The Role of Economics in the RMA (or Vice Versa)

Judge J. R. Jackson*

I was originally invited here to give a talk on "the role of economic analysis *in RMA* jurisprudence*". Fortunately I was also given leave to rewrite the topic, and I have exercised that right. Due to time limitations I have largely left the jurisprudence of the Resource Management Act 1991 ("the RMA") to the footnotes, and I have omitted any reference to analysis because I wish to discuss some economic themes about resource use at a more basic level. Revised in that way my theme becomes "the role of economics in the RMA". However, as I prepared for this address I realised that a more interesting, and possibly more insightful, topic might be a reversal of the heading so that it becomes "the role of the RMA in economics". Hence the alternative title.*

There are always dangers when anyone talks outside their discipline. The reason for my dealing with the subject of economics at all is that there is, from a lawyer's perspective, an economic "thread"[1] running through the RMA. In fact, to continue the weaving metaphor, economics is more than a thread: it could be seen as the warp running at right angles to the weft of the law. Both make up the fabric of the Act.

I. INTRODUCTION

A narrow reason for looking at the role of economics is that much of the practice of resource management is perceived as being about (local) government intervention in people's lives. It may be useful to consider the promoting[2] and

* Judge of the Environment Court. This is an edited version of a paper originally delivered at the forum on *Environmental Law for Sustainability*, 17 April 1999, New Zealand Centre for Environmental Law, The University of Auckland.

1 *Marlborough Ridge Ltd v Marlborough District Council* [1998] NZRMA 73 at 85.

2 RMA, s 5(1).

enabling[3] aspects of the RMA if only as a counter-balance to the "interventionist" mentality that constant work with plans and resource consents tends to encourage. The broader reason for lawyers and resource managers to consider economics is that it introduces several new potentially very fruitful ways of looking at sustainable management of resources.

I had understood that from an economist's point of view, the whole of the RMA has economic implications. But it goes further than that. Dr Brian Easton, in a paper to the New Zealand Planning Institute in 1998, categorically asserted:[4]

> In summary then, the process provisions of the RMA have two major economic functions: the allocation of property rights and the exercise of property rights. Both functions involve costs — the compliance costs of the RMA process.

Dr Easton's whole paper is of interest for a number of reasons. First, it demonstrates how significant in economic terms the RMA is. Secondly, it demonstrates how economic analysis tends to come back to the legal system once it tries to deal with the real world. Thirdly, Dr Easton refers to an "allocative function" in the Act. I return to that issue briefly later in this paper.

II. THE DEPENDENCE OF ECONOMICS ON THE LAW

Because of the link between resource management and economics, and the further connection to property rights, and since I am speaking at the new Centre for Environmental Law, it is perhaps useful to suggest a subsidiary theme for this paper: the dependence of economics on the law. To change my metaphor: a country's legal system has been described as the third leg of a stool whose other two legs are economic subjects — the supply of and demand for resources. In the last few years we have had many interesting examples around the world of how, if the rule of law and other aspects of a legal system are removed, a political economy will fall over. After the fall of the former Soviet empire in that annus mirabilis, 1989, many economists apparently felt that some sophisticated advice from them would soon have the economies of the Soviet bloc humming in the same way that Western European countries recovered from the ravages of World War II. But it has not worked well, and in Russia itself the economy has gone backwards. There are insufficient laws and/or impartial uncorrupted judges and/or roubles to run the system. Contracts go unenforced unless they are contracts in a *mafioso* sense. Property rights are unclear. Taxes are not collected. Technical insolvents are not bankrupted. The environment continues to be polluted and

3 Ibid, s 5(2).

4 Easton, B., "Is the Resource Management Act Sustainable?" (1998) 129 *Planning Quarterly* 5 at 7.

destroyed. So to the lawyers and students here I say: do not be overwhelmed by economic imperialists, they cannot do without the legal system.

It is only possible to suggest a few ideas in the limited space available, so the relevant economic concepts and misconceptions will first be outlined. This leads to the economic conclusion that all legal rights incur costs. As an example, costs of rules under the RMA to protect amenity and other community values are considered. This leads finally to a tentative discussion of the equity and/or efficiency of different resource allocations.

III. ECONOMIC CONCEPTIONS AND MISCONCEPTIONS

I explain in this paper why economists are interested in the RMA. But why do resource managers need to consider economic analysis at all? The simplest answer is that as a matter of law, economic analysis is relevant to the RMA because there are references in the Act to various economic concepts. The Act refers to:

(a) "enabling" people and communities to provide for themselves, health and safety;[5]
(b) "economic ... wellbeing";[6]
(c) the "efficient use and development of natural and physical resources";[7] and
(d) benefit/cost analysis.[8]

But I suspect an economist would say that even if none of that overtly economic language was in the statute, the RMA would still have economic functions similar to those described by Dr Easton.

Some people dislike the application of economics to the RMA because "economics is about money". They believe that the RMA is only partly, and perhaps not most importantly, about monetary benefits or costs. They are of course partly right: non-monetary benefits (or values) and costs are expressly included in the definition of benefits and costs.[9] Several points need to be made about this contrast. First, economics is not just about money,[10] it is about resources. Money is simply a claim on resources.[11] Secondly, while I accept that the RMA

5 RMA, s 5(2).
6 Ibid.
7 Ibid, s 7(b).
8 Ibid, s 32.
9 Ibid, s 3. The definition of "benefits and costs" states that it "includes benefits of any kind, whether monetary or non-monetary".
10 Although monetary policy is an important part of the "dismal science" of macro-economics it is arguably less scientific than the micro-economic world of production and consumption of resources.
11 See Posner, R. A., *Economic Analysis of Law* (4th ed, 1992) 17.

is not just about monetary values, when a quantitative evaluation can be made of a potential environmental harm that may be useful. It provides one objective basis for a decision.[12] I recognise the difficulty (and even impossibility in some cases) of attributing monetary values to some things. How does one value a threatened species, or the ecosystem(s) in which it lives? But it is also important to realise that it is possible to put serious figures on some seemingly impossible objects. For example, in calculating whether it is worth upgrading a section of road, Transit New Zealand assumes a human life is worth approximately $2.5 million.[13] And there is a complex and sophisticated branch of economics in which a huge amount of effort is being expended on the subject of "valuing the environment".[14]

There is also a definitional connection between the RMA and economics. Remember that the purpose of the Act is "... to promote the sustainable management of natural and physical resources".[15] Marry that with the definition of economics as "the study of how scarce resources are or should be allocated"[16] and the Environment Court has suggested that "... resource management can be seen as a subset of economics".[17] The reason it is a subset is that economics is concerned with all resources, including of course labour and capital, whereas the RMA is only directly concerned with natural and physical resources.[18]

Some people may find the general idea repugnant. They associate all economics with the ideology of "free markets". That is to confuse the "*ought*" with the "*is*". Economics (at the micro-economic level) as a discipline is a positive science as well as the normative subject of political economy.

It is not true that all micro-economic discourse is by definition or by its basic assumptions disposed to be "right wing" or "free market" orientated. It is possible to analyse all resource use issues in economic terms without subscribing to any particular ideological creed. In a recent book called *The Cost of Rights*[19] the authors analyse the benefits and costs of the property rights which are the mainstay

12 See *Marlborough Ridge Ltd v Marlborough District Council* [1998] NZRMA 73 at 88.

13 I am indebted to Mr D. J. McKenzie for this figure. Apparently the figure goes up to $2.8 million in the country but is less in the urban areas. What are the economic implications of this inequality?

14 For an introduction to this area, see the chapter with that title in Hodge, I., *Environmental Economics: Individual Incentives and Public Choices* (1995).

15 RMA, s 5(1).

16 Black, J., *Oxford Dictionary of Economics* (1997) 137; Posner, supra note 11, at 17.

17 *Marlborough Ridge Ltd v Marlborough District Council* [1998] NZRMA 73 at 86.

18 As defined in s 2 of the RMA.

19 Holmes, S. & Sunstein, C. R., *The Cost of Rights* (1999).

of "free market" approaches to resource use issues. The very interesting argument was summarised in a review published in *The Economist*, which said:[20]

> ... the successful assertion of any right, *even an ostensibly negative one against unwarranted government interference*, inevitably requires government action and expenditure. All rights cost money, and as a result are a claim on the public purse. Any rights claim, therefore, requires taxation — itself the most coercive of government acts — and what is spent on protecting any particular right cannot be spent on protecting other rights, or on other public purposes. Rights, like any other claim, have "opportunity costs". [Author's emphasis.]
>
> This is even true of the most "negative" of rights. The right to free speech or religion would be meaningless without police forces to protect individuals exercising these rights from others who might object. And neither right would mean much without publicly subsidised courts where they could be asserted, both against others and the government. The right against arbitrary arrest or search and the right to a fair trial require government oversight of both the police and the judiciary, and the provision of legal representation to indigents, if they are to have any meaning.
>
> Property rights, most sacrosanct of all to conservatives, are really a bundle of claims on the public purse — for national defence, police and fire protection, the enforcement of contracts and the recording and enforcement of ownership and transfers of ownership among other services. This all costs money. Many negative rights, in fact, are as redistributive as positive rights.

The authors point out that their analysis breaks down the distinction between fundamental (constitutional or human rights) and other rights. Perhaps the RMA should be relabelled the "Natural Rights Act"[21] to give it status equal to the Human Rights Act 1993. This analysis also suggests that any dichotomy between regulations and the market is a matter of degree, rather than a fundamentally different categorisation of activities.

More seriously, I hope that resource managers can benefit from economic analysis without being led by the nose in a particular political direction. The use of economic analysis in the RMA does not prejudice the user's impartiality. Each case can still be decided on its own merits. The references in the RMA to efficiency and benefits/costs enable the decision-maker to remember and take into account the fact that any regulation (ie, plan) or regulatory action (resource consent) costs the public. People tend to assume that the RMA is costless. It is not — it is very expensive and so is subordinate legislation such as district plans made under it.

20 *The Economist* (13 March 1999). I should also point out that the American Conservative/Liberal distinction is being used here. For a diametrically opposed use of the words in NZ see Nixon, R., "The RMA: An Impending Ideological Crisis" (1998) 129 *Planning Quarterly* 2.

21 With apologies to Aquinas who used the Latin expression "natural rights" for what we now call "human rights".

But the RMA does not let those costs loom too large either: it enables them to be weighed against the purpose and other principles of the Act. Part II of the RMA sets out an ordered list of principles and other considerations which a functionary (usually a council officer) has to consider when coming to a decision. The hierarchy set out in ss 5–8 has been discussed many times[22] and I do not need to describe it here. In fact consent authorities (or at least the Environment Court) appear to have little difficulty in prioritising issues when ecological factors are in issue — whether under ss 5(2)(a) & (b) or s 6. More delicately balanced issues arise when there are no mountains of national importance, only the relatively level plains of amenities and other "community values".

IV. THE COSTS OF AMENITIES AND OTHER COMMUNITY VALUES

As an example, consider whether a council can control the location of retail activities in a city. Bob Nixon has identified two views on this issue. The first view he describes as "conservative" and the second as "liberal":[23]

> [1] the location of retail activities is a community issue associated with the vitality of the Central City which can, in turn, justify regulatory intervention.
>
> ...
>
> [2] the location of retail activity is a matter to be determined by the market, subject only to such regulatory intervention which can be justified (for example) on traffic or amenity grounds, and directly associated with the site.

It is easy to see that some controls may often be justified to deal with traffic and amenity issues by having regard to the purpose of the RMA — particularly the meaning of sustainable management as an enabling of communities to provide for their wellbeing and health and safety. But what is the justification *under the RMA* for the community approach in viewpoint [1]? It tends to derive from the following factors:

(a) the focus of the RMA on providing for "social, economic, and cultural wellbeing";[24]
(b) the requirement to avoid, remedy or mitigate adverse effects of activities on the environment;[25]

22 *Trio Holdings Ltd v Marlborough District Council* (1996) 2 ELRNZ 353; *North Shore City Council v Auckland Regional Council* [1997] NZRMA 59; and *Baker Boys Ltd v Christchurch City Council* [1998] NZRMA 433.
23 Nixon, supra note 20, at 3.
24 RMA, s 5(2).
25 Ibid, s 5(2)(c).

(c) the definition of "environment" as including "... *The social, economic, aesthetic and cultural conditions which affect ... [people and communities]*";[26]
(d) the list of functions of district councils including "*integrated management of the effects of the use ... of land and associated natural and physical resources*";[27] and
(e) the need to have particular regard to the "maintenance and enhancement of the quality of the environment".[28]

To see whether those aspects of the RMA justify general community action[29] under the RMA we must, under the usual principles of statutory interpretation, look at the purpose and scheme of the Act as a whole.[30] If, for example, a Council is considering a plan change to restrict retailing outside the city centre it needs to examine the issue, not only in the light of the mentioned sections but also the following aspects of the purpose and scheme of the RMA.

In Part II:

- the Act primarily relates to "natural and physical resources"[31] (which are defined as including "structures");
- wider community interests are to be *enabled*;
- the primary aims are to sustain "the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations"[32] and to safeguard "the life-supporting capacity of ecosystems";[33]
- the matters of national importance do not include broad social objectives;[34] and
- the need to have particular regard to the efficient use and development ... of natural and physical resources.[35]

26 Ibid, s 2.
27 Ibid, s 31.
28 Ibid, s 7(f).
29 *Not* relating to s 5(2)(a) or (b), s 6 or s 8 matters.
30 Burrows, J. F., *Statute Law in New Zealand* (1992) 120.
31 RMA s 5(1).
32 Ibid, s 5(2)(a).
33 Ibid, s 5(2)(b).
34 Ibid, s 6.
35 Ibid, s 7(b).

In Part III:

- The recognition of existing allocations of private property rights in respect of *land*[36] (as opposed to the common rights, in the economist's sense, in respect of air and water).[37]

In Part IV:

- There is a process for testing the appropriateness of a reallocation of rights[38] with reference to efficiency and effectiveness.

In Part V:

- There is the parliamentary exhortation not to have regard to trade competition;[39] and
- The non-provision of compensation for controls on land use.[40]

Looking at the scheme of the RMA, is not the primary aim to manage natural and physical resources and not other resources such as human labour, consumer products, or technology? Conversely, while it is concerned with the *efficient* use of those natural and physical resources, it is not directly concerned with the "social justice"[41] or substantive equity of the re-allocation of rights to these resources.

The difficulty for councils (and the Environment Court) is that while trade competition is expressly excluded[42] from consideration, the community objectives are not. They are expressly included in s 5(2) — even if qualified by the "enabling" word. So while they obviously rank relatively less highly in the scheme of things, it is always possible (and in fact quite frequent) for a particular "community" or part of it to say that in *its* case the purpose of the RMA — specifically the aim of the Act to enable people and communities to provide for their social, economic and cultural wellbeing — entails that there should be some restriction on land uses elsewhere. For example, central city users argue that the central city will "die" if it is not given some protection by forbidding retail development elsewhere.

36 Ibid, s 9.
37 In ss 12, 14 and 15 of the RMA.
38 RMA, s 32(1).
39 Ibid, ss 61(3) and 74(3).
40 Ibid, s 85.
41 This is in inverted commas because I am fearful that "social justice is inimical to the rule of law": Robertson, B., "Law, Religion and Economics" [1995] NZLJ 192.
42 See *Hartford Group Ltd v Auckland City Council* (1998) 4 ELRNZ 374; *Queenstown Property Holdings Ltd v Queenstown Lakes District Council* [1998] NZRMA 145 at 173; and *Baker Boys Ltd v Christchurch City Council* [1998] NZRMA 443 at 447.

They could argue under s 5 that they are *disenabled* from providing for the community's wellbeing. My example may be simplistic but this is not a trivial issue. Nor is the converse: urban sprawl. There is plenty of evidence both in New Zealand and overseas of precisely these phenomena; there are also many case studies of attempts to remedy the problems. A recent example on a massive scale is the report on Chicago — *Chicago Metropolis 2020*. That report apparently identifies *one* cause of Chicago's dead centre (bereft of residents) as:[43]

> America's highly subsidised love affair with the car. The report estimates that commuters driving to work ... pay only 25% of the true cost of their transport; the balance is borne by the public in the form of pollution, congestion, wear and tear on infrastructure ...

I am still unsure of the scope of the RMA in supplying answers, especially bearing in mind the scope for abuse of the system by trade competitors to engage in "rent-seeking"[44] behaviour. This is behaviour that is inefficient because it involves spending time and money not on the production of real services and goods, but on trying to get local government to change the rules so as to keep out competitors.

An excursion into the world of rent-seeking may be interesting here. I quote from *The Economics of Law*:[45]

> Another problem with common property rights [as opposed to private property rights] is that they encourage rent seeking activity. Rent is defned in economics as any payment over and above the amount necessary to keep a factor of production [ie, a resource] in its current use. Rent seeking may be defined as the devotion of resources to gathering pure surpluses, ... eg businessmen may try to influence the award of public contracts in favour of their companies. The idea can be applied to common property resources as participants seek rents, even if overuse means they get none. Common rights imply an increased incentive to spend resources on conflict
>
> [It has been ...] argue[d] that the usual notion of rent seeking implies a value judgement about what is an appropriate efficiency standard. ... [that] the use of the *status quo ante* [may be used] as a standard to define rent seeking: a person seeking to change status-quo property rights is rent seeking.

It is interesting to consider who might be seen as "rent-seekers" under the RMA. In terms of land uses the obvious *status quo* is New Zealand's existing land law. Thus anyone seeking to remove one of the bundle of rights that constitutes a fee simple title is, at first sight, rent-seeking. The RMA authorises that removal on the grounds that it is necessary for the sustainable management of resources. But

43 *The Economist* (10 April 1999).

44 *Queenstown Property Holdings v Queenstown Lakes District Council* [1998] NZRMA 145 at 173. For a definition (summarised in the next sentence) see Black, supra note 16, at 399.

45 Dnes, A. W., *The Economics of Law* (1996) 14.

of course the *process* of the RMA allows people to use that process where there are no real grounds: trade competitors alleging other (ie, non trade-competitive) effects are an example.[46] But the position may be more complex than that. What if the *status quo* is seen as the common law rights *plus* the existing operative district plan. Then any change to the "rights" under that plan — whether the change is sought by way of an application for a resource consent, a plan change, or a new plan — is a change to the *status quo* and thus rent-seeking. Is this the economic (and logical) rationale for the decision in *Woolworths NZ Ltd v Christchurch City*, where the Court stated "... the retail commercial sector having made investment decisions on the basis of the plan is entitled to rely on those provisions".[47]

So, on one view, the real rent-seekers were not Woolworths, but the opposition seeking to establish a new supermarket. I have raised the issue here because it seems to raise the question of allocation. So are decisions about equity unavoidable to some extent? That is a general problem not necessarily raised by retailing issues. The chief legal difficulty with the supermarket wars is that they breach the *specific* anti-competitive provisions of the RMA: the prohibition on taking trade competition into account.[48]

Under the RMA the *status quo* for using the coastal marine area, or for using water or for discharging contaminants is that they are in a peculiar form of common ownership: no one can use these resources (with limited exceptions) unless a rule in a plan or a resource consent says so.[49] Is an applicant for a coastal permit a rent-seeker? At least subconsciously I think many people think so — they think that a marine farmer is getting something for nothing. Perhaps putting coastal permits out for tender would assist in both psychological and efficiency terms.

So does the RMA have a role as to the general equity of the current distribution of resources? I think the answer, at least for land uses, is nearly "no": that "social justice" or equity has a very limited role in the RMA. It stems from the series of general exclusions in the RMA's scheme. The Act is *not* concerned with:

(a) resources other than natural and physical resources;
(b) allocation of totally new property rights in land; or
(c) compensation for property rights which are affected by the Act.

Perhaps local authorities implicitly recognise fairness in "reverse sensitivity" cases. For example, subdivision for residential purposes may not be permitted in

46 See *Queenstown Property Holdings Ltd v Queenstown Lakes District Council* [1998] NZRMA 145 at 173.

47 [1994] NZRMA 310 at 321.

48 RMA, ss 66(3), 74(3), & 104(8). See *Baker Boys Ltd v Christchurch City Council* [1998] NZRMA 433 at 449.

49 RMA, ss 12, 14 & 15.

a rural area because of the land's proximity to pig farms. Of course there are economic issues in the situation as well. The pig farms may maximise net wealth.

Even for water and discharge rights, Parliament has decided that local authorities may only re-allocate property rights within strict limits. They must only have regard to the ecological, amenity and Treaty of Waitangi principles in ss 5–8, RMA, and to the principle of efficient use of natural and physical resources. I have always thought that little[50] or no further consideration of "social justice" or equity[51] is required.

V. EFFICIENCY

Notwithstanding the preceding discussion, the boundary between descriptive and normative micro-economics is still unclear to the writer. Nowhere is there more confusion than in the subject of "efficiency". That concept is introduced into the Act by s 7(b) of the RMA, which requires everyone applying the Act to have particular regard to "... the efficient use and development of natural and physical resources".

In *Marlborough Ridge Ltd*[52] the Environment Court referred to the *Concise Oxford Dictionary* (8th ed) definition of "efficient" as meaning "productive with minimum waste or effort".[53] The Court continued:

> This basic definition of "efficient" is certainly consistent with the purpose of the Act. Its difficulty is that it does not give any guidance as to what is "waste". Nor as to how to quantify the waste so that we can ascertain what is "minimum" (which introduces an interesting quantitative element to the definition). In particular many people would not recognise that the costs imposed by the RMA and plans under it are themselves "waste" — economists call them "transaction costs" — and should be taken into account in assessing efficiency. On the other hand the general definition does show why efficiency is a qualitative goal that has been included in the RMA — most people prefer to avoid "waste".

The Court followed with a discussion of economists' definitions and applications of efficiency. That case did not identify that theoretical efficiency is only met in classical economics if certain conditions are met. The Court was aware of (and uneasy about) the assumptions, but since only one economist gave evidence they were not challenged in *Marlborough Ridge*. I will consider them briefly here.

50 Is it relevant under RMA, s 104(1)(i)?

51 Using "equity" in the economic sense of fairness rather than in the legal senses.

52 *Marlborough Ridge Ltd v Marlborough District Council* [1998] NZRMA 73.

53 Ibid, 86.

Economists speak variously of transactions or of markets being efficient if certain conditions are met:[54]

(a) that property rights are well defined;
(b) that trade is voluntary, but contracts are binding;
(c) that prices are understated signals (or information); and
(d) that people are rational and react to incentives.

There are several interesting aspects to these presumptions. First note the references to the legal system. Unless the rule of law, and substantive laws as to property and contractual rights apply, markets cannot be efficient. Secondly, as a trial technique, do not the assumptions open the witness to damaging cross-examination about whether they live in the real world? On this point a British economist, Judith Rees, has written:[55]

> ... it can be argued that the existence of ... abstract models has allowed the perpetuation of two common myths. First, that the market system, as it actually exists, can produce even an approximation to technological efficiency and an efficient allocation of resources in the economy. And second, that observable sources of inefficiency can be corrected. The notion that there are specific market failures, which legislation, administrative change or price regulation can correct, so restoring "efficiency", is a common one. It provides the rationale for much government intervention in the minerals sector and, as will be shown later, also serves as the basis for economic remedies to common property resource and pollution problems. However, the whole idea of correction becomes untenable when the entire system is made up of inefficient conditions; *when inefficiency is not the exception but the rule.* Imperfectly competitive firms, imperfect labour and capital markets, non-rational behaviour, the immobility of factors of production, government activity, unpriced public goods, common property and environmental resources are everywhere: how, then, is it even possible to conceive of a meaningful programme of correction? [Author's emphasis.]

Thus while economists talk about efficiency, and even separate it into different components,[56] it is still difficult to ascertain when a particular transaction or use of resources, or rule in a plan *is* efficient.

The Environment Court decided in *Baker Boys*[57] that efficiency could be shortly defined as "maximising value". That at least suggests a practical positive standard against which normative questions about the distribution of costs and benefits can be assessed. My current thoughts on s 7(b) are that economic analysis may have some use with respect to efficiency if we consider how existing

54 See, eg, Maughan, C. W., "Economics and the Law" [1997] NZLJ 110.
55 Rees, J. A., *Natural Resources: Allocation, Economics and Policy* (2nd ed, 1990) 128–129.
56 See *Marlborough Ridge Ltd v Marlborough District Council* [1998] NZRMA 73 at 88.
57 *Baker Boys Ltd v Christchurch City Council* [1998] NZRMA 433 at 464.

inefficiencies may be minimised.[58] This approach appears to get around the problems identified by Judith Rees. The question then is how do we minimise inefficiencies? This pragmatic emphasis appears to be consistent with "modern market theory"[59] as opposed to the neoclassical economist's view of markets and the role of the state.

VI. IDEAS FOR REFORM

I was invited to give ideas for reform of the RMA, if appropriate. In general terms, it is not appropriate to do so for good constitutional reasons to do with the separation of powers. However, I do not wish to comment on the substantive merits of any change to s 7(b) merely on its utility. It is precisely because economics has a positive or descriptive role (rather than just a normative one) that I question whether any amendment of s 7, to refer to "economically efficient use" will be particularly useful. All aspects of efficiency have economic dimensions. The efficient use of resources can always be analysed in economic terms, so why restrict s 7(b) in the way proposed? That has two potential disadvantages. First, it presumably eliminates any reference to other aspects of efficiency (eg, thermal or other energy efficiency).[60] Secondly, the Court will be bedevilled with submissions as to what is economic efficiency and what is not. In other words, there will be an interpretative (thus jurisdictional) constraint, which is not present as the RMA stands.

But why not make s 7(b) even simpler? If it is about keeping costs down, why not say so? The paragraph could state that any person acting under the RMA should have particular regard to (amongst the other matters in s 7):

> ...
> (b) the need to minimise transaction costs ...

In fact this concept appears to be growing in acceptance. I was interested to see a well-known New Zealand economist, Dr Brian Easton, in a recent *Listener* column, write on "Weighing it up — a case for government intervention". He said:[61]

> Such musings have led to the argument that microeconomic policy should be based on the "Coase Normative Principle". ... It states: "Organise the government's interventions in order to minimise transaction costs."

58 I am indebted to B. Longley for this way of applying section 7(b); and also for the reference to Rees, supra note 55.

59 Phelps, E. S., *Political Economy: an Introductory Text* (1985) 465.

60 I am indebted to Judge Sheppard for this example.

61 The *Listener* (27 March 1999) 52.

The name of the policy is intriguing partly because it identifies the policy with Nobel prize-winner Professor Ronald Coase and thus glows in the reflected prestige of his name. Secondly, it indicates that in Dr Easton's view the policy does have a normative element.[62] A third aspect of interest is that the Coase Normative Principle appears to be one of the principles expressed in the "third way" changes in European governments over the last two years (notably in England and Germany). We may hear more of the third way in the lead-up to the elections in New Zealand this year. No doubt the phrase will soon lose its "zen" sound.

Returning to s 7(b) and its discussion of "efficient use", there may be wider issues involved since there is a normative component to efficiency. Another definition of economic efficiency states:[63]

> *[E]fficiency* ... [means:] Getting any given results with the smallest possible inputs, or getting the maximum possible output from given resources. Efficiency in consumption means allocating goods between consumers so that it would not be possible by any reallocation to make some people better off without making anybody else worse off. Efficiency in production means allocating the available resources between industries so that it would not be possible to produce more of some goods without producing less of any others. Efficiency in the choice of the set of goods to produce means choosing this set so that it would not be possible to change it so as to make some consumers better off without others becoming worse off. Efficiency is also referred to as Pareto-optimality.

The idea that an efficient solution is one that does not leave anyone worse off is surely a very appealing one. But how often is it, or rather can it be, achieved in decisions under the RMA? What is the role of equity in the sense of substantive fairness under the RMA?[64]

VII. SUMMARY

I am of the view that it is not part of the Environment Court's role to engage in an ideological debate, or even in a normative debate beyond certain essential limits. My struggles with the concept of efficiency in the RMA are an effort to separate and apply a scientific aspect of it from the normative. I am aware that this paper is sadly inconclusive, but the intersection of the RMA and economic analysis has not yet been worked out. As tentative conclusions, however, I suggest that resource management itself is a proper subject for economists, and that practical micro-economics is a proper subject for lawyers. And to conclude, all of us need to consider the cost of rights under the RMA.

62 That there is a normative element even in s 7(b) was recognised by the Environment Court in *Marlborough Ridge Ltd v Marlborough District Council* [1998] NZRMA 73 at 89.

63 Black, supra note 16, 139.

64 This is the subject of the RMLA conference in Christchurch in October 1999.