Judicial decision making under the Resource Management Act 1991: a critical assessment

Martin Phillipson*

The judicial history of the Resource Management Act is noteworthy in that the flood of litigation expected to follow the passage of the Act has not materialised. The litigation that has occurred has tended to be very fact-oriented and the Planning Tribunal has (in the opinion of the author) shown a marked reluctance to tackle many of the serious issues that need to be decided in order for the Act to function effectively. This paper will attempt to provide some explanations for this phenomenon by analysing several decisions of both the Planning Tribunal and the High Court. In addition it will be shown that on certain occasions where the Planning Tribunal has taken a more adventurous approach and tackled key definitions, the resulting decisions have provided useful guidance for decision makers working with the Act on a regular basis. If the Act is to function properly, the Planning Tribunal must use these decisions as blueprints for its future deliberations.

I INTRODUCTION

Following the entry into force of a piece of new legislation there is a period usually marked by a flood of litigation where members of the communities and professions affected test the new law, find its edges and weak spots and, most importantly, clarify the definitions of key terms. This period may last several years, until the Court of Appeal has had several opportunities to accurately define key terms. The Resource Management Act 1991 (hereinafter the Act) has not followed that pattern. The expected flood of litigation has not materialised. Apart from this general lack of litigation, the most intriguing aspect of the Act's judicial history has been the lack of "quality litigation".[1] Most of the litigation has been very fact-oriented and the Planning Tribunal (hereafter the Tribunal) in particular has shown a marked reluctance to delve more deeply into the legislation and tackle the key questions and definitional problems which must be addressed if the Act is to function properly. In the absence of definitions of crucial terms, a climate of uncertainty is created within which developers and others find it difficult to operate. This paper will use several decisions of the Tribunal and the High Court to illustrate this phenomenon, but will also focus on three decisions of those

* LLB (Leicester), LLM (Sask); Lecturer in Law, Victoria University of Wellington. This paper was originally presented to the conference on *Current and Future Research Needs in Environmental and Resource Management* at the University of Otago, February 1994. The author wishes to thank Bruce Pardy for his comments. The author also expresses gratitude to the Victoria University IGC.

1 That is, litigation which advances understanding of a key phrase or definition.

bodies which the author believes illustrate the benefits of tackling certain key sections and definitions head on.

II RESOURCE MANAGEMENT ACT 1991: KEY PROVISIONS

The most significant Part of the legislation, it is submitted, is Part II, which establishes a hierarchy of purposes and principles underlying the operation of the Act. Every function, power and authority exercised under the Act must accord with the terms of Part II. Without a clear understanding of the relative importance of these terms in relation to the rest of the Act, and a better understanding of the actual meaning of the provisions themselves, the Act will not be able to function effectively. If the meaning and import of these terms is uncertain, those bodies will not be able to exercise their powers in the most efficient manner.

The fundamental purpose of the Act is "to promote the sustainable management of natural and physical resources." Sustainable management is defined as:[2]

> 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 remainder of Part II (comprising sections 6-8) contains other principles of vital importance, but which are to be interpreted with reference to the definition contained in Section 5. These principles are grouped into three categories:

1. Matters of National Importance, such as the protection of the natural character of the New Zealand environment and the preservation of indigenous flora and fauna.

2. Other Matters, such as the preservation of amenity values, heritage sites and the intrinsic value of ecosystems.

3. The Treaty of Waitangi, requiring that Maori issues and concerns be considered in the management of the environment.

Part II represents the heart of the Act and the interpretation of these provisions will be essential to the attainment of the ultimate goal of sustainable management. The

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2 Resource Management Act 1991, s 5(2).

approach contained in Part II was adopted due to the need for a more realistic evaluation of the environmental costs of resource-use decision making.[3]

Apart from the meaning to be attached to Part II terms themselves, there is also the broader issue of the relative importance of those matters in deciding when to grant a resource consent. This question leads to discussion of another key section in the Act, Section 104 (as amended by the 1993 Resource Management Amendment Act). Section 104 indicates to the Tribunal those matters which should be considered when deciding whether to grant or uphold the granting of a resource consent.

Another major change which the Act introduced was increased liability provisions, contained in Part XII. These provisions substantially increased the maximum fines which can be levied and also introduced the possibility of prison sentences for the most serious environmental offences.[4] Any environmental legislation, no matter how progressive, will be ineffective if it does not give decision makers the power to levy effective sanctions against offenders.

This paper will focus mainly on the Tribunal's treatment of Part II related provisions. Its efforts in this area have been sketchy but the overall thrust of this paper is that the Tribunal must be adventurous and attempt to tackle the clearly difficult task of finding meaning for, and thus developing, the philosophical heart of the Act. As stated above, the Act can be characterised as unusual because of the relatively small amount of "quality litigation" that has occurred in the two and a half years since its entry into force. It is submitted that one of the reasons for this has been the narrow approach of the Tribunal. In several cases where the Tribunal has been presented with the opportunity of discussing several Part II provisions, it has preferred merely to decide the case before it on the facts, avoiding any apparently unnecessary discussion of the wider definitional issues which the case may have raised. For example in *Aro Valley Community Council Inc.* v *Wellington City Council*,[5] a case involving an appeal against the granting of a resource consent the Tribunal stated:[6]

> [A]s far as the Resource Management Act is concerned it is still early days. We should therefore avoid determining issues that do not need to be determined in order to deal effectively with the proceedings before us.

Similarly in *Hugh and Morris* v *Marlborough District Council* [7] where the notice of appeal stated the following:[8]

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3 See *Sustainable Management of Resources*, Information Sheet Number 2 (Ministry for the Environment, Wellington, 1992.)

4 Maximum fine under the Resource Management Act is $200,000. Serious offences can incur a 2 year prison sentence.

5 *Aro Valley Community Council Inc.* v *Wellington City Council* (1991-1992) 1 NZRMA 221.

6 Above n 5, 227.

7 *Hugh and Morris* v *Marlborough District Council* (1992-1993) 2 NZRMA 396.

8 Above n 7.

> The proposal is contrary to Section 5 of the Resource Management Act in that it will not promote the sustainable use of natural and physical resources. The proposal is contrary to s7 of the Resource Management Act in that it will not result in the efficient use and development of natural and physical resources....

In its final decision, the Tribunal stated:[9]

> We do not consider the proposed activity to be of sufficient importance to be considered in terms of Part II. There is nothing in that Part of the Act which gives positive encouragement to the proposed activity, nor is there anything which would warrant the Tribunal in holding that the activity cannot take place.

These two examples illustrate the Tribunal's approach. Although the cases did not raise issues of monumental importance, they raised issues which the Tribunal could have elaborated upon if it so wished. In *Hugh*, the vital question of sustainability and Part II was raised and the Tribunal dismissed it out of hand. Saying that Part II has no place, or that it is not necessary to deal with difficult matters is unsatisfactory. This is primarily because the decisions do nothing to advance our understanding of key matters and in the case of *Hugh*, does nothing to advance our understanding of Part II.

The Tribunal must seize the opportunity when it arises to advance our understanding of Part II matters. Waiting for a textbook case within which all definitions contained in Part II and the overall importance of Part II can be determined is unrealistic. That is not to say that this is the Tribunal's approach, but the development of Part II will inevitably be incremental in nature, each decision adding a little more until a wider picture of the provisions emerges. It is also submitted that these decisions do not necessarily have to be correct, as incorrect or contentious decisions provide excellent opportunities for appellate courts, and even the legislature, to review the effectiveness of certain provisions.

However, it would be unfair simply to criticise the Tribunal. They do face a difficult task. The Act completely revamped environmental law in New Zealand and turned a planning statute into a wide ranging and complex piece of environmental legislation. Nevertheless, there have been cases where the Tribunal and the High Court have ventured to discuss these provisions at length with, it is submitted, highly satisfactory results. These cases illustrate the advantages of an adventurous approach and should serve as blueprints for future Tribunal decisions.

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9 *Hugh and Morris* v *Marlborough District Council* Unreported Final Decision, 24 June 1993, Planning Tribunal, W41/93 at 9.

III QUALITY LITIGATION UNDER THE RESOURCE MANAGEMENT ACT

A *Batchelor* v *Tauranga District Council*[10]

In *Batchelor* the Tribunal (and eventually the High Court) had the opportunity of weighing the relative importance of Part II matters against other sections of the Act. The case concerned an appeal under s 120 of the Act against a council decision refusing a resource consent. The appellant had applied for permission to establish an off-licence in premises previously occupied by a service station. Such an establishment would have been contrary to the existing zoning and the application was turned down.

On appeal, therefore the Tribunal had to scrutinise the terms of the original Section 104[11] which stated in subsection 4:[12]

> [W]hen considering an application for a resource consent, the consent authority shall have regard to-
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> (a) Any relevant rules of a plan or proposed plan; and
> (b) Any relevant policies or objectives of a plan or proposed plan; and
> (c) Any national policy statement, and regional policy statement;and
> (d) Where the application is made-
> (i) In accordance with a regional plan, any relevant district plan; and
> (ii) In accordance with any district plan, any relevant regional plan; and
> (e) Any relevant water conservation order; and
> (f) Any relevant draft water conservation order..; and
> (g) Part II; and
> (h) Any relevant regulations.

The question I wish to focus on stems from the placing of Part II matters in s104(4)(g) in the list of matters to be considered. Both the Tribunal and the High Court took this placement as stating that the other specified matters were to be addressed before Part II considerations. This is clearly contrary to the spirit of the Act. The Tribunal itself acknowledged that:[13] "all other provisions of the Act are ancillary to the purpose stated in Section 5."

However, having classified all other provisions as ancillary they continued:[14]

> [I]t should be recognised that there are other measures which Parliament has found necessary to serve that broad general purpose and which spell out its intent in more detail. We hold that where the intent of detailed provisions of the Act is clear, and express guidance is given for the exercise of a discretion, it is not necessary to refer to the general purpose of the Act. (Namely Section 5).

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10 *Batchelor* v Tauranga *District Council* (1991-1992) 1 NZRMA 266.
11 The section as originally presented in the RMA 1991.
12 RMA 1991, s 104.
13 Above n 10, 269.
14 Above n 10, 269.

Although as a matter of strict statutory interpretation this decision is correct, and the specific should invariably override the general, it left the Act in a difficult situation. The Act's over-riding purpose, to which the Tribunal explicitly stated that all other provisions were ancillary, could be overlooked if a more specific provision addressed the matter at hand.

Similarly, Part II matters in general could be overlooked, or looked at a later stage in a decision following the High Court in *Batchelor*.[15] The main question that the Court had to address was whether Part II matters were to be treated preferentially in relation to the other matters that the Tribunal must address under Section 104. The High Court's decision was unequivocal:[16]

> The Act does not specify ... the weight to be given to Section 5 ... . [P]art II (and Section 5) is part of a list of matters to be considered but has no special prominence.

This decision was subsequently followed in several other decisions of the Tribunal.[17]

Batchelor quickly established itself as one of the leading pieces of Resource Management Act jurisprudence. Based, as it was, on an ambiguity in the Act, the Ministry for the Environment acted to rectify this situation and to place Part II matters in a position of undeniable prominence.[18] The Resource Management Amendment Act became law in July 1993. Section 54 of the Amendment Act replaced the original section 104 of the Act 1991 in its entirety. The new section began:

> Subject to Part II, when considering an application for a resource consent and any submissions received, the consent authority shall have regard to:
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> (a) Any actual and potential effects on the environment of allowing the activity; and
> (b) Any relevant regulations; and

The section then proceeded to list the categories which had previously been listed before Part II matters in the original s 104.

Batchelor is an example of quality litigation because of its outcome. Clearly the drafters of the legislation intended Part II to be pre-eminent and placed it in s104(4)(g) as a signpost. However this could easily be interpreted in the manner chosen by the Tribunal in the first *Batchelor* decision. This confusion led to further legislation which

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15 *Batchelor* v *Tauranga District Council* (1992-1993) 2 NZRMA 137

16 Above n 15, 141.

17 See *NZ Rail* v *Marlborough District Council* (1992-1993) 2 NZRMA 449; *Gill v Rotorua DC* (below note 20).

18 For further analysis of the effect of the amendment made to s 104 see Martin Phillipson, "The Relationship Between Part II of the RMA & Resource Consents", [1994] NZLJ 67.

clarified the drafters' original intent. Part II matters are now undeniably the pre-eminent considerations in deciding whether to grant a resource consent.[19]

The decision in *Batchelor* illustrates the benefits of the Tribunal (and High Court) taking risks and defining key sections. Even though the decision could be characterised as incorrect or inconsistent, it still achieved a desirable result and certainly advanced our understanding of the place of Part II in the overall framework of the Act.

B Gill v *Rotorua District Council*[20]

Gill represents a more traditional piece of quality litigation, in that the decision itself helped to clarify the import of some key Part II matters, namely, those pertaining to the duties of consent authorities in relation to Maori. In *Gill* the Tribunal was asked to review the award of a resource consent to build townhouses and holiday homes on land adjacent to a Maori reserve. The site had previously been designated as a Proposed Scenic Reserve and the Maori reserve was possibly a burial ground and was of major historical significance in that it pre-dated European settlement and was also the site of an early mission station.

Although the developer of the site had consulted at some length with the local Maori Trust, Judge Kenderdine was highly critical of the actions of the Council in relation to their performance (or lack thereof) of their duties under sections 6, 7 and 8 in liaising with the local *iwi* and discovering their concerns over the proposed development. She commented:[21]

> One of the nationally important requirements in Part II is that account be taken of the principles of the Treaty of Waitangi under s 8. One of these is consultation with *tangata whenua*. The council does not appear to have actively consulted with the tribe over the proposal. The records clearly indicate that the necessary advice was conveyed to the Trust, and from there it was a matter for the Trust to deal with. This is not what the legislation requires. The Council's actions appear to have been merely passive.

Judge Kenderdine then went on to clarify the exact nature of the Council's obligation under Section 7:[22]

> The test under s 7 which the Council has to meet is a high one. It is required to have particular regard to the issues listed. We have no evidence that the council gave special regard to the Maori issues in its investigations into the proposal. The section imposes a duty to be on enquiry. The Council should have investigated why the Maori people supported the designation and should have been on alert as a consequence.

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19 Judge Kenderdine in *Wellington Rugby Football Union* v *Wellington City Council* Unreported, 30 September 1993, Planning Tribunal, W84/93 stated: "The recent amendment Act now gives Part II matters primacy."

20 *Gill* v *Rotorua District Council* (1992-1993) 2 NZRMA 604.

21 Above n 20, 616.

22 Above n 20, 616-617.

Gill is an excellent decision[23] in that several sections of the planning and development community now have a better understanding of their obligations under the Act as a result of Judge Kenderdine's pronouncements.[24] Local authorities now have a clearer indication of what is expected of them in terms of consulting the *tangata whenua* over resource consent applications which may seriously affect land of particular significance to the *tangata whenua*. Similarly, developers and planners are more aware of the matters that the Tribunal considers important in evaluating the desirability of a proposed development on, or adjacent to, land of historical and ancestral significance to the *tangata whenua*. Judge Kenderdine's approach is to be commended. Instead of restricting her decision to a finding that the District Council had not fulfilled its duties under the Act, she elaborated on the extent of that duty and has provided a clear indication of what is expected of consent authorities in similar situations in the future. *Gill* is an illustration of what can occur if the Tribunal is prepared to tackle key provisions directly. Unfortunately, the vast majority of Tribunal cases have not followed this pattern, particularly where Part II provisions are concerned.

The final case which I want to scrutinise does not relate to Part II, but relates to the liability provisions contained in Part XII[25] mentioned above. The reason I am focusing on this case is that it represents the textbook "quality litigation" case. The District Court[26] attempted to discuss the implications of the provisions and on appeal the High Court laid down clear guidelines which the Tribunal will be able to follow in future. Admittedly, the liability provisions are less of a minefield than the provisions in Part II, but nevertheless the decisions represent a pattern of decision making for the most part absent from the Tribunal's and High Court's deliberations under those sections. As such, the case represents a model which the Tribunal and High Court should aim to follow.

C The Machinery Movers Cases

In *Augustowicz* v *Machinery Movers* [27] the director of the defendant company was charged with a breach of Section 15(1)(a)&(b) of the Act, which constituted an offence under Section 338 of the Act. Employees of the defendant's company dumped several thousand litres of toxic substances onto the yard of a timber company which then flowed into an adjacent stream. Over 100 ducks nesting on the stream were killed and members of the public who went to the animals' assistance were hospitalised after being overcome by fumes. In his defence the director stated that his employees were unaware

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23 In terms of it being a piece of quality litigation.

24 However, decisions of the Tribunal made following presentation of this paper may have limited the scope of the decision in *Gill*. See eg *Sea-Tow* v *Auckland Regional Council,* Report to Minister of Conservation, Unreported, 14 December 1993, Planning Tribunal, Report A129/93 and *Hanton* v *Auckland City Council*, Unreported, 1 March 1994, Planning Tribunal, A10/94. The author has recently completed a piece on the impact of these decisions which is, as yet, unpublished.

25 Namely, ss 338 to 343.

26 Which under s 309 must hear all proceedings under s 338.

27 (1992-1993) 2 NZRMA 209.

of the toxic nature of the substances and believed them to be harmless. Their belief was founded on a letter from Auckland Regional Council allowing them to dump quantities of specified harmless substances into a nearby drain.

In the District Court, Judge Bollard stated that while the employees were unaware of the exact nature of the substances, the operative event was the dumping of the substances contrary to the Council's letter which therefore constituted a breach of Section 15 and therefore an offence under Section 338. Having established that an offence took place, Judge Bollard reviewed the sentencing options available to him under the Act.

He began by noting that the maximum fine available under Section 339 was $200,000 and acknowledged certain mitigating factors including the erroneous belief that the contents were harmless and the speedy clean up instituted by the defendant. Despite acknowledging the defendant's submission concerning the company's precarious financial position and the $12,000 already spent on clean up costs he fined the defendant a total of $36,000. He commented:[28] "I need hardly add that were it not for the mitigatory aspects that exist in this case, the fine would have been substantially more".

The defendant appealed to the High Court on the grounds that the sentence was excessive and that the District Court should have taken guidance from the sentences levied under the previous liability regime contained in the Town and Country Planning Act 1977.

The High Court,[29] under the guidance of Mr Justice Williams, began by noting that the Act was informed by a wholly different environmental philosophy which places far greater emphasis on environmental protection and introduces much more stringent penalties. However, instead of simply upholding the sentence (which was the eventual outcome) the Court went further and took a wide ranging look at both the liability provisions and the sentencing of corporate environmental offenders in general. Perhaps the most impressive part of the judgement was the Court's enunciation of a list of factors which should be taken into account when sentencing corporate environmental offenders. In doing do, the Court noted that the Act was silent on matters which should be taken into account and this was a deliberate move on the legislature's part to encourage a flexible and innovative approach to sentencing. In identifying those matters to be taken into account, the Court relied heavily on the Canadian decision of *R* v *Bata Industries*.[30]

The Court identified four key issues that should be taken in environmental sentencing cases generally:

(a) The nature of the environment affected;
(b) The extent of the damage caused;

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28 Above n 26, 217.
29 (1992-1993) 2 NZRMA 661.
30 (1992) 7 CELR (NS) 293.

(c) The deliberate nature of the offence; and
(d) The attitude of the accused.

When sentencing corporate environmental offenders, the Court identified five other factors which should be taken into account:

(a) The size of the corporation, the nature of its operations and its wealth and power;
(b) The extent of the corporation's attempts to comply with the law;
(c) Remorse on the defendant's part;
(d) The profits realised by the offence; and
(e) Criminal record or evidence of good character on the part of the corporation.

The High Court considered these factors and also added the significant consideration of Machinery Movers' precarious financial position. Although they saw this as an important consideration, it did not alter their opinion as to the correct nature of the sentence handed down by the District Court and they quoted from *Bata*:[31] "The environment must not be a sacrificial lamb on the altar of corporate survival."

They concluded that the $36,000 fine was appropriate given the nature of the case and the new sentencing regime which the Act had established. In order to ease the financial burden on Machinery Movers' they allowed payment of the fine to be on a monthly basis so as not to endanger the viability of the corporation.

Machinery Movers is quality litigation because it sets out clear and authoritative guidelines which the Tribunal and other courts can follow. As such it represents a model judgement in that the lower court has made its pronouncements on the matter and the appellate Court has refined and clarified the basic principles which the lower Court set out.

IV CONCLUSION

I began by asserting that the interpretation of the Act has not followed the traditional developmental pattern of new statutes. There are many reasons for this, but the approach of the Tribunal in certain decisions has been a significant factor. In some cases, however, it has explored further with excellent results. The meaning of key terms has been clarified and guidelines and precedents have been set. The Tribunal, District Court and High Court have shown themselves to be more than capable of developing case law which can solidify the foundations of the Act. The trend established in the cases highlighted should be continued.

The Tribunal must be more adventurous. It has to re-invent itself and adapt to its new role as the key court of first instance under the Act. In the vital early years of the Act it will be the conduit through which those key cases covering crucial issues will pass. This is not an easy role, but it must be the Tribunal which provides the ammunition for the appellate courts who will ultimately make the final decisions in

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31 Above n 30, 293.

those key cases. Similarly, the District Court and the High Court must be prepared to act decisively (as they did in the *Machinery Movers* cases) in order to help the Tribunal, and the Act, function more effectively.

In several decisions, the Tribunal and other courts have noted that the Resource Management Act is a new regime informed by a new philosophy. The same could be said of the Tribunal and its role. It must act in accordance with a new philosophy and must begin the key process of selecting those cases which will eventually provide the climate of certainty within which New Zealand's environment can be sustainably managed.