, whether or not local conditions seem satisfactory. In practice, it might well entail requiring that good-practice clean technology be applied even when the local environmental impact of existing technology is acceptable.

Further, the sustainable development ethos does not sit well with industry start-up. Industrial developers operate with limited capital, and often cannot afford the cleanest technologies. They need to generate cashflow, then retrofit the cleaner technologies as they make profits. A shrinking envelope of consent might help to reconcile the need for a little tolerance at start-up with long-term environmental responsibility; but defining such an envelope fairly and practicably presents a daunting problem.

## Local and national interests

Territorial Local Authorities hold the first regulatory bridge facing resource consent applicants. The Act offers guidance rather than prescription. The TLAs' district and regional plans interpret the Act in a local context, as a basis for sustainable management measures for the region. Plans may specify too few quantifying standards to assure effective monitoring or secure the intended results.

The flexibility implicit in the Act's understanding of *sustainable* accommodates local needs and conditions; but the same flexibility has also meant that a national legal framework has not developed, making it difficult for resource users to work across regions. Resource users need clear, realistic and comprehensive plans on which to base resource consent applications. A planning model in the nature of a template might promote consistency and make for a less arduous and expensive process.

Allowing development to take on a distinctive local flavour is a laudable ambition; but administrative regions are not independent economies or ecosystems – some of the effects of development are national in scale. How to control these and still address local concerns remains a problem.

Templates, National Policy Statements (NPS), National Environmental Standards (NES) and codes of practice are available options. No NES has yet been issued, and there is just one NPS in use, with another in the pipeline. Mechanisms are needed to ensure that these options are developed to cover the range of predictable issues, and that they are used. Minor developments with no specifically local implications could be governed by a national code of practice rather than re-litigated for each region.

Central Government has tended to respond to complex issues (such as mining, climate change, hazardous substances and new organisms) with further legislation. National Strategies have been created for energy efficiency, waste management, transport, and sustainability, providing a non-statutory policy framework. As the Strategies have not been fully consulted on or implemented, however, their effectiveness as guidelines is yet to be tested. It is doubtful whether the RMA can ever satisfactorily manage our Kyoto obligations, since many discretionary activities generating greenhouse gases lie entirely outside its reach. Kyoto needs its own specific legislation.

The Minister for the Environment has the power under the Act to call in any project requiring consent if the Minister considers it “of national significance”. Call-in powers have been applied to only two proposals, and the Business Compliance Cost Panel recommended that more use be made of them. This might ensure more expedient and consistent handling of infrastructural projects of national importance.

### **Evaluating consent applications**

A non-prescriptive regulatory framework that leaves room for innovation is most likely to promote acceptable and effective solutions. But such a framework also requires rigorous and robust evaluation of consent applications. The process should ideally apply multi-disciplinary expertise, especially to complex projects, to ensure consistent and workable results.

At the same time a balance must be struck between expert input and the views of the community or its elected representatives. Reconciling environmental, social and economic imperatives will inevitably involve a degree of compromise. Whole-system engineering and life-cycle analysis of cumulative effects can, however, be used to assess proposals on a scientific basis. Again, the Act provides for the development of National Policy Statements and environmental standards to provide guidance and promulgate best practice; they would also help promote consistency. But some irreconcilable clashes of interest remain unavoidable, and represent the price of flexibility.

TLA staff need sufficient expertise to deal justly and expediently with each case. Resources constraints prohibit the employment of extensive expertise, but a broad base with experts in crucial areas should suffice. Poor practice needs to be identified and remedied; professional development or mentoring programmes may represent a solution to popularly perceived inadequacies. A knowledge base needs to be developed covering all relevant points of law; and some external input from people with technical experience in industry, manufacturing, economics or engineering might raise the integrity and consistency of the process.

### **Administration**

The administration of the legislation is often wasteful, with cases backlogged for years at the Environment Court. Compliance costs resulting from such delays are a persistent stain on the reputation of the Act. The appointment of more judges to the Environment Court

on the recommendation of the Business Compliance Costs panel is tackling the case backlog, but this is just part of the problem.

The RMA is written so as to encourage the reviewing of cases on their own merits, with little incentive to refer to test cases. As a result each case has to be litigated from the ground up – another issue that national performance standards might address.

The Ministry for the Environment’s FAQ website section asks *How does NZ guarantee environmental objectives are met?* and answers: *If a council is not carrying out its functions the Minister for the Environment can undertake those functions and then recover the costs from that Council and community.* There are, however, no accountability mechanisms or incentives for TLAs to improve their RMA administration. Anecdotal evidence of inconsistent approaches and less than desirable outcomes suggest that some form of external performance review is needed.

### **Public consultation**

The public consultation process is notorious for delaying consent decisions inordinately. Instances of evident misuse of the right to democratic input have marred its reputation. Competitors of resource users and small interest groups have bombarded and frustrated the process, sometimes contriving to stifle development without an objective basis in science or reason. It has also been claimed (notably in recent months by Business New Zealand and Federated Farmers) that objections have been used cynically to enhance prospects of compensation.

Mechanisms are needed to hold applicants and objectors equally accountable, to foster mutual trust and restore the integrity of the consultation process. Political parties have suggested that costs be awarded against spurious objectors, and that objections from people not directly affected by an application be disallowed. Any such legislated constraints on the consultation process are likely to move rather than solve the problem; TLAs would still have to accommodate objections by some process, in some legal arena. Again, however, operable guidelines might help to modify a litigious culture of reaction in a positive direction.

In general, nevertheless, there has been a growing respect for community opinion, proponents adapting to the requirements of the Act by seeking community buy-in from the initiation of a project.

### **Closing remarks**

It is widely agreed that the Act is potentially a valuable instrument for managing competing claims on finite resources, but that its implementation is flawed. Much of the criticism the Act attracts would be more appropriately directed at its administration; at unreasonable expectations on the part of users; and at the occasional abuse of the consultation process.

Any environmental protection legislation will encounter resistance; and decisions are bound to cause controversy, since they involve values that must be judged subjectively, and impact profoundly on individuals. Any genuine efforts to minimise and mitigate impacts will be contentious at times.

The non-prescriptive flexibility of the Act is valuable, but promotes inefficient re-litigation of predictable issues and hampers working across TLA boundaries, especially where national interests are at stake. Guidelines and national codes of practice, already provided for, could be used better to address both problems.

The non-prescriptive approach requires a resolute focus on outcomes. Research is needed to evaluate the quality of resource consent decision-making delivered under the Act, and to determine whether resourcing and accountability mechanisms are sufficient to secure sustainable outcomes. Accountability and efficiency are also issues in respect of the administration of the Act and associated litigation.

The consultation process is open to abuse, some of which might be manageable by amendments to the legislation; but it is not finally possible to legislate to ensure mature and responsible behaviour by all the parties to resource consent applications. The damage done to the reputation of the Act by adverse publicity is probably disproportionate.

## Other Informatory Notes

- Note One:** The Role of Engineers in Developing National Wealth
- Note Two:** Policy and Leadership Framework for Wealth Creation in New Zealand
- Note Three:** The Role of Technology Education in New Zealand's Future Prosperity
- Note Four:** Sustainability and Climate – An Engineering Response
- Note Five:** Wealth Creation in New Zealand Improving Intellectual Property Realisation
- Note Six:** Climate Change and the Greenhouse Effect
- Note Seven:** The Drive for Innovators and Entrepreneurs – School governance and technology education
- Note Eight:** Managing Innovation
- Note Ten:** Economic Growth and National Infrastructure

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