Harmfully Optimistic Decentralisation and the Resource Management Act

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The Resource Management Act 1991 (the Act) was an ambitious attempt to revolutionise environmental planning. However, the Act has been constantly reformed and rapidly became a bloated and complicated legislative scheme that has attracted widespread criticism. Consequently, both Labour and National parties signalled an intention to repeal the Act following the 2020 election. This article seeks to investigate to what extent the decentralisation of environmental management impacted on the success of the Act. The article argues that the Act's efficacy has suffered from a systemic lack of meaningful central direction provided to under-resourced local governments. In reaching this conclusion, the article first establishes that the Act was an example of "unfinished business", given the lack of supporting policy statements and standards relative to expressions of intent at its inception. The article then argues that the lack of supporting policy has negatively impacted on the implementation and effectiveness of the Act, particularly by overwhelming regional authorities unequipped to design local environmental standards from scratch. Finally, the article tracks the historical implementation of central guidance (such as national policy statements), concluding that the lack of central guidance has primarily occurred due to skewed political incentives that currently discourage the Government from intervening in regional environmental management.

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1. INTRODUCTION

The brainchild of Sir Geoffrey Palmer, Labour's Minister for the Environment, the Resource Management Act 1991 (the Act) was an ambitious attempt to revolutionise environmental planning. It set out a detailed blueprint of policy-making and planning processes that would govern day-to-day resource management.

Despite being granted the tools to establish nationally binding environmental standards and policies under the Act, ensuing governments opted not to use them for 13 years — barring the singular compulsory Coastal Policy Statement.[1] As a result, the Act lacked a clear purpose and offered no substantive guidance regarding environmental standards. This left local authorities to independently set environmental standards and evaluate consents in a manner judged appropriate for their communities. Unfortunately, many councils lacked the resources and information to implement meaningful change. Government's failure to prescribe quantitative standards for a range of environmental issues (such as water quality) in a timely manner is accepted as a critical failure that has had a detrimental effect on the Act's ability to protect the environment.[2]

The long-maligned Act has already been amended 18 times since its inception.[3] The current Minister for the Environment, the Hon David Parker, had previously announced that the Government will be undertaking a "comprehensive overhaul" of the Act following an independent review, given that it was "under-performing in the management of key environmental issues".[4] Following the bipartisan support of the independent review panel's findings, which advocates for the Act to be replaced by two separate pieces of legislation, it seems reasonably likely that the Act will be repealed despite the outcome of the 2020 election.[5]

This article seeks to discern why, for almost three decades, political focus has consistently been on reform, rather than finishing the work begun in the statute, and whether this tendency has had a negative effect on the Act's efficacy. To fully address this inquiry, the article must examine three separate questions. Whether the Act was an example of "unfinished business", given the

1 Rt Hon Geoffrey Palmer "The Resource Management Act — How we got it and what changes are being made to it" (speech to the Resource Management Law Association, New Plymouth, 27 September 2013) at 13.

2 Greg Severinsen and Raewyn Peart *The Resource Management System: The Next Generation, Working Paper 1* (Environmental Defence Society, Auckland, 2018) at 58.

3 Marc Daalder "RMA reform launched into sea of political icebergs" *Newsroom* (online ed, New Zealand, 25 July 2019).

4 Daalder, above n 3.

5 Thomas Coughlan "Scrap and replace the RMA, official report to Government says" *Stuff* (online ed, New Zealand, 29 June 2020).

lack of supporting policy statements and standards. Then, whether the lack of supporting policy negatively impacted on the implementation and effectiveness of the Act. Finally, why subsequent governments have opted to focus on reform since the Act's inception — rather than repairing the obvious hole left by central government in the existing policy and planning framework.

Examination of the first question starts with a brief overview of the Town and Country Planning Acts of the 20th century. The significant level of centralised guidance and the prescriptive nature of the zoning system highlights the magnitude of the sweeping changes made by the Act. Turning to the political and social context, the neoliberal ideology underpinning the fourth Labour Government's sweeping economic reforms heavily influenced the Act's decentralised approach to policy and planning. This intriguingly occurred alongside a growing domestic conservationist movement that demanded more stringent legal environmental protections.[6] This is important to understand, as the Act represented a genuine attempt to reconcile these two competing interests — which would later manifest itself in the broad wording of the statute.

The article then turns to the second question: establishing whether the lack of policy guidance has had a negative impact on both the implementation and effectiveness of the Act. In failing to provide any quantitative support, the article finds that Parliament has overshot what would be considered a reasonable level of devolution to councils. In many cases, local authorities were under-resourced and lacked sufficient information (particularly scientific data). This had a negative impact on the quality of the local plans produced. This lack of data had a negative effect on the ability of councils to enforce their local rules — undermining the entire legislative scheme's ability to genuinely protect the environment. The lack of policy guidance clearly had a negative effect on the implementation of the Act.

Next the article evaluates the effectiveness of the Act in achieving three primary goals: environmental protection; improving the efficiency of economic activity; and devolving resource management to local communities. It finds that environmental outcomes have worsened under the Act and that its effectiveness as a policy tool is doubted by many key stakeholders. Clear policy may have reduced the length of delays in the consent process that currently bedevil the commercial sector. Attempts to decentralise decision-making have also been undermined by the continual need to refer matters to the Environment Court. This lack of policy guidance clearly had a negative impact on the effectiveness of the Act.

6 Veronica Jacobsen "Resource Management in New Zealand: Rhetoric, Reality and Reform" (1999) 6(3) Agenda: A Journal of Policy Analysis and Reform 225 at 226.

Having established that the reform project was unfinished, to the detriment of the Act's implementation and effectiveness, the article turns to the final question to explain why the Act has subsequently never been completed. To establish why subsequent governments have generally continued to opt to focus on reform, rather than producing supporting policy documents, the actions of each government since the Act commenced are analysed.

A conclusion is drawn that fear of negative political consequences and cost have likely been the primary drivers behind an ongoing preference to "sit on the fence" and avoid setting quantitative environmental standards. Creating policy statements requires Government to draw a line in the sand — opening it up to criticism from a range of stakeholders. Inaction is far less likely to garner any criticism, especially when blame for environmental or commercial issues can be pegged as symptoms of a dysfunctional Act. Responding to environmental issues by "fixing" the Act through reform gives the appearance of concern for the environment but is far less controversial. The political incentives do not encourage proactive environmental protection through policy documents and have generally fostered an unsuccessful culture of reactive environmental governance.

2. WAS THE RESOURCE MANAGEMENT ACT 1991 AN EXAMPLE OF "UNFINISHED BUSINESS", GIVEN THE LACK OF SUPPORTING POLICY STATEMENTS AND STANDARDS?

2.1 Surrounding Context to Resource Management Law Reform

2.1.1 Existing urban planning legislation

Before the establishment of the Resource Management Act 1991, urban planning and resource use was governed by a series of Town Planning Acts throughout the 20th century.[7] The Acts gave central government enormous power to intervene in the economy, and reflected the Keynesian economic ideology that was prevalent at the time.[8] New Zealand had a highly regulated, centrally planned economy — and for decades this resulted in low unemployment and economic stability. This philosophy was replicated across other policy fields, including environmental planning — resulting in the incredibly broad scope of considerations under the Acts in comparison to modern resource management legislation.

7 The Town-planning Act 1926, Town and Country Planning Act 1953 and Town and Country Planning Act 1977.

8 Jacobsen, above n 6, at 226.

For example, the 1977 Town Planning Act was intended to foster "the wise use and management of resources" to promote holistic benefits to society.[9] As such, the scope of considerations was incredibly broad — decision-makers were to consider the "social, economic, spiritual, and recreational opportunities", with specific regard to the interests of children and minority groups.[10]

Regional schemes utilised zoning, a prescriptive, generalised form of planning that was inherited from England.[11] This meant that activities were not typically looked at on a case-by-case basis, beyond whether they were compliant with the relevant zone in the district plan.

The 1953 version of the Act represented the first attempt to decentralise some authority to regional councils — to encourage the uptake of planning.[12] Notably, a model district plan was provided to guide authorities in preparing and approving new instruments — a clear example of meaningful central guidance.[13] Once approved by the Ministry, regional schemes were considered binding on district plans — creating a hierarchy of instruments similar to the modern regime.[14] This allowed councils some level of autonomy, whilst central government retained control over the entire process.

2.1.2 Labour's neoliberal policy agenda

"Rogernomics" reforms were the primary focus of the fourth Labour Government's policy agenda when elected in 1984.[15] The reforms were intended to aggressively liberate the free market, in the interest of boosting economic growth.[16] This was characterised by sweeping restructures of the state sector, in an attempt to replicate the efficiencies of private-sector firms.[17] For example, heavy reform of the education system in 1989 devolved decision-making authority to individual communities and reduced government input.[18] It was thought that this approach improved the quality and efficiency of decision-

9 Town and Country Planning Act 1977, s 4.
10 Town and Country Planning Act, second schedule.
11 New Zealand Productivity Commission [NZPC] *A History of Town Planning* (NZPC, Wellington, June 2015) at 4.
12 At 7.
13 Town and Country Planning Regulations 1954 (SR 1954/141), second to fifth schedules.
14 Town-planning Act 1926, s 3(1).
15 Jonathan Swards *Constructing Neoliberalism: Economic Transformation in Anglo-American Democracies* (University of Toronto Press, Toronto, 2000) at 81.
16 At 82.
17 Jonathan Boston and others *Public Management: The New Zealand Model* (Oxford University Press, Auckland, 1996) at 57.
18 Ivan Snook and others *Educational Reform in New Zealand 1989–1999: Is there any evidence of success?* (Massey University, Palmerston North, September 1999) at 32.

making, a tactic that would later be replicated during the resource management law reforms.

Upon re-election in 1987, the limited state intervention model was very much the focus of the Labour Party. In 1989 the newly appointed Minister for the Environment, Geoffrey Palmer, sought to streamline planning laws with the introduction of a new Bill, designed to avoid "tying people up in bureaucratic knots".[19] From the outset, there was clearly an intent to minimise central government intervention, and delegate authority to the regions.[20]

2.1.3 The growth of environmentalism

Despite the zealous focus on increasing productivity, the Act was not intended to slash environmental protections in favour of economic development. While the Muldoon era of regulation and large government projects eventually led to growing rumblings for economic deregulation, it can also be credited for catalysing the growth of New Zealand's environmentalist movement.[21]

The dawn of the New Zealand environmental movement can be traced back to the "Save Manapouri" campaign that opposed the development of a hydro dam in the early 1970s.[22] It was the first environmental campaign that "manifestly influenced politics" at a national level — over 10 per cent of the population signed an ultimately unsuccessful petition that was presented to Parliament.[23] This highlighted the growing social importance of environmental preservation.

Following construction of the dam, there was discontent with the lack of environmental protections offered by the 1977 Act — particularly given the constant threat of increased Coromandel mining.[24] Many of these concerns were echoed by the Māori community; particularly the lack of transparency and consideration given to environmental consequences.[25] This public sentiment

19 Rt Hon Geoffrey Palmer "Reform of the Resource Management Statutes" (address to the Seventh International Conference of Chief Executives in Local Government, Christchurch, 28 January 1988) at 31.

20 RP Boast "Reforming Planning Law: What's on the agenda?" [1988] NZLJ 361 at 362.

21 Jacobsen, above n 6, at 225.

22 Kennedy Warne "Manapouri — Damning the Dam" *New Zealand Geographic* (issue 100, November/December 2009) <https://www.nzgeo.com/stories/manapouri-damning-the-dam/>.

23 Warne, above n 22.

24 Jacobsen, above n 6, at 226.

25 At 226.

was further aggravated by the "Think Big" Muldoon era, which was viewed as a period of "government-sponsored environmental destruction".[26]

The local movement occurred within the wider context of a growing global focus on environmental protection. It was becoming clear that uncontrolled economic growth was having irreversible effects on the environment — effectively "borrowing resources from future generations".[27] This was first discussed at the 1972 Stockholm United Nations Conference on Environment and Development, where concepts such as integrated environmental management and sustainable development were introduced to the global lexicon.[28]

The concept of "sustainable development" was gaining traction — and subsequently promoted widely in the 1987 "Bruntland Report".[29] The UN report urged more affluent nations to adopt a more responsible way of living, to achieve growth and development in harmony with natural ecosystems. Sustainable development is defined in the report as "development that meets the needs of the present without compromising the ability of future generations to meet their needs".[30]

In preparing a new environmentally focused Bill, Parliament was facing growing pressure from both domestic environmental groups and foreign political powers. Calls for stronger environmental protections were not a natural marriage for reduced central regulatory control. Reconciling these two competing interests became a difficult puzzle for policy-makers.

2.1.4 Development of the Resource Management Act

In the decade following the passing of the 1977 Town and Country Planning Act, land-use planning became more sophisticated and wider in scope.[31] As the rate of urban expansion slowed, planning issues became inherently more political; concerning issues such as housing renewal and environmental

26 Julie Frieder *Approaching Sustainability: Integrated Environmental Management and New Zealand's Resource Management Act* (Ian Axford New Zealand Fellowship in Public Policy, December 1997) at 15.

27 Klaus Bosselmann "The Concept of Sustainable Development" in Klaus Bosselmann, David Grinlinton and Prue Taylor (eds) *Environmental Law for a Sustainable Society* (2nd ed, New Zealand Centre for Environmental Law, Auckland, 2013) 95 at 95.

28 Environment Foundation "History" (4 January 2018) Environment Guide <www.environmentguide.org.nz>.

29 World Commission on Environment and Development *Our Common Future* (Oxford University Press, Oxford, 1987) at 41.

30 At 41.

31 A Hearn QC *Report of the Review of the Town and Country Planning Act 1977* (August 1987) at 1.

protections.[32] The existing management regime was widely criticised as a product of a bygone era and there was a general mood calling for legislative reform.[33] Consequently, Andrew Hearn QC was appointed to produce a report that assessed reform options in November of 1986.[34] This report provided the "genesis" for the ensuing resource management law reform process.[35]

Mr Hearn found several issues with the existing Act. The new regime needed to be more flexible, granting room to accommodate a market-based approach — in which economic instruments would act as an additional tool to govern resource use.[36] It was also recommended that co-ordination of regulatory management schemes was improved to enable swifter decision-making.[37] This would help to rectify tensions arising from the perception that delays and red tape deterred developers from embarking on new projects.[38]

In January 1988 the Government announced a comprehensive review of the Town and Country Planning Act and other associated environmental statutes.[39] The ambitious project sought to improve economic efficiency by reducing state intervention, whilst simultaneously providing robust environmental protections.

Described as an "enormous and impassioned effort",[40] the two-year reform project involved extensive public consultation.[41] The Government held public meetings, media seminars and published 32 working papers over the project lifespan to ensure the proposed policy options were fully understood and discussed.[42] Thousands of submissions were drawn upon to inform the conceptual framework of the Act, leading to strong public support for the incoming Bill.[43]

Once introduced to the House, a specially enlarged select committee was established to undertake the usual submission process.[44] Over 1400 submissions were received, delaying the progress of the Bill — a report was not made back to the House until August 1990, with October's election rapidly approaching.[45]

32 Harvey C Perkins, P Ali Memon, Simon R Swaffield and Lisa Gelfand "The Urban Environment" in P Ali Memon and Harvey C Perkins (eds) *Environmental Planning in New Zealand* (Dunmore Press, Palmerston North, 1993) 11 at 21.
33 Hearn, above n 31, at 22.
34 NZPC, above n 11, at 10.
35 At 10.
36 Hearn, above n 31, at 30.
37 At 29.
38 At 38.
39 Frieder, above n 26, at 15.
40 At 15.
41 At 15.
42 Palmer, above n 1, at 6.
43 At 7.
44 At 8.
45 At 8.

The Bill was later passed into law after the 1990 election — which was won by the National Party.

Incoming Minister for the Environment the Hon Simon Upton had referred the Bill to a review group in November 1990 — who reported back with a redrafted principles section which was adopted into the Act.[46] Rather than analysing the potential ramifications of this change, which is a matter of speculation, the article is primarily concerned with the actions of Parliament after the Bill was enacted.

2.2 Decentralised Planning, and the Burden of Regional Authority

2.2.1 Key content

The prescriptive zoning approach borrowed from England was replaced with a custom-built system that focused on the contextual environmental effects of activities.[47] The lens of analysis had shifted, with the intention of increasing the efficiency and output of the economy. It was hoped that investors and developers would be free from previous restrictions that had stunted economic growth, whilst the focus on adverse effects was intended as a robust environmental safeguard.

Government also took a large backwards step, allowing communities to make decisions about local resource management.[48] Significantly, ministerial control of regional plans was revoked.[49] The Act sought a fundamental shift away from planners dictating terms, to allow market participants to efficiently allocate resources in a way that was socially and environmentally responsible.

Despite weakening its broad powers under the previous regime, Government still had a part to play. It was tasked with overseeing and monitoring the implementation of the Act and could create technical standards given its resourcing and ability to gather information as needed.[50]

The philosophies that underpin the Act are concisely stated in s 5:[51]

> (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.

46 At 8.
47 AP Randerson "Environmental Law and Justice — A Perspective on Three Decades of Practice and Some Possibilities for the Future" (1999) 3 NZJEL 1 at 11.
48 At 11.
49 At 11.
50 See the Explanatory note to the Resource Management Bill 1989 at v.
51 Resource Management Act 1991, s 5.

(2) In this Act, "sustainable management" means 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 attempting to grant communities flexibility, the Act was written with an exceptionally abstract purpose. In a 1992 analysis of the Act, Professor Janet McLean argued that the Resource Management Act was part of a legislative trend to state broad principles, rather than prescribe rules.[52] In this sense, the Act was a "goal based statute", in which the legislature abstractly states values and transfers political discourse regarding quantitative environmental standards to regional and territorial authorities.[53] In attempting to balance many competing interests, Government failed to draw any line in the sand — deferring the task to local authorities. The remainder of this article will illustrate why this has been problematic.

2.2.2 The policy and planning blueprint

The Resource Management Act creates a hierarchy of policy documents and plans that inform the decisions made by local authorities on a day-to-day basis. Under the Act, Parliament must produce a national coastal policy statement and is empowered to create additional national policy statements (NPSs) or national environmental standards (NESs) as required.[54] The statements are intended to provide guidance regarding matters of national importance, ultimately improving the consistency and integration of the Act.[55]

All local policies and plans must give effect to pt 2 of the Act and higher-level national policy documents, which were intended to "guide local government decisions".[56] NPSs sit atop this hierarchy of documents, with regional and

52 Janet McLean "Process with Purpose" (1992) 7 Otago LR 538 at 539.
53 At 544.
54 Resource Management Act, ss 43–45.
55 See the Explanatory note to the Resource Management Bill 1989 at ii.
56 At vi.

territorial authorities following suit respectively. This was recently affirmed by the Supreme Court, granting national policy documents the power to impose "environmental bottom lines", that must be complied with.[57]

Regional authorities are responsible for water, soil, pollution and geothermal management.[58] They must prepare regional policy statements that provide an overview of local issues, and the intended methods to achieve integrated management of resources in the area.[59]

District councils are primarily responsible for land-use management and noise control.[60] They must also prepare district plans to regulate activities within the region. Under district plans, types of activities are categorised — as either permitted, controlled, restricted discretionary, discretionary, non-complying, or prohibited.[61] The category of activity (determined by the local plan) governs the decision-making process of the local authority, and the scope of valid considerations when granting consents. Permitted activities do not require resource consents, whilst prohibited activities will never be granted a consent.[62]

A person wishing to undertake any other type of activity must apply for a consent with their local authority, and provide an assessment of environmental effects of the proposed activity.[63] The authority must then decide whether to permit the activity, in accordance with any relevant policy documents or standards, and ensure that their decision (and all local plans) gives effect to pt 2 of the Act.[64]

This is the process by which resource management occurs at a local level. In this sense, the Act is a blueprint. Citizens apply for a consent and the local authority must first establish the type of activity (per the local plan), and then evaluate the decision according to the rules established in the Act. Evidently, a large amount of discretion is given to territorial authorities, consistent with the philosophy of decentralised power that underpins the Act. The difficulty arises when individual staff are asked to balance the conflicting, abstract goals outlined in the purpose of the Act without any further central guidance.

57 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] 1 NZLR 593 at [132].
58 Resource Management Act, s 30.
59 Section 59.
60 Section 31.
61 Section 87A.
62 Section 87A.
63 Section 88.
64 Section 104.

2.2.3 Non-existent central guidance

The Resource Management Act was intended to provide a framework and identify a clear purpose for resource management activities, whilst allowing for objectives or results to be identified in future policy statements and plans.[65] As outlined above, there is a clear and obvious framework for decision-making, that is made complicated by an incredibly flexible purpose. Flexibility is certainly not inherently bad in this context, particularly given the desire to free developers from red tape. However, it was inferred that some central guidance would occur, providing clarity to local authorities — and such powers were granted to Government in the form of NPSs and NESs. Ideally, this would assist councils to formulate pragmatic environmental objectives and standards.[66]

Yet there was no such central guidance for 13 years. Barring the compulsory national coastal policy statement (published in 1994), subsequent governments left councils to decipher the Act. The first NES, for air quality, was published in 2004 — while the first non-compulsory NPS, for electricity transmission, was published in 2008.[67] The lack of guidance during the first decade of the Act's implementation is widely criticised as a major failure of central government, making the job of regional authorities significantly more difficult and expensive than intended.[68]

In this sense, the Act represents an example of unfinished business. The impassioned effort to overhaul the existing planning legislation engaged the views of New Zealanders from across the political spectrum. Years of careful policy development created a framework within which territorial and local government could operate to manage resource use — but they were stranded without a clear purpose. As will be discussed in the next part of the article, failure to provide any quantitative guidance alongside this new framework left councils with an overwhelmingly difficult task.

65 See the Explanatory note to the Resource Management Bill 1989 at ii.

66 Cath Wallace "Managing Resources in New Zealand" (paper presented to the Australian and New Zealand Society for Ecological Economics Inaugural Conference, Coffs Harbour, NSW, November 1995) at 12.

67 Resource Management (National Environmental Standards for Air Quality) Regulations 2004; "National Policy Statement on Electricity Transmission" (13 March 2008) 58 *New Zealand Gazette* 1603 at 1631.

68 Sir Geoffrey Palmer "Ruminations on the problems with the Resource Management Act 1991" [2016] NZLJ 46 at 46.

3. HAS THIS NEGATIVELY IMPACTED ON THE IMPLEMENTATION AND EFFECTIVENESS OF THE ACT AS INTENDED?

3.1 What Impact has the Lack of Central Guidance had on the Implementation of the Act?

The Act was intended to devolve a significant degree of responsibility to regional and territorial authorities. In practice, all powers and responsibilities had been unceremoniously dumped onto regional and territorial authorities.

In 2001, Californian environmental authorities evaluated the implementation of the Resource Management Act to anticipate challenges in their own upcoming policy reforms. They concluded:[69]

> Local government, for its part, lacked the financial resources, capacity, and expertise to effectively [fulfil] their obligations under the RMA. … In a sense, the RMA announced, "let's implement sustainability" and then fully punted the task to local government authorities.

In some instances, devolution of resource management authorities is intuitive. Councils are better equipped to engage with their unique communities and build meaningful relationships. Comparatively, a one-size-fits-all approach from Government is less appropriate and unlikely to garner the same level of participation. This theoretically should improve the quality of consultation — supporting the democratic robustness of the system.

However, there is no reason why different regions would, for example, require separate standards for water quality or acceptable levels of air pollution. In such instances, it would be better for central government to retain authority and dictate the terms of play for local decision-makers. This would reduce the administrative burden on councils and leverage the vast resources of central government. Generally, this has not happened. The following section outlines instances where the devolution has burdened councils with an unachievable workload.

69 Andrea P Sumits and Jason I Morrison *Creating a Framework for Sustainability in California: Lessons Learned from the New Zealand Experience* (Pacific Institute for Studies in Development, Environment, and Security, Oakland, December 2001) <https://pacinst.org/wp-content/uploads/2013/02/sustainable_california2.pdf> at 43.

3.1.1 Plan preparation

Decades of a consistent zone-based planning regime had given councils a wealth of institutional knowledge — that was now irrelevant in the new world of effects-based planning. Council staff who had studied as town planners were effectively required to retrain whilst simultaneously giving effect to the new legislation.[70] This was a difficult task — particularly for smaller, rural authorities that had to contend with stricter financial constraints and a general lack of technical expertise (particularly scientific).[71] Evidence of this difficulty soon became apparent — by 1997 only 10 district plans were operative.[72]

Many councils were not equipped with sufficient information to develop meaningful plans. Under the previous regime, councils were not required to justify planning rules — so environmental data was not collected systematically.[73] This gave most councils very little initial data upon which to set standards and goals in their plans. This was a large problem in more remote regions with smaller ratepayer bases, limiting the financial resources that could be allocated towards improving quantitative knowledge of the local environment.

The problem was compounded by local government reforms in 1989 that significantly downsized the sector — more than 800 separate entities were reduced to 86 governmental and quasi-governmental entities.[74] The substantial restructures fractured inter-departmental relationships, which had a substantial impact on the levels of information-sharing that occurred between councils.[75]

As a result, plan preparation was an extremely time-consuming task. In a 2008 investigation it was found that, on average, councils took over five and a half years to establish operative plans — with the Canterbury Regional Coastal Plan taking over 11 years to take effect.[76] This clearly shows that local authorities struggled to effectively implement the Act, due to the sheer magnitude of the task. Clear central guidance may have provided authority for councils to rely on, removing grounds for some of the appeals that delayed the planning process — a significant problem for larger councils. Essentially,

70 At 41.
71 At 40–41.
72 At 42.
73 Dr Ulrich Klein "Assessment of New Zealand's Environmental Planning Model" (2005) 9 NZJEL 287 at 302.
74 Frieder, above n 26, at 12.
75 Sumits and Morrison, above n 69, at 40.
76 Blair Devlin *Analysis of timeframes for the development of policy statements and plans under the Resource Management Act 1991* (Brown & Pemberton Planning Group, Wellington, 16 December 2008) at 18.

remote councils had too little information to work with due to a lack of data, and large councils were hindered by an overload of information — particularly at the submission stage.

Subsequently, each council was required to independently reinvent the wheel, with varying levels of success.[77] Given that economic efficiency was a major driver of the Act, this was highly counterproductive. A handful of councils (for example, Taranaki) took innovative approaches, but in other instances territorial authorities seemed to have simply altered the language and structure of their pre-existing district schemes from the previous era of planning.[78] This inconsistency was said to have discouraged business investment — as larger companies that operated in multiple areas were unsure as to what sort of regulations they would be subject.[79]

Additionally, the Ministry for the Environment highlighted abuse of the Act's processes for "personal gain or vexatious reasons" as a concern that exacerbated the lack of consistency between councils.[80] In delegating authority to protect the environment, central government was also overly optimistic with respect to the intentions and aspirations of local councils. Often councils are most concerned with regional growth and creating job opportunities — and do not want to be perceived as overtly regulatory or hindering the prosperity of the region.[81] This undermines the legitimacy of plans as environmental protection tools. Given the lack of central powers to intervene (particularly with urgency), Government seemed to be blindly optimistic, rolling the dice on the environment and placing a large degree of faith in local authorities.

The ad hoc approach to planning made it incredibly difficult to compare and evaluate the effectiveness of different approaches to planning from region to region. To combat this discrepancy, central government implemented national planning standards in 2017 — designed to provide additional guidance and improve consistency in the structure, format and content of regional plans.[82] Whilst the effectiveness of this measure is unlikely to be felt for another decade or so, it will be incredibly helpful — especially for smaller councils. It is unfortunate that it has taken 27 years for guidance in this area.

77 Sumits and Morrison, above n 69, at 40.
78 At 40.
79 At 43.
80 Ministry for the Environment *Improving the RMA 2004: the scope of the programme* (Ministry for the Environment, Wellington, May 2004) at 2.
81 Sumits and Morrison, above n 69, at 42.
82 Ministry for the Environment "About the National Planning Standards" (5 April 2019) <www.mfe.govt.nz>.

3.1.2 Enforcement

The knowledge gaps that undermined plan development continued to impede the Act's implementation, by impacting upon the ability of councils to enforce their local plans. In 1996 an OECD Environmental Performance Review stated that the biggest barrier to efficient implementation of the Act was inadequate data.[83] Unfortunately, the statutory timeframes for the implementation of the first regional plans left councils without the time or resources to gather any baseline data.[84]

It is incomprehensible that councils were expected to evaluate the effects of an activity without any baseline data, or data that would explain the potential effects on the environment. A lack of data also prevented a feedback loop from improving plans and made it near impossible for council staff to enforce conditional resource consents. In some instances, councils had to resort to using information provided by interest groups or the project assessments of consent applications.[85] It is highly problematic that public bodies were forced to rely on potentially biased and unverified data.

As a result, local councils struggled to make consistent decisions — frustrating developers with what was referred to as "black box" decision-making criteria.[86] This created a situation where councils did not have sufficient data to be correctly giving effect to the Act — which eroded public confidence in council decision-making processes. Many councils lacked the resources to resolve this issue themselves — highlighting the burden of devolving the bulk of the responsibilities in the Act to much smaller regional bodies. This is an obvious failure, given that the Act was intended to free up development and improve the transparency of decision-making.

Clearer environmental standards would have made data collection substantially easier for regional councils — as collecting data to measure against a known indicator is much more achievable than trying to establish your own system of indicators without existing data. This improved regional consistency would allow Government to easily compare performance levels, and address resource shortages in regions where compliance was wavering.

3.2 What Impact has this had on the Effectiveness of the Act?

Without clear guidance from central government, many councils struggled to establish coherent plans that contained any sort of quantitative analysis of

83 Organisation for Economic Co-operation and Development [OECD] *Environmental Performance Reviews: New Zealand* (OECD, Paris, 1996) at 110.
84 Frieder, above n 26, at 60.
85 Klein, above n 73, at 303.
86 Frieder, above n 26, at 60.

environmental effects, due to a systemic lack of data. As a result, decision-making became more subjective than intended. This created an inherently uncertain system, where a decision-maker could justify any outcome using the broad principles in the Act:[87]

> The decision-maker can [by apt choice of pt 2 elements] reach a decision based on community values presently existing, and then find a section of the Act or a part of a regional or district plan which supports that subjective judgment.

The following section will highlight how this lack of guidance has eroded the effectiveness of the Act, for both environmental and commercial groups. It will also outline how the large volume of disputes referred to the Environment Court undermines the legitimacy of community-based decision-making.

3.2.1 Environmental protection

In 2016 an Environmental Defence Society report found that 81 per cent of respondents (stakeholders involved in the consenting process) felt that the environment had declined since the Act's implementation — almost half of which felt as though the degradation had been "significant".[88] Additionally, when asked about the effectiveness of councils in protecting the environment, the average score was 4.7 out of a possible 10.[89] Quite possibly this sentiment stems from decision-makers consistently placing a higher priority on commercial benefits in comparison to environmental concerns. To illustrate this point, a 1996 survey of 82 consenting authorities found that 99 per cent of applications had been granted.[90] Environmental concerns are clearly not slowing the rate of consent approvals.

It is not unreasonable to assume that the overwhelming rate of approved consent applications has had a negative effect on the environment. In part, this is due to a lack of consultation. Consenting decisions are only open for public submissions if they are "notified" — this can either be prescribed by the district plan per activity type, or done on a discretionary basis.[91] In 1997/1998, 95 per

87 Hon Judge WJM Treadwell "RMA Places Increased Pressure on Decision-Makers" (address to New Zealand Planning Institute Conference, approved précis reproduced in *Planning Quarterly*, June 1994) at 5.

88 Marie A Brown, Raewyn Peart and Madeleine Wright *Evaluating the environmental outcomes of the RMA* (Environmental Defence Society, Auckland, 2016) at 37.

89 At 46.

90 Ministry for the Environment *Resource Management Act: Annual Survey of Local Authorities 1997/98* (ME 320, Ministry for the Environment, Wellington, July 1999) at 9.

91 Resource Management Act, s 95A.

cent of applications had become non-notified, meaning that the public was only consulted 5 per cent of the time.[92]

This is likely a cause of the high rate of consent approvals — as decision-making authorities are bound to consider public submissions when a consent is notified (which may give reason to decline an application).[93] Without public submissions, environmental interest groups often get shut out of the picture — allowing for highly subjective decisions to be made. This is a clear failure of practical devolution, given that Government intended for communities to have a greater say. Policy statements could have been used to outline instances where notification was mandatory, ensuring that all views were heard. This would grant environmental groups an opportunity to oppose environmentally damaging applications that would otherwise have been approved without consultation.

3.2.2 Commercial interests

The commercial sector typically lambasts the Act for its costliness and the delays it causes.[94] Clear-cut policy would have eliminated the grey area that currently surrounds decision-makers, by giving them concrete rules to guide decisions, rather than attempting to make "overall broad judgements" and reconcile the myriad of abstract competing interests outlined in pt 2 of the Act.[95] National policy would have established consistency of outcome across the country for businesses attempting to work within a variety of differing regional plans — theoretically reducing their compliance costs.

The common misconception that businesses would oppose further regulation in the sector was disproven by a 2002 Ministerial Panel on Business Compliance Costs, finding that the commercial sector was keen to see policy statements utilised to improve the consistency of decision-making.[96]

As it stands, there is genuine concern regarding the qualification and experience of council decision-makers, undermining business confidence in the Act.[97] Due to the subjective, complicated decision-making process, the reasoning for decisions is often unclear — leading to many consents being appealed in the Environment Court.

92 Ministry for the Environment, above n 90, at 2.
93 Resource Management Act, s 104(1).
94 Gabrielle Penn "Less bureaucracy, more flexibility" *The New Zealand Herald* (online ed, Auckland, 3 October 2018).
95 *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC) at 86.
96 Ministry for Commerce *Report of the Ministerial Panel on Business Compliance Costs* (New Zealand Government, Wellington, 11 July 2001) at section 5.2.4.
97 Trevor Daya-Winterbottom "RMA Déjà Vu: Reviewing the Resource Management Act 1991" (2004) 8 NZJEL 209 at 224.

The impact of non-existent policy statements and standards is reflected in the Environment Court's workload over the past 30 years. For example, in the year ending June 2008, nearly 1,149 appeals were lodged with the Environment Court, of which 558 concerned resource consents.[98] This backlog is clearly excessive and is an obvious cause of delays in consent processing. By comparison, this number drops to 485 (112 consent appeals) by 2017 — approximately 10 years after the uptake of policy documents as part of the political mainstream in New Zealand.[99]

One must be wary of drawing a causal link where there is clearly a wide range of other issues at play — but the correlation is certainly noteworthy. Given that consents are evaluated on a case-by-case basis (for example, there is no "precedent" as such), this can be discounted as a cause of the decrease in volume. Yet it is possible to infer that the increased uptake of central guidance has played some role in reducing the number of appeals, alongside regional councils gaining institutional knowledge as they become more familiar with the Act. Early central government support may also have helped to transplant this institutional knowledge at the outset, further increasing the speed and consistency with which consents are dealt with.

3.2.3 Localised decision-making

Many consents have ended up being evaluated by the Environment Court — a centralised power. In attempting to decentralise decision-making processes, Government has passed on a set of rules so vague that councils and applicants have been forced to look to the courts for guidance. This was not the intention of Parliament — as the Environment Court was systemically underfunded throughout the 1990s, indicating that the volume of cases was not anticipated.[100]

The volume of cases headed to the Environment Court is concerning. Parliament intentionally left the provisions flexible, to be interpreted by different communities with unique values. Due to the complete lack of clarity in pt 2 of the Act, a large proportion of the influential precedent in the area has been created by the Environment Court.[101] To this effect, the Court has essentially taken a quasi-legislative role in defining the intentionally flexible statutory provisions. This clearly undermines the effectiveness of the intended devolution under the Act.

98 Harry Johnson *Report of the Registrar of the Environment Court* (Environment Court, June 2017) at 9.

99 At 9.

100 Daya-Winterbottom, above n 97, at 232.

101 George Ruka and Catherine Iorns Magallanes "Environmental law or palm-tree justice?" [2009] NZLJ 185 at 187.

Further to this, there is some concern that the increasingly common practice of appointing Court benches consisting of two environment commissioners and one judge can lead to legally incorrect decisions.[102] In 2007, 80 per cent of hearings occurred with only one judge on the bench.[103] Given that the commissioners are not all legally trained, there is reason for concern regarding the consistency of decisions being made on appeal. Following the Environment Court, appeals to the High Court are relatively costly, which can prevent those that are clearly wronged from access to a correct legal analysis of their situation.

3.3 Conclusion

Clearly, an earlier uptake of central guidance would have had a positive impact on both the Act's implementation and effectiveness. Councils would have had more guidance to prepare plans and policy statements and to gather appropriate data for enforcement. This would have had a positive impact on the effectiveness of the Act — particularly with regard to environmental protections and timely consent processing. Due to the lack of supporting policy, the decentralisation of authority is somewhat ineffective — as public consultation is undermined and difficult decisions are deferred to the Environment Court.

4. WHY HAVE SUBSEQUENT GOVERNMENTS OPTED TO FOCUS ON REFORM, RATHER THAN REPAIRING THE OBVIOUS HOLE IN THE EXISTING FRAMEWORK?

4.1 Approaches to the Resource Management Act

This part of the article will briefly outline the varied political approaches taken by subsequent governments since the Act commenced. There is a consistent appetite to use reform, rather than NPSs or NESs within the existing framework. It will then explain why cost and negative political consequences have caused the continued disregard of non-compulsory policy documents.

4.1.1 National (1990–1999)

Having inherited the Bill and seen it through Parliament, it fell to the National-led Government to set the tone for the implementation of the Resource Management Act. Excluding the compulsory national coastal policy statement, it chose not to exercise its right to implement further policy tools. Minister for

102 At 185.
103 At 188.

the Environment Simon Upton later stated that his Ministry lacked the staff and financial resources to prepare statutory standards and statements.[104] Given that Ministry funds are allocated by the Budget — produced by the Government of the day — this suggests a complete lack of political will to resource the Ministry appropriately to create such documents.[105] This was compounded by Treasury's blunt opposition to establishing policy documents — as it clearly supported a deregulated, free-market economic approach to resource management.[106] This laissez-faire, decentralised approach was also supported by Mr Upton and his successor, the Hon Rob Storey.[107]

It is unclear how smaller territorial authorities were supposed to give effect to the Act if it was too expensive and difficult for central government. This attitude clearly indicates that cost is likely a significant factor in the decision not to utilise the policy tools offered to Parliament.

The process for establishing the optional policy documents was also considered to be quite costly and time-consuming, requiring the appointment of a board of inquiry to report on the proposed statement and extensive public consultation.[108] Having produced the coastal policy statement, it was thought that the process was inefficient and not a priority for Government.[109] Additionally, the comprehensive consultation processes that informed such policy documents were believed to be cumbersome — watering down policy documents and preventing Government from expressing a meaningful opinion on various issues.[110] One can sympathise with this sentiment — consultation on technical, scientific matters (for example, water quality) can certainly be unhelpful when coming from those who lack sufficient understanding. In some instances, an authoritative approach would be more appropriate — and this is not necessarily possible given the requirements to consult under the Act.

Rather than invest time and money into clarifying grey areas and constructing the apex of the policy and planning hierarchy, National instead opted for a substantial reform of the Act. The Act was amended in 1993, which was the first attempt to clarify the confusion created by pt 2.[111] Unfortunately, this

104 Simon Upton "National Direction or National Interference?" (speech given to Resource Management Law Association of New Zealand, Seventh Annual Conference, 1999) at 4–5.

105 Ulrich Klein "Integrated Resource Management in New Zealand — A Juridical Analysis of Policy, Plan and Rule Making under the RMA" (2001) 5 NZJEL 1 at 35.

106 Sumits and Morrison, above n 69, at 38.

107 At 39.

108 At 39.

109 At 39.

110 At 39.

111 At 25.

marked the beginning of an ongoing political preference to fix the Act through reform, rather than clarify the Act with NESs and NPSs.

4.1.2 Labour (1999–2008)

The Labour-led governments of the 2000s can be credited with publishing the first optional policy tools — starting with the 2004 Air Quality NES. Interestingly, a large proportion of documents they went on to produce are not what you would consider strictly "environmental" — consisting of guidelines regarding electricity transmission and telecommunications infrastructure. To some extent these rules improved commercial certainty and ease of business for large companies — for example, by allowing network operators to install low-impact infrastructure without resource consent.[112] Whilst the utilisation of policy tools must be applauded, it is to be wondered if the use of NPSs for commercial convenience is consistent with the environmentally protective philosophies that underpin the Act. There is a wider question to be asked regarding the ongoing influence the corporate sector has had on the Act's reforms and implementation, but this will not be addressed further in this article.

Significantly, Labour also made an amendment to the Act to simplify the process of creating national policy statements and environmental standards.[113] This likely contributed to the increased uptake over the proceeding 15 years and is a clear signal that the Government appreciated the value of the policy tools. However, they soon became caught up in the largest resource management debate since the turn of the decade — the foreshore and seabed controversy.[114] It is likely that the Labour Government was keen to keep resource management issues off the policy agenda and out of the news cycle — which likely discouraged it from establishing further policy documents.

4.1.3 National (2008–2017)

The subsequent National-led Government came under intense criticism from environmental groups for its attempted reform of the Resource Management Act — described as an attempt to transform the Act into an economic development act.[115]

112 Ministry for the Environment "About the National Environmental Standards for Telecommunication Facilities 2016" (15 August 2018) <www.mfe.govt.nz>.

113 (20 March 2003) 607 NZPD 4293.

114 Ben Thomas "Save us, I beg you, from this never-ending bullshit about the foreshore and seabed" *The Spinoff* (online ed, Auckland, 8 May 2017).

115 Sir Geoffrey Palmer *Protecting New Zealand's Environment: An Analysis of the Government's Proposed Freshwater Management and Resource Management Act 1991 Reforms* (New Zealand Fish and Game Council, Wellington, 2013) at 27.

However, the Government did show that it was willing to respond to public outrage with policy — as was done with the first National Policy Statement for Freshwater Management.[116] Unfortunately for the environment, water quality had already reached crisis level before central government felt pressured to act. The second version of the statement, published in 2014, drew heavy criticism from the scientific community who felt that the policy was the bare "minimum they could have done given the level of concern".[117]

This was disappointing, as the degradation of waterways (particularly the loss of swimmable rivers) has generated a large degree of ongoing public attention, offering Government a political mandate to intervene.[118] Rather than using policy statements to proactively set protective standards, the use of these tools came across as a political mechanism to save face.

The National Government also highlighted another issue with not requiring policy statements and standards to be produced. It preferred to utilise informal policy guidelines and strategies such as the "Environment 2010 Strategy".[119] Informal strategies undermine the importance of the formal policy documents intended to top the planning document hierarchy.[120] They do not require the same rigorous preparation, any minimum level of public consultation, and are not enforceable in the same manner as formal documents — given that they do not fit into the prescribed hierarchy.[121] Thus councils are not required to give effect to them — rendering strategies and guidelines essentially aspirational goals that do not add clarity to the Act.

4.1.4 Current Labour Government

Whilst the current Government has continued to develop various policies and standards, the recent reaction to the initial announcement of national policy statements for both urban development (NPS-UD) and highly productive land (NPS-HPL) is noteworthy. Local Government New Zealand (LGNZ) had expressed the view that NPS-HPL is overly simplistic, while numerous mayors labelled NPS-UD as unaffordable without additional funding.[122] Whilst councils

116 *Report of the Land and Water Forum: A Fresh Start for Freshwater* (Land and Water Forum, Wellington, September 2010) at viii.

117 Dr Angus McIntosh "Freshwater national standards set — experts respond" (3 July 2014) The Science Media Centre <sciencemediacentre.co.nz>.

118 Charlie Mitchell "Top scientist: Fixing freshwater issues an 'enormous challenge'" *Stuff* (online ed, New Zealand, 12 April 2017).

119 Klein, above n 105, at 36.

120 At 36.

121 At 36.

122 Marc Daalder "Nice pointers, but show us the money, say councils" *Newsroom* (online ed, New Zealand, 22 August 2019); and Sam Sachdeva "Valuable land plans spark concerns" *Newsroom* (online ed, New Zealand, 15 August 2019).

are generally supportive of NPS initiatives, this sentiment may suggest that councils are becoming less quick to trust guidance from central government.[123] The NPS-UD came into force on August 2020 and its implementation will be supported by the Kāinga Ora—Homes and Communities Act 2019 and the Urban Development Act 2020, in addition to significant funding from central government.[124] This suggests that the Government has been willing to engage with feedback from key stakeholders, such as LGNZ, which is very encouraging. It remains to be seen whether the latest round of reforms will be up to the task of repairing the complex planning and environmental issues that have been left to fester for decades.

4.2 Why has Government been Hesitant to Implement Policy Statements and Standards?

Earlier this article referred to Professor McLean's argument that the Resource Management Act was an example of a "goal based statute", in which the legislature states broad principles — outlining the ends, rather than the means.[125] Reflecting on the implementation of the Act with the benefit of decades of hindsight, one can agree with this sentiment. The legislature has benefited from passing on the political disputes and controversy that would accompany the development of tangible standards and objectives to less visible local authorities.[126] Subsequent reforms give the appearance that sustainability is a priority, but allow the blame for bad decisions to be deflected to councils and the Environment Court.[127] Whilst it would be unrealistic to expect a catalogue of policy statements and standards within a single parliamentary term, it would be reasonable to expect that the Government would have got the ball rolling with critical standards in areas of high risk and importance to New Zealanders.

There is an obvious trend indicating increased use of NPSs and NESs once Government implemented the Air Quality NES in 2004. There are now five operative policy statements (and two proposed), and six sets of standards (with three proposed). At the time of writing, the NPS-UD will soon replace the existing Urban Development Capacity policy statement and the National

123 Daalder, above n 122.

124 Kāinga Ora — Homes and Communities *Tauākī Whakamaunga Atu: Our Statement of Intent 2019–2023* (Kāinga Ora — Homes and Communities, Wellington, 7 February 2020) at 16; as part of the Government's Urban Growth Agenda see Ministry of Housing and Urban Development "Urban Growth Agenda" (18 May 2020) <https://www.hud.govt.nz>.

125 McLean, above n 52, at 544.

126 At 544.

127 At 548–549.

Environmental Standards for Marine Aquaculture will soon come into force.[128] This suggests that an earlier proactive implementation of policy tools may have established a culture of utilising NPSs and NESs — increasing their usage over the past 28 years. This may have prevented the current problem — where policy documents are used as an ambulance at the bottom of the cliff to resolve incredibly complex environmental issues.

Having examined the actions of Government since the Act's commencement, it is clear that a desire to avoid potential political fallout and cost concerns were both significant factors in the failure to adequately supplement the resource management regime with plans and standards.

At face level, it may seem counterintuitive for Parliament to champion law reforms that decentralise decision-making and empower communities if it intended to implement a wide range of mandatory standards at the outset. The philosophy that underpins the entire statute validates a council's authority to have the first attempt at applying its own resource management plans. Given this context, it may not have been politically wise to grant councils wide authority to govern local resource management and then immediately constrain the flexibility with which they were able to do so.

In an ideal world, sustainable management of resources would manifest itself in a unique manner in communities across New Zealand. Strict standards from the beginning would undercut the ability of councils to shape their own innovative strategies and policies. It is unfortunate that this has not eventuated and that early Government intervention may have benefited the effectiveness and implementation of the Act. However, it seems that there was no political incentive for Government to be proactive.

A recent example of the dubious public appetite for central regulation of the environment could be seen at the announcement of the Climate Change Response (Zero Carbon) Amendment Act 2019.[129] Almost 30 years since the inception of the Act, Government still struggles to reconcile the views of environmental groups and commercial interests in a manner that avoids public outrage. To illustrate this point, the Minister for the Environment has recently been criticised for proposing "arbitrary" nitrate standards in response to what is an obvious freshwater crisis.[130] Rather than wrestling with this divisive issue head on, it is clearly a politically "safe" move to be reactive to public opinion,

128 Ministry for the Environment *National Policy Statement on Urban Development 2020* (ME 1513, Ministry for the Environment, Wellington, July 2020) at 1.2; and Resource Management (National Environmental Standards for Marine Aquaculture) Regulations 2020, reg 2.

129 Thomas Coughlan "Zero Carbon Bill lives or dies on politics" *Newsroom* (online ed, New Zealand, 9 May 2019).

130 Matthew Wood "Things must change, Environment Minister tells Timaru meeting" *Stuff* (online ed, New Zealand, 20 September 2019).

rather than proactive on behalf of the environment. To his credit, Mr Parker has pressed on with reform, publishing a draft National Policy Statement for Freshwater Management, alongside a new freshwater planning process, as part of the Resource Management Amendment Act 2020.[131]

It is also likely that reform generates substantially more media attention and allows Government an opportunity to lay blame on the Opposition for the state of the environment, by "fixing" their mistakes. This was recently done by Mr Parker in repealing the 2017 Amendment Act's collaborative planning process, implemented by the previous National-led Government.[132] The reform seesaw also allows the two major political parties to focus the debate on high-level processes rather than open highly polarising dialogue about quantitative standards or strict rules.

As previously mentioned, it would have been a financially costly exercise to establish national standards during the initial roll-out of the Act. This further detracts from the incentive for Government to be proactive and establish policy standards, when fiscal resources can be invested in more politically sympathetic causes (such as healthcare or schooling). In effect, Government would potentially lose twice — garnering criticism for meddling in local affairs with policy statements and losing any positive publicity it may elicit for spending the funds elsewhere.

However, the current Government has the benefit of hindsight. In lieu of the announced reforms to the Act, Mr Parker should be encouraged to learn from the mistakes of his predecessors. This Government's increased use of national policy statements is heartening and it is to be hoped that this trend continues. Although it may be a case of too little, too late for the Act in its current form.

There is a fair argument (that is outside the scope of this article) that the Act is no longer fit for purpose after 30 years of rapid population growth. Critics have stated that the Act is inadequate for modern urban planning.[133] If reform is inevitable and imminent, Mr Parker should be urged to ensure that territorial and regional authorities are provided with adequate resources and policy guidance to effectively implement the new version of the Act at the outset. This should avoid an encore of the current mess we have slowly spiralled into over the past 30 years.

131 Ministry for the Environment *A new freshwater planning process* (INFO 951, Ministry for the Environment, Wellington, June 2020) at 1.

132 Marjorie Cook "David Parker plans to reverse Nick Smith's resource consent non-notification law" *Stuff* (online ed, New Zealand, 14 November 2017).

133 NZPC *Better urban planning: Final report* (NZPC, Wellington, February 2017) at 4.

5. CONCLUSION

To conclude, this article has analysed why the political focus towards the Resource Management Act has consistently been on reform, rather than finishing the work begun in the statute, and whether this tendency has had a negative effect on the Act's efficacy.

This required the issues to be broken into three separate questions. First, whether the Act was an example of "unfinished business", given the lack of supporting policy statements and standards. Following this, whether the lack of supporting policy negatively impacted on the implementation and effectiveness of the Act. Having established the relevant context, the article investigated why subsequent governments have opted to focus on reform — rather than repairing the obvious hole left by Government in the existing policy and planning framework.

It was concluded that the resource management law reform project was not completed, despite the Act becoming law. Given that the Act states broad principles that offer little meaningful guidance to its users, the shortage of supporting policy documents meant that councils were essentially given a "hospital pass" by Government — who managed to successfully sit on the fence between environmental and commercial interest groups. The lack of attention devoted to developing policy documents is starkly obvious when compared to the intensive consultation process in developing and drafting the Act.

This had a negative effect on both the implementation and effectiveness of the Act. Councils were overburdened — in many cases lacking the data, skills and financial resources to develop meaningful plans in accordance with the Act. In turn, it became almost impossible to effectively enforce the environmental standards prescribed by these plans — as councils were systemically deficient of adequate information to evaluate any changes in the environment. This has meant that the environment has continued to degrade under the current regime. The lack of clarity in the Act (particularly pt 2) has also slowed the consenting process significantly — with many applications being determined in the Environment Court. In this sense, the Act has failed to free developers from excessive red-tape delays. In deferring to the Environment Court, the Act has also lost a large degree of the regional autonomy that was envisioned. Rather than regional councils determining how resources are to be used in their communities, many of the more controversial or difficult applications are being forwarded to the Court — a centralised authority that is relatively detached from the local issues.

Finally, the actions of subsequent governments were analysed to discern why there had been a delayed uptake of national policy statements and plans. A conclusion was drawn that there were likely two primary reasons: political fallout and cost. In creating policy statements, Government must take a

quantitative stance, rather than continuing to sit on the fence. This opens it to criticism from commercial and environmental interest groups, creating negative press that could be entirely avoided. Unless there is substantial pressure to intervene with policy statements (for example, the freshwater crisis), it is far more politically desirable to deflect negative environmental sentiment onto the Act itself — offering Government the opportunity to "fix" the Act, and blame whatever the current issue is on both the broken Act and the Opposition that failed to fix it. This attitude is compounded by the cost and difficulty of establishing policy documents.

Consequently, the political incentives are currently set up in such a manner that it is preferable for the Government to be reactive, rather than proactive, regarding the environment. This is highly concerning. Considering the high likelihood of substantial reform following the recent independent review panel's report, the present Government is strongly urged to continue the current trend of improving the level of central guidance regarding environmental and planning issues.