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**The Resource Management Act 1991:  
A Free Marketers Dream?  
The Influence of Libertarianism on the RMA**

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**Jessica Hanning**

A dissertation submitted in partial fulfillment of the degree of  
Bachelor of Law (Honours), at the University of Otago.

October 2010

## **Acknowledgments**

To my supervisor Ceri thank you immensely for your patience, guidance and support throughout this year;

To Carla for your tremendous proof reading effort;

To all my friends and extended family who have always encouraged me and ensured there were many fun times over the last five years;

To my family for their support throughout my entire degree, especially to Sarah for her formatting skills and for hurrying me along from the other side of the world and my parents for their endless love and encouragement;

Finally to Nick, for supporting me, putting up with me at my most stressed and always being there to make me laugh.

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# INTRODUCTION

The Resource Management Act 1991 (RMA) governs New Zealand's key resources: land, air and water. The RMA regulates and places limits on the ability of people to do things with their private property. It also affects the type of access and use citizens have to common resources such as air space, water and the coastal area. The RMA therefore has a broad scope and accordingly should be of interest to everyone. The purpose of this dissertation is to consider whether the RMA should be given a libertarian interpretation.

The RMA was introduced at a time when libertarianism dominated thinking in the political arena. As a result it is arguable that the RMA is based upon libertarian ideals and was introduced with the intention that it be interpreted in accordance with these ideals. This interpretation requires limiting the states interference with citizen's abilities to use resources. Instead resource allocation and use decisions should be left in the hands of the market. Citizens should be able to do what they choose with their resources unless there is some proper reason for intervention, such as market failure. This dissertation will examine the scheme of the RMA and the context in which it was enacted to illustrate how a libertarian interpretation is justified. By contrasting different judicial interpretations of the RMA the author will give justifications in favour of the libertarian approach.

Chapter One considers two contrasting philosophical approaches to governance. Firstly, centralised planning which involves large intervention by the state into individual citizens lives. Secondly, a libertarian approach which seeks to limit the states involvement in individual's affairs through reliance on market mechanisms.

Chapter Two looks at the context in which the RMA was enacted and the influence this had on the Act. The RMA emerged after extensive libertarian reforms were implemented across the whole economy. The author illustrates how the RMA's content is influenced by these libertarian ideas and why it should be interpreted accordingly.

Chapter Three examines how the courts have taken two contrasting approaches to the interpretation of the RMA. One is a libertarian based approach which favours limited intervention and reliance on the market. The other represents a more directive approach where regulation is widespread and greater limits are placed on how individuals may use resources.

Chapter Four traverses the arguments in favour of the libertarian interpretation of the RMA. The author presents arguments as to why this approach should be preferred over the heavy handed regulatory approach.

Finally, Chapter Five will address the possible shortcomings of a market based approach to the RMA. The chapter concludes by suggesting that some of these may be overcome through the use of environmental compensation.

Ultimately, this dissertation illustrates that the RMA has the potential to cause great intrusions into individual's lives. However, these intrusions could be minimised if the local authorities and courts were more willing to embrace a libertarian approach and allow market processes and efficiency to guide resource use in appropriate circumstances.

Although this dissertation adopts the less popular libertarian interpretation this does not necessarily reflect the author's personal views. However, it must be borne in mind that the author has a background in economics and therefore is likely biased towards the use of the market and other economic concepts.

## **CHAPTER ONE: PHILOSOPHICAL UNDERPINNINGS**

The political backdrop in which the RMA was enacted plays a critical role in affecting how the RMA should be interpreted and applied. This backdrop affected the actual content and structure of the RMA; therefore it assists in adding meaning to the text. Generally it is the judiciary's role to interpret legislation, however the RMA was an innovative Act which repealed over 75 laws and amended over 150 others.<sup>1</sup> The RMA established a new process for resource management unseen anywhere in the world. Given the novelty and magnitude of the Act, the author believes that aids to interpretation, including the context of the reform, should be relevant to ensure successful implementation of the new scheme.

An important question influencing the approach to the RMA is how pervasive the role of the state should be in controlling individual citizen's lives and the workings of the economy? This is a controversial topic which came to the fore in New Zealand during the 1980's. The prevailing view was that the government had a large role to play in ensuring the welfare of its citizens. However, the rise of the libertarian ideology based on neoclassical economics became popular and with this came the decline of centralised planning. The acceptance of the libertarian ideology in the political arena led to a number of radical structural changes within New Zealand. The New Zealand economy essentially shifted from one where key decisions were made by the central government and its agencies, to one where these decisions were left to the market place. An important qualification to this discussion is that New Zealand has never subscribed to a fully centrally planned society nor a fully market led society. It is more a matter of positioning on the spectrum between these two extremes. While historically New Zealand fell closer to centralised planning, it now favours the market approach. Below is a consideration of the theory behind these two contrasting philosophical approaches to governance.

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<sup>1</sup> Hon Simon Upton MP, (4 July 1991) 516 NZPD 3018.

## 1. Centralised Planning

Centralised planning represents a highly interventionist approach to the role of the state in our society. Under this approach the government is responsible for determining and planning what is best for society in terms of the economy, welfare and other aspects of citizens' lives. The main features of a centrally planned economy include public ownership of the means of production, central bureaucratic control of the economy, strict planning of the use of inputs and outputs and limited international trade.<sup>2</sup>

Planning is the process through which the allocation of resources is guided by a centrally developed plan in order to meet specified objectives.<sup>3</sup> Instead of the market determining the prices and quantities of goods produced within a society, the state does.<sup>4</sup> The rationale behind this view stems from collectivist or socialist beliefs which are concerned with ensuring equality for all. In particular, centralised planning adheres to the Marxist idea that a capitalist system exploits the majority working class, for the benefit of the small minority who own the means of production.<sup>5</sup> As a consequence the means of production in a centrally planned economy are publicly owned.<sup>6</sup> The state therefore controls the key industries within the country and has responsibility for planning which goods or services should be produced and at what quantities. The state is responsible for setting prices and deciding where capital should be invested so that everyone can benefit from it. By controlling the means of production the state is able to make sure the profit accrues to the community as a whole instead of a minority. This ensures the basic needs of everyone are met and that there is a more equal distribution of income.<sup>7</sup> As the central planner the state controls the economy. This includes controls over the banking and credit system, the money

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<sup>2</sup> Alan A Brown and Egon Neuberger 'Basic Features of a Centrally Planned Economy' in Alan A Brown and Egon Neuberger (ed) *International Trade and Central Planning: An Analysis of Economic Interactions* (University of California Press, Berkeley, 1968) 405 at 406-407.

<sup>3</sup> PR Gregory and RC Stuart *Russian and Soviet Economic Performance and Structure* (7<sup>th</sup> Ed, Addison Wesley, Boston, 2001) at 94.

<sup>4</sup> Ibid, at 9.

<sup>5</sup> This includes land, natural resources and capital; JL Seitz *The Politics of Development: An Introduction to Global Issues* (Basil Blackwell, New York, 1988) at 5.

<sup>6</sup> Or in less interventionist countries the means of production are publicly controlled.

<sup>7</sup> Seitz, above n 5, at 5.



supply and wages.<sup>8</sup> It also leads to interventions such as price controls, subsidies, a large welfare state and countless regulations.

An important benefit said to accrue from centralised planning is that the state has control over the profits from production of goods and services, so they are able to spread these evenly across society. Also, the state can bring about high economic growth by using this profit to invest in new industries, rather than allowing it to be spent on consumption goods.<sup>9</sup>

There are various degrees at which central planning can be undertaken. In Russia, there was almost complete nationalization of all productive assets and economic development was fully directed by the state.<sup>10</sup> However, not all countries which subscribe to a centralist view will necessarily plan the economy to such an extensive degree. In New Zealand, prior to 1984 the economy was largely controlled by the state. However, the state did not own all the countries productive assets, nor did it directly control output. Instead it influenced the type of output produced through price controls, subsidies and numerous regulations. The state also tried to ensure a more equal distribution of income through compulsory unionism, wage controls and the establishment of a large welfare system. Heavy state intervention as required under central planning began to lose favour with the failure of centrally planned economies in Eastern Europe and East Asia.<sup>11</sup>

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<sup>8</sup> Gregory and Stuart, above n 3, at 100-101, 117.

<sup>9</sup> Ibid, at 180.

<sup>10</sup> Ibid, at 9.

<sup>11</sup> Alan Bollard and David Mayes *Corporatisation and Privatisation in New Zealand* (NZ Institute of Economic Research, Wellington, 1991) at 5.

## 2. Libertarianism

In contrast to above the libertarian view holds that the state should interfere with citizens as little as possible. The central tenets of the libertarian approach include the importance of individual liberty and the rule of law, the benefits of market forces and entrepreneurship, and the perils of bureaucratic control of government and society.<sup>12</sup> In the 1970's libertarian ideas were refined and became popular in many western economies.<sup>13</sup> The newly accepted view was that the state should decrease regulations, restrict government, abandon planning of the economy and increase reliance on private entrepreneurship and competitive market forces.<sup>14</sup> Essentially, instead of the state planning and controlling the economy and other aspects of society, these decisions should be left to market forces. This is because the market is the most effective mechanism for allocating resources and making other important decisions. The market maximizes individual freedom and harnesses competitive forces to result in the most efficient outcome. The market obtains information about society's preferences through the price mechanism. Consumers and producers signal their preferences for different goods through the price they are willing to pay to obtain them. This allows the market to direct resources to production of the goods which society places the greatest value upon, and in this way decides between competing uses of resources.<sup>15</sup> Under this view, the market allocates resources in a way that maximises the overall welfare of society.

Libertarians argue that a number of negative consequences flow from government regulation and interference with market forces. The basic criticism of central planning is that the state does not have adequate information about society's preferences which is necessary to make resource usage decisions.<sup>16</sup> Without pricing information it is likely the government will make mistakes in allocating resources and this will lead to an inefficient outcome which does not maximise society's welfare. Other criticisms include that government interference is likely to stifle entrepreneurship, impede

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<sup>12</sup> AD Sorensen and RA Day "Libertarian Planning" (1981) 52 TPR 390 at 390.

<sup>13</sup> Ibid.

<sup>14</sup> RE Klosterman "Arguments for and against Planning" (1985) 56 TPR 5 at 6.

<sup>15</sup> Mark Pennington "Free Market Environmentalism and the Limits of Land Use Planning" (1999) 1 J Environ Policy Plann 43 at 45.

<sup>16</sup> Gregory and Stuart, above n 3, at 195.

innovation and impose unnecessary financial and administrative burdens.<sup>17</sup> A centrally planned economy also runs contrary to the importance placed on individual liberty. Liberty is often suppressed through political and social controls which are used by the state to maintain their power and ability to direct economic activity.<sup>18</sup> Production may be less than optimal because individuals who have been stripped of ownership of the means of production have limited incentives to maximise production as they no longer receive the surplus profits. Similarly, they also lack incentives to pass on information to the central planners about the best methods to produce their output, or other relevant information which they had previously acquired as the owners of the means of production. Central planning can therefore result in less than optimal output because incentives are distorted and the planners lack vital information.

Despite the libertarian view that the market should be left to function with little interference from the state, there are some exceptions to this. The operation of the markets depends on rules governing property rights and their exchange. The state therefore has the role of establishing and enforcing a robust set of property and contract laws.<sup>19</sup> It is also accepted that sometimes the market may not provide the most efficient allocation of resources. Market failure may occur in a number of situations, but most relevant to environmental management is when there are externalities or common access resources. Common access resources include resources such as air and water to which access is not restricted. Where common resources exist, tragedy of the commons is likely to result.<sup>20</sup> This is the idea that people sharing access to a common resource will tend to over exploit it unless its use is regulated. This is because there are no clear property rights to these resources. People using the resource do not have to pay anything for it, so they will tend to take excessive quantities and not consider the costs they impose on other resource users. It is legitimate for the state to intervene to prevent exploitation of common access resources.

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<sup>17</sup> Klosterman, above n 14, at 6.

<sup>18</sup> Seitz, above n 5, at 8.

<sup>19</sup> Sorensen and Day, above n 12, at 391.

<sup>20</sup> John Black, Nigar Hashimzade, and Gareth Myles "A Dictionary of Economics" (2009) Oxford Reference Online. See 'Tragedy of the Commons' <[www.oxfordreference.com](http://www.oxfordreference.com)>

The second type of market failure is externalities. An externality is where one person's use of a resource imposes an uncompensated cost or benefit on a third party.<sup>21</sup> Negative externalities cause damage to other people or the environment, for example, air pollution. The key is that this cost is not paid for by those carrying out the activity. Positive externalities are effects of an activity which provide benefits to other people who do not pay for them, for example the public's enjoyment of views of a private garden.<sup>22</sup> An externality creates an inefficient situation because the resource user is making their decisions based on a private cost which is lower than the social or total costs of their activity. The additional cost they are imposing on others, for example pollution, is un-priced. If the resource user is made to internalize the externality, which amounts to making them account for the costs they are imposing on others, they will change the level of the activity they engage in to a more efficient level. In the situations of market failure such as these, most libertarians accept that it may be necessary for the state to intervene to correct this market failure.<sup>23</sup> Overall, whilst the libertarian approach champions the use of competitive market forces it does not completely reject government regulation, but accepts it may be useful in certain circumstances.

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<sup>21</sup> John Asafu-Adjaye *Environmental Economics for Non-Economists: Techniques and Policies for Sustainable Development* (2<sup>nd</sup> Ed, World Scientific, New Jersey, 2005) at 71.

<sup>22</sup> Black, Hashimzade, and Myles, above n 20, see 'externality.'

<sup>23</sup> Lawrence Wai-Chung Lai "Libertarians on the Road to Town Planning" (2002) 73 TPR 289.

## CHAPTER TWO: THE POLICY APPROACH BEHIND THE RMA

The previous section summarised two contrasting approaches to the role of the state in society. In New Zealand the libertarian view became dominant and a number of reforms were instituted to reflect this. The following section will provide evidence supporting the view that the RMA's content was influenced by libertarian ideas and was intended to be given a libertarian interpretation.

### 1. Economic Reforms

Historically, New Zealand has illustrated a deeply entrenched preference for state intervention in economic activity, coupled with a lack of commitment to the free market.<sup>24</sup> This has resulted in a heavily regulated economy, with widespread government intervention. Almost all sectors of the economy were subject to regulatory control. The state either owned or exercised strong controls over New Zealand's key industries and resources. Many industries were protected from foreign competition through the use of trade barriers and subsidies. Banks and other financial institutions were subject to statutory functions. In the labour market, unionism was compulsory and wage levels were subject to state control. Price and wage controls were used in attempts to stabilize the inflation rate.<sup>25</sup> Overall, the state acted as the guiding hand of the New Zealand economy.

During the 1980's the libertarian view of the state gained popularity in New Zealand.<sup>26</sup> This was due to the failure of a number of highly interventionist systems around the world and the poor performance of the New Zealand economy under the highly regulatory regime.<sup>27</sup> As a result New Zealand underwent extensive structural

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<sup>24</sup> Patrick Massey *New Zealand: Market Liberalization in a Developed Economy* (St. Martins Press, New York, 1995) at 27.

<sup>25</sup> Ibid, at 27-30.

<sup>26</sup> This view was endorsed by the Treasury, politicians, academics and the Federated Farmers amongst others. David Young *Values as Law: The History and Efficacy of the Resource Management Act* (Institute of Policy Studies, Victoria University, Wellington, 2001) at 10-12; Jane Kelsey *Economic Fundamentalism* (Pluto Press, London, 1995) at 87.

<sup>27</sup> Bollard and Mayes, above n 11, at 3-5; Massey, above n 24, at 30.

reforms in 1984. Industry protections were removed and many state owned and operated industries were privatized. The exchange rate was floated, price controls were lifted, subsidies were removed and trade was opened up. There was a substantial freeing up of the financial markets.<sup>28</sup>

These fundamental changes set the climate in which the resource management law reform took place and from which the RMA eventually emerged. Given the government's acceptance of libertarian ideas of market liberalisation, free trade, deregulation and limited government<sup>29</sup> it seems inevitable that these themes would be carried over into influencing how resource management should be practiced in New Zealand. The RMA has been described as giving planners a mandate to bring the market to bear on the environment.<sup>30</sup> The remainder of this chapter provides support for this view.

## **2. Earlier Legislation**

The Town and Country Planning Act 1977 (TCPA) was the predecessor to the RMA. The TCPA allowed planners to direct the spatial pattern of rural and urban land uses through prescriptive zoning schemes.<sup>31</sup> Under that legislation the purpose of planning included the wise use and management of resources and the direction and control of development.<sup>32</sup> The wise use and management of New Zealand's resource was also listed as a matter of national importance which had to be recognised and provided for.<sup>33</sup> This meant the local authorities had to determine how resources should be used in New Zealand. Instead of leaving important decisions about the allocation of resources across different activities up to the market, these decisions were put in the hands of local government. The TCPA was therefore a directive piece of legislation, which was consistent with the centralised planning philosophy that dominated the political climate of the time.

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<sup>28</sup> P McDermott "Positioning Planning in a Market Economy" (1998) 30 *Environ and Planning A* 631 at 640.

<sup>29</sup> Kelsey, above n 26, at 2.

<sup>30</sup> McDermott, above n 28, at 644.

<sup>31</sup> PA Memon and BJ Gleeson "Towards a new planning paradigm? Reflections on New Zealand's Resource Management Act" (1995) 22 *Environ and Planning B: Planning and Design* 109 at 110.

<sup>32</sup> Town and Country Planning Act, s 4(1).

<sup>33</sup> *Ibid*, s 3(b).

Under the TCPA decision makers were reluctant to leave decisions up to the market. For example, it was considered undesirable to allow market forces to determine the size of land allotments.<sup>34</sup> In 1987 a review of the TCPA was undertaken to determine whether any changes were needed to bring resource management practice into harmony with the recent economic reforms. In particular, were the procedures for controlling land use still desirable?<sup>35</sup> A number of criticisms of the TCPA emerged from this review. The Act was found to be too prescriptive, as it usurped the role of the market even when there was no market failure. The Act was also seen as too restrictive as it constrained worthwhile developments and imposed unnecessarily high administrative costs.<sup>36</sup> The review suggested that in order to promote consistency with economic policy the TCPA needed to give greater recognition to the use of market forces. This would involve placing more emphasis on evaluating the costs of any intervention and on determining whether intervention would be more appropriate than leaving decisions up to the market.<sup>37</sup>

Given the change in thinking that occurred in New Zealand politics it is no surprise that the RMA contrasted greatly to the TCPA. The main purpose of the TCPA was to control the actual activities that took place in relation to land and other resources. The RMA however, has shifted the focus from control of the activities to control of the effects of activities. This reflects a substantial change in philosophy regarding resource management law. Market forces are left to determine how resources are used and it is only the effects of resource use that the legislation is concerned with. The courts have accepted that the focus of the legislation is on controlling or managing the effects of use, not on the actual use or outcome itself.<sup>38</sup> They also noted that plans can no longer be proactive in promoting particular outcomes.<sup>39</sup> The Councils function in relation to district plans is the management and control of effects, not the prescriptive allocation of resources for land use, which would equate to wise use philosophy of the

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<sup>34</sup> *Minister of Conservation v Whangarei District Council* PT Whangarei A006/92, 19 February 1992 at 11, 19.

<sup>35</sup> *A Hearn Review of the Town and Country Planning Act 1977* (Department of Trade and Industry, New Zealand Government, Wellington, 1987).

<sup>36</sup> *Ibid*, at 8 and 23.

<sup>37</sup> *Ibid*, at 29.

<sup>38</sup> *Eldamos Investments Ltd v Gisborne District Council* EC Gisborne W047/2005, 22 May 2005 at [132].

<sup>39</sup> *Ibid*, at [157]; This idea of proactive planning is discussed further in Chapter Three.

TCPA.<sup>40</sup> The change can be noted by comparing the purpose provisions. Nowhere in the RMA can reference be found to the wise use and management of resources nor the direction or control of development. The statutory obligation under the TCPA requiring decision makers to actively create opportunities for development has been replaced with the goal of sustainable management.<sup>41</sup> Another important difference is that the TCPA was used to pursue social, economic and cultural objectives, whereas the RMA is concerned with environmental outcomes. Therefore plans under the RMA should be more constrained, as any intervention must be for the purpose of controlling adverse environmental effects, not for the attainment of socio-economic goals.<sup>42</sup>

Overall, the change in philosophy from the TCPA which was very directive in terms of resource use, to the RMA which focuses on enablement and management of environmental effects, supports a more market based approach to resource management. The change can be summed up as a “shift towards management of resources rather than planning for their strategic use.”<sup>43</sup> This new philosophy is consistent with a libertarian interpretation of the RMA.

### **3. Hansard**

Throughout the parliamentary debates on the Resource Management Bill there are numerous statements made by the government which indicate New Zealand politics had subscribed to the libertarian view of the state and that this extended to the RMA. When the Bill was introduced by the Labour government, it was described as a new system that would provide for greater efficiency in the planning process.<sup>44</sup> Given that the government had adopted a libertarian stance, under which the market is viewed as the most efficient method for resource allocation, it is reasonable to infer that the reference to efficiency symbolized a move towards greater reliance on the market. The legislators made explicit that the focus was shifting from the means to the environmental ends and that plans would “be concerned first and foremost with the

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<sup>40</sup> *Kiwi Property Management Ltd v Hamilton City Council* (2003) 9 ELRNZ 249 at [32].

<sup>41</sup> Memon and Gleeson, above n 31, at 119.

<sup>42</sup> JE Dixon and others “Planning under a Co-operative Mandate: New Plans for New Zealand” (1997)

40 *Journal of Environ Planning and Management* 603 at 611.

<sup>43</sup> *Ibid*, at 612.

<sup>44</sup> Geoffrey Palmer (5 December 1989) 503 NZPD 14166.



effects of activities.”<sup>45</sup> A number of times it was suggested that any controls over activities had to be explicitly justified.<sup>46</sup> In other words there must be good reason to interfere with market processes. The government recognised the need for industry to make their own decisions about how to achieve particular environmental outcomes, rather than legislation dictating the process.<sup>47</sup> Philip Woollaston summed up the effect of the change when he stated that the statutory purpose means you “have equal treatment of different land uses rather than a statutory picking of winners and deciding what should be preferred above all else.”<sup>48</sup>

These ideas were reaffirmed by Simon Upton when the Bill was taken over by the National government. He made it explicit that whilst the previous Act had focused on planning for activities, the focus of the Resource Management Bill was on environmental effects. He also stressed that the Bill was not meant to be a social and economic planning device.<sup>49</sup> Upton noted that the economic mode of management in the TCPA had virtually vanished. The decision makers under that Act actively directed the economy and determined what the wisest uses of resources were. He emphasised that a more liberal market economy now existed where economic and social outcomes were largely in citizen’s hands.<sup>50</sup> The government focus had shifted to controlling externalities and letting developers and society get on with their business.<sup>51</sup> Therefore, both the National and Labour governments supported a much more liberal approach to resource management.

#### **4. Resource Use Presumptions**

Under the TCPA a person was prohibited from doing anything with their land unless there was a rule giving them permission to do so.<sup>52</sup> The RMA deliberately reversed this presumption. Under s 9 a person may do whatever they choose with their land, unless there is a rule prohibiting it. This is consistent with the libertarian view that the

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<sup>45</sup> Ibid, at 14167.

<sup>46</sup> Ibid.

<sup>47</sup> Geoffrey Palmer (28 August 1990) 510 NZPD 3951.

<sup>48</sup> Ibid, at 3960.

<sup>49</sup> Simon Upton (9 May 1991) 514 NZPD 1874.

<sup>50</sup> This was illustrated by the use of ‘enables’ in s 5.

<sup>51</sup> Simon Upton (4 July 1991) 516 NZPD 3019.

<sup>52</sup> Ibid, at 3020.

state should not interfere with a person's property and liberty unless there is good reason, namely market failure. The rationale behind this change was to provide more certainty for landowners and to require any controls to be explicitly justified by the decision makers.<sup>53</sup>

Under the provisions relating to subdivision, the coastal marine area, aquaculture, water and discharges the presumption remains unchanged.<sup>54</sup> A person may not undertake any activity in relation to these resources unless there is a rule in the plan which allows it or they obtain resource consent. Although the more directive approach has been retained in relation to these resources this can be justified under a libertarian view. There is much more likely to be externalities in relation to these resources, especially in relation to discharges and subdivisions. Also, airspace, water and coastal areas are usually commonly owned, therefore issues arise around who can use these resources and how to avoid exploitation of them. Given that there will almost always be market failure in relation to these particular resources it is legitimate to create rules around their use to preempt this market failure. The RMA also recognises that in some situations leaving it up to the market may be a better alternative than direct regulation which is why a person may apply for resource consent to undertake an activity which has not been expressly allowed. The presumptions as to resource use are therefore consistent with a libertarian interpretation of the RMA.

## **5. Other RMA Provisions**

The RMA contains a number of provisions that illustrate a libertarian approach has been adopted. Some provisions give local authorities power to take into account economic effects, while other provisions allow for the use of economic analysis. The purpose of the RMA is to promote the sustainable management of natural and physical resources.<sup>55</sup> Sustainable management includes 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

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<sup>53</sup> Geoffrey Palmer (5 December 1989) 503 NZPD 14167.

<sup>54</sup> Resource Management Act, ss 11, 12, 14, 15.

<sup>55</sup> Resource Management Act, s 5(1).

cultural wellbeing.<sup>56</sup> Sustainable management is the guiding principle of the Act, which must be at the forefront of the decision makers mind when applying the RMA.<sup>57</sup> The inclusion of economic wellbeing in such an integral part of the Act means economic considerations must play an important role in the RMA.

Part 2 is the cornerstone of the RMA. Along with the purpose, ss 6, 7 and 8 list other matters that must be considered in every decision made under the RMA. In particular, s 7 requires that all persons exercising functions and powers in relation to managing the use, development and protection of natural and physical resources shall have particular regard to the efficient use and development of natural and physical resources.<sup>58</sup> The legislature has therefore contemplated that in some cases, efficiency, a core libertarian principle, may have a prominent role in resource management decisions. The language of the Act suggests there is a hierarchical approach to considerations under Part 2, so that s 5 trumps all the matters under ss 6, 7 and 8 and so on. Under this view, if there were no issues under ss 5 and 6, then the efficiency consideration under s 7 would play a more important role.<sup>59</sup> However, the courts have held that Part 2 of the Act should not be subject to strict statutory interpretation, but should be applied in a broad way, by conducting an overall judgment of the Part 2 matters.<sup>60</sup> This suggests efficiency could play an important role, even where there are other relevant issues under ss 5 or 6. Whichever view is taken, efficiency must be given genuine attention, because the legislature has placed it in a prominent part of the Act.

Libertarian economic concepts are relevant to the consent process and to the formation of plans or policy statements. When considering a resource consent application the consent authority must not have regard to the effect of the proposal on any persons who give consent to the application.<sup>61</sup> Also, public notification is only mandated where the adverse environmental effects are more than minor.<sup>62</sup> Together these provisions allow a potentially affected party to give consent to an application in

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<sup>56</sup> Ibid, s 5(2).

<sup>57</sup> The interpretation of s 5 is discussed further in Chapter Three.

<sup>58</sup> Resource Management Act, s 7(b).

<sup>59</sup> *Baker Boys Ltd v Christchurch City Council* (1998) 4 ELRNZ 297, at 330.

<sup>60</sup> *New Zealand Rail Limited v Marlborough District Council* [1994] NZRMA 70, at 86.

<sup>61</sup> Resource Management Act, s 104(3)(a)(ii).

<sup>62</sup> Ibid, s 95A.

exchange for some type of compensation, thereby avoiding public participation. This illustrates the influence of libertarianism because it allows the parties to resolve issues themselves in the market place, without recourse to government intervention. Efficiency plays a role in the promulgation or variation of plans or policy statements. The relevant body must complete an evaluation of the proposed plan or policy statement. This evaluation must examine whether, having regard to their efficiency and effectiveness, the policies, rules or other methods are the most appropriate for achieving the objectives.<sup>63</sup> Efficiency is a core libertarian concept which implies the use of economic analysis each time a plan or policy is promulgated or varied. The evaluation must also take into account the benefits and costs of the policies, rules and other methods. A cost-benefit analysis is an important economic tool used to evaluate and compare alternative policies or actions. This aligns with the libertarian view, as ensuring the most cost effective action is taken will result in the most efficient outcome.

Relevant libertarian concepts also appear in various other provisions of the Act. The Minister for the Environment has the function of considering and investigating the use of economic instruments.<sup>64</sup> This illustrates that the legislature envisioned the utilization of economic analysis in the appropriate circumstances. Efficiency is also relevant to existing resource consents,<sup>65</sup> the allocation of space in coastal marine areas,<sup>66</sup> monitoring of policy statements and plans<sup>67</sup> and the granting of discharge and coastal permits.<sup>68</sup>

The foregoing provisions provide a sound basis for concluding that economic considerations play a large role in the RMA context. Considerations of efficiency, economic factors and the use of economic instruments are all consistent with taking a more libertarian approach to the RMA. Section 7(b) requires that resource use is efficient. Allocative efficiency occurs where resources are allocated to the uses that society values the most.<sup>69</sup> The market is an indispensable means of mobilizing

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<sup>63</sup> Ibid, s 32(3)(b).

<sup>64</sup> Ibid, s 24(h).

<sup>65</sup> Ibid, s 124B.

<sup>66</sup> Ibid, s 165I(1)(b)(ii).

<sup>67</sup> Ibid, s 35.

<sup>68</sup> Ibid, s108(8)

<sup>69</sup> *Marlborough Ridge Ltd v Marlborough District Council* (1997) 3 ELRNZ 483 at 501.

knowledge which is tacit, subjective and dispersed throughout society.<sup>70</sup> The market can collect information on prices and preferences which the council cannot due to lack of funds and because the information is so widely dispersed. The inclusion of efficiency represents a libertarian approach because a properly functioning market will always be more efficient at allocating resources than a local authority. If a local authority does intervene in situations of market failure, they need to attempt to use the most efficient resource allocation mechanism. The mechanism could be regulatory, such as rules in plan, or it could be some alternative mechanism such as economic instruments. Whichever the local authority chooses needs to be the most efficient as this will minimize costs and get the best use of resources to maximise society's welfare. These provisions justify a libertarian approach because they require efficiency in resource use and administrative efficiency. Efficiency is inextricably linked with the operation of markets. If the legislature had intended for the council to make resource allocation decisions themselves they could have avoided any reference to efficiency and simply focused on minimizing costs, or other language that does not implicate a market approach.

## **6. Environment 2010 Strategy**

The Environment 2010 Strategy is a statement of policy from the Ministry for the Environment which delineates the Government's approach to the environment. The Strategy was released in 1995. It established a number of principles that will guide the government in "shaping the market to improve environmental outcomes."<sup>71</sup> These principles include ensuring the internalization of external environmental costs, the creation of sustainable property rights and the use of least cost policy tools. The market is explicitly recognised as an efficient means of allocating resources and as a useful means of achieving environmental goals.<sup>72</sup> The government recognises that individual freedom and the right to make your own decisions are important values for New Zealanders, but these values may be limited where market failure occurs. The government suggests that even where market failure occurs it may not always be

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<sup>70</sup> Wai-Chung Lai, above n 23, at 306.

<sup>71</sup> *Environment 2010 Strategy – A Statement of the Government's Strategy on the Environment* (Ministry For the Environment, Wellington, 1995) at 7.

<sup>72</sup> *Ibid*, at 7 and 10.

worthwhile to intervene, as the government often lacks information needed to achieve a better result. It is therefore necessary that the costs and benefits of different types of intervention are compared alongside the costs and benefits of simply doing nothing.<sup>73</sup> Only if a superior result can be achieved should the government intervene in the market. Overall, the strategy emphasizes the use of market mechanisms in relation to the environment. The focus on efficiency, internalizing externalities and the use of competitive market forces show that the government intended that environmental issues be resolved under a libertarian framework.

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<sup>73</sup> Ibid, at 11.

## **CHAPTER THREE: A LIBERTARIAN INTERPRETATION AND THE COURTS' APPROACHES**

Chapter Two demonstrated that the RMA was greatly influenced by libertarian ideas and therefore the Act should be interpreted in accordance with them. This chapter will address the question of how the libertarian approach should affect the interpretation of the RMA and how this has played out in reality.

Currently, the courts are taking an inconsistent approach to the application of the RMA. The 'economic thread' line of cases embraces libertarian concepts and advocates an enabling approach to resource management. Under an enabling approach the people and community are allowed to decide which activities best provides for their wellbeing through participation in the market. This line of cases is consistent with the libertarian view of resource management. In other cases the courts are more reluctant to make use of economic ideas and prefer a more directive approach, where the local authority plays a much larger role in determining where and how activities may take place. These cases have failed to move away from the command and control approach of the past. Below is a discussion of the case law illustrating the two divergent approaches.

### **1. Libertarian Approach**

There are three main ways in which a libertarian view impacts on interpretation of the RMA. Firstly, there should only be intervention in limited circumstances to correct for externalities. Second, efficiency should be the main driver of decision making under the Act. Lastly, the RMA is enabling and this requires that local authorities do not use the Act to plan for social, cultural or economic outcomes, as these decisions should be left in the hands of the citizens. Below is an examination of the case law supporting this interpretation.

### **i) Intervention**

A theme running through the RMA is that people should be allowed to do what they like with their property unless it has adverse effects which need to be controlled.<sup>74</sup>

This is consistent with a libertarian's view that markets should not be disturbed unless there are externalities. A libertarian approach to resource management entails leaving the way resources are used up to the market thereby enabling people and communities to determine how to provide for their own wellbeing. There is one large proviso: the state may intervene where there is market failure, in the form of externalities or common access resources.

An externality is a cost or benefit of resource use which is imposed on someone other than the resource user. For example, if a person builds a house and it affects the view from the neighbour's property, they have imposed a cost on the neighbour which they have not been compensated for. Whilst the market generally provides the most efficient allocation of resources, it fails to do so in the case of externalities. This is because not all of the costs of the resource use are being considered by the resource user. The classic economic meaning of an externality is a cost imposed on other people.<sup>75</sup> However, many of the costs under the RMA are imposed on the environment. For example an activity may cause an adverse effect on an ecosystem. Therefore the classical meaning of an externality needs to be extended in a RMA context, to include effects imposed solely on the environment. This is supported by the legislature whom specifically referred to the concept of an environmental externality and stated that externalities in this context mean the effects of activities on the receiving environment.<sup>76</sup> Common access resources also represent market failure as often no market to allocate these resources exists. In situations of market failure such as these it is legitimate to intervene to correct the failure. However, the costs of market failure must outweigh the cost of the intervention and any interference with the market must be the minimum intervention necessary to fix the defect.<sup>77</sup> Under a libertarian approach any intervention must be justified. This minimalist view to intervention draws support from the High Court in *Westfield (New Zealand) Limited v*

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<sup>74</sup> Resource Management Act, ss 5(2)(c), 9, 17(1).

<sup>75</sup> Asafu-Adjaye, above n 21, at 71.

<sup>76</sup> Simon Upton (9 May 1991) 514 NZPD 1875; (4 July 1991) 516 NZPD 3019.

<sup>77</sup> Kerry James Grundy "Re-examining the Role of Statutory Planning in New Zealand" (1995) 13 Urban Policy and Research 235 ["Statutory Planning"] at 236.



*Hamilton City Council* which stated that in New Zealand people are free to do what they like provided there is no law prohibiting it and there should only be a rule if it is necessary.<sup>78</sup>

The author believes that Part 2 contains examples of externalities.<sup>79</sup> Therefore, if any issues arise under these sections it is legitimate for the local authority to intervene and take actions to ensure the adverse effects are remedied, mitigated, or avoided.<sup>80</sup> For example, if a proposal interfered with public access to a lake the council could impose conditions on the consent to ensure access and thereby avoid the externality.<sup>81</sup> In *Golden Bay Marine Farmers v Tasman District Council* the Court thought that paragraphs (a) to (c) of s 5 represented examples of environmental market failure.<sup>82</sup> In *Queenstown Property Holdings Ltd v Queenstown Lakes District Council*, the Environment Court considered that the enabling thrust of the RMA and the emphasis on economic efficiency may preclude affirmative action by council unless there are issues under ss 5, 6 or 7.<sup>83</sup> The Court thereby lends support to the view that the council should not interfere with the market unless there is an externality. Likewise in *Baker Boys Ltd v Christchurch City Council*, the Court held that there is a weak presumption provided by s 7(b) that the market should be left to work.<sup>84</sup> However, if there are no issues under ss 5 or 6 the presumption is strong.<sup>85</sup> This is consistent with a libertarian view that those sections represent externalities, and if there are none we should let the market decide how resources are used. Also, if public access resources exist it may be necessary for the authorities to establish markets or alternative allocation mechanisms. An example, although not established under the RMA, is the individual transferable quota system (ITQ) operating in relation to New Zealand fisheries.<sup>86</sup> As a common resource, anyone can take unlimited fish from the ocean which leads to depletion of the fish stocks. By introducing an ITQ the state allocated

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<sup>78</sup> *Westfield (New Zealand) Limited v Hamilton City Council* (2004) 10 ELRNZ 254 at [38].

<sup>79</sup> Resource Management Act, ss 5(2), 6 and 7.

<sup>80</sup> *Ibid*, s 5(2)(c).

<sup>81</sup> *Ibid*, s 6(d).

<sup>82</sup> *Golden Bay Marine Farmers v Tasman District Council* EC Nelson W42/2001 27 April 2001 at [1017].

<sup>83</sup> *Queenstown Property Holdings Ltd v Queenstown Lakes District Council* [1998] NZRMA 145 at 180.

<sup>84</sup> *Baker Boys Ltd v Christchurch City Council*, above n 59, at 319.

<sup>85</sup> *Ibid*.

<sup>86</sup> Richard Newell, James Sanchirico and Suzi Kerr "An Empirical Analysis of New Zealand's ITQ Markets" (paper presented at IIFET 2002: Fisheries in the Global Economy, International Fisheries Economic Conference, Wellington, 2002) at 1.

the rights to take fish in New Zealand. Now owners of permits can trade them on the market and there is no incentive to deplete the fish stocks, as this would lower the value of the permits. By allocating property rights and pricing common resources, a more efficient result is achieved and resource depletion is avoided.<sup>87</sup>

Recently, the High Court stated that it is up to individuals to choose how to use their resources. However, this is limited to the extent that their activities impose adverse affects on others, which would justify the use of planning instruments and resource consents.<sup>88</sup> This is in harmony with a libertarian interpretation. The key to government intervention or planning is that it should supplement or assist the market, not suspend it or replace the price mechanism with central direction.<sup>89</sup>

## **ii) Efficiency**

References to efficiency are contained throughout the RMA.<sup>90</sup> Section 7(b) refers to the efficient use and development of natural and physical resources. Section 32 requires that an evaluation of a proposed plan or policy statement must examine whether, the policies, rules or other methods are the most appropriate for achieving the objectives having regard to their efficiency and effectiveness. Efficiency is the main driver behind the libertarian focus on the market. The market is the preferred method of resource allocation because it results in the most efficient outcome. The inclusion of efficiency in the RMA therefore promotes the use of market forces under a libertarian framework. Where intervention is necessary to avoid market failure, there is still an onus on the council to ensure the intervention is efficient and cost effective. Section 32 requires a cost benefit analysis of any methods or rules the council proposes to use in the plan. This requires a comparison of alternative options to find which will have the greatest net benefit, thereby maximizing society's welfare. A cost benefit analysis is important because externalities are not priced in the market. Therefore in undertaking a cost benefit analysis the decision maker can make allowance for these, even though an individual would not. This produces a better picture of whether the solution in the plan is efficient in comparison to leaving it to

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<sup>87</sup> Ibid, at 7.

<sup>88</sup> *Meridian Energy Ltd v Central Otago District Council* HC Dunedin CIV 2009 412 980, 16 August 2010 at [119].

<sup>89</sup> Wai-Chung Lai, above n 23, at 297.

<sup>90</sup> Refer to Chapter Two.

the market or an alternative solution. For example, in *Canterbury Regional Council v Christchurch City Council* the Court found that zoning was appropriate to avoid the negative externalities associated with dispersed growth.<sup>91</sup> However, it was still necessary to undertake a cost benefit analysis to determine which of the alternative zonings would be the most efficient.<sup>92</sup> The Court concluded that if it could be shown that an objective or policy has positive social benefits in monetary terms, it would be hard to find it was inefficient.<sup>93</sup>

Local authorities have two main functions under the RMA. They create plans which set out rules around resource use and they consider individual resource consent applications for specific resource uses.<sup>94</sup> It may be argued that the purpose of the resource consent process is to ensure that any activities undertaken do not impose externalities. If they do, the local authorities can impose conditions to ensure they are considered by the person undertaking the activity. The purpose of a plan is to deal with market failure related to common access resources and activities which almost inevitably create externalities. If an activity will most likely create externalities, it may be desirable to create rules which either prevent the activity or set out conditions which will alleviate the externality. If a party is unsatisfied with this they could apply for a plan change or resource consent, importantly they would only have the incentive to do so if their activity was a worthwhile, efficient use of their resources. Where an activity is unlikely to impose externalities of any significance, they should simply be left to the market and resource consent should not be required. In each case the local authority needs to be sure that the market failure is significant enough to justify a rule in the plan, or if it would be more efficient to simply let the market operate. Just because an externality exists, does not necessarily mean the local authority must intervene. A person can undertake an activity under s 9 as of right, provided it does not contravene a rule in the plan. This suggests any effects arising from these lawful activities must be considered acceptable.<sup>95</sup> Therefore, it is not necessary to alleviate every externality caused by resource use. It may sometimes be more efficient to let the market operate, albeit in a state of market failure, than to impose costly rules in the

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<sup>91</sup> *Canterbury Regional Council v Christchurch City Council* EC Christchurch C217/2001, 6 Dec 2001 at [56].

<sup>92</sup> *Ibid*, at [260].

<sup>93</sup> *Ibid*, at [354].

<sup>94</sup> Resource Management Act, Parts 5 and 6.

<sup>95</sup> *Smith Chilcott Ltd v Martinez* HC Auckland AP74-SW/00, 4 September 2000 at [22].

plan.<sup>96</sup> The local authority must also investigate whether some other method such as economic instruments or voluntary agreements may be the most effective way to deal with an externality. The libertarian focus on efficiency requires that when there is market failure the least cost policy is used to correct it. The use of economic instruments is encouraged under a libertarian approach, as they usually let the market continue to operate subject to certain conditions.<sup>97</sup>

*Marlborough Ridge Ltd v Marlborough District Council*<sup>98</sup> is the central case articulating the libertarian approach. The Court referred to a distinct economic thread running through the RMA. The Court suggested that because economics is about resource use generally, then resource management is a subset of economics. Therefore efficiency under the RMA refers to economic efficiency, not any other kind of efficiency.<sup>99</sup> Efficiency is defined simply as production with minimum waste or effort.<sup>100</sup> Section s7(b) requires that market forces encourage efficiency by gravitating resources to the most productive use, as local authorities are ill-equipped to determine the efficient allocation of resources or to plan for sustainable management to occur. If there are no adverse environmental effects, then the market should decide the best use of the land.<sup>101</sup> Provided all externalities are internalized, that is paid for by developer, the result will be efficient.<sup>102</sup> In *Marlborough Ridge* a plan change to build a resort was allowed but a further plan change to allow residential development alongside the resort was not. Nobody opposed the plan change except for the council.<sup>103</sup> The Court found that landscaping would mitigate any adverse effects, so the externalities were internalized. Therefore no good reason to interfere with market processes and stop the development existed.<sup>104</sup> Consequently the plan change was allowed. This case represents an example of where efficiency guides the decision maker. There was no reason to interfere with the market, given that the externalities would be corrected.

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<sup>96</sup> *Environment 2010 Strategy*, above n 71, at 11.

<sup>97</sup> For example, the imposition of a tax or subsidy.

<sup>98</sup> *Marlborough Ridge Ltd v Marlborough District Council*, above n 69.

<sup>99</sup> *Ibid*, at 498-499.

<sup>100</sup> *Ibid*, at 499.

<sup>101</sup> The court accepts evidence to this effect from an economist; *Ibid*, at 505-506.

<sup>102</sup> *Marlborough Ridge Ltd v Marlborough District Council*, above n 69, at 507.

<sup>103</sup> *Ibid*, at 488.

<sup>104</sup> *Ibid*, at 506-507.

In relation to land use, the Court has held that the market is a more efficient mechanism for valuing competing resources than law.<sup>105</sup> This equates to the idea that the market should be the preferred option for determining how land should be used, not government planning. *Baker Boys* held that s 7(b) means in certain circumstances the court can consider whether letting markets resolve the issue is a more appropriate solution than second guessing the best solution for community.<sup>106</sup> Therefore, one consequence of this libertarian interpretation is that the legitimacy of strict zoning is called into question. Developers should decide where to locate their activity. It is developers who have the incentive to make it efficient and worthwhile, because they are the ones that have made the investment. Provided that they mitigate any adverse effects, it would seem they are better suited to making decisions like these than local authorities whom lack the right incentives and information to choose where activities are most efficiently located.<sup>107</sup> One way the libertarian approach to land use can be promoted is via effects based planning. Instead of traditional zoning which was based on the type of activity to be undertaken on the land, this approach is based on the effects of activities. Standards are set around which effects on the environment are acceptable and only if the activity meets these standards will it be permitted.<sup>108</sup> This is consistent with a libertarian approach because it allows people to choose where to carry out their activities provided they meet the environmental standards.

*Boon v Marlborough District Council* illustrates the libertarian approach well.<sup>109</sup> The council proposed a plan change which would rezone land from rural to industrial as they wanted to provide land to facilitate the economic growth and development of the forestry industry. The Environment Court overturned the plan change because it was an unnecessary interference with the market which amounted to picking winners.<sup>110</sup> It should be up to the industry to decide where to locate in the future, as the Council lacks the necessary information to select the optimum forestry processing site. The optimal site may vary and by stipulating the area for development the council could

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<sup>105</sup> *Baker Boys Ltd v Christchurch City Council*, above n 59.

<sup>106</sup> *Ibid*, at 318.

<sup>107</sup> *Ibid*, at 314.

<sup>108</sup> The Court held that this type of planning was lawful in *Application by Christchurch City Council* [1995] NZRMA 129 at 143.

<sup>109</sup> *Boon v Marlborough District Council* [1998] NZRMA 305.

<sup>110</sup> *Ibid*, at 26-27.

discourage potential processors by limiting their options.<sup>111</sup> Instead of actively planning where industry should occur in the future the council should set environmental standards and let the developers choose a site at which they can most effectively meet those standards. By allocating resources in this way the council was harking back to the wise use philosophy of the TCPA which is no longer appropriate.<sup>112</sup> There was also no indication from the forestry industry that they required more development sites in the future, and even if they did they had not indicated a preference for any particular site. Setting aside a specific area for wood processing undermines efficiency as it excludes activities that might make more efficient use of the land. If wood processors required more land they could outbid rival users to obtain it. If not, their use of the land is not efficient compared to alternative uses.<sup>113</sup>

### **iii) Enablement**

Section 5 refers to 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 wellbeing. A libertarian interpretation draws on the word ‘enables’ to support the idea that it is the people and community themselves who provide for their own wellbeing through the market. It is not for local authorities to use the RMA to engage in socio-economic planning. As emphasised in parliamentary debates, the RMA is not a socio-economic statute, its sole focus is on the environment.<sup>114</sup> Therefore the local authorities should not be making judgments about which activities best provide for the community’s social, economic or cultural wellbeing. People should be enabled to determine this for themselves through participation in the market. The court has recognised that markets are an efficient mechanism for allowing people to act on their own predictions.<sup>115</sup> This is provided that the local authority controls any externalities which could have a disabling effect on their ability to effectively participate in the market. Also, ‘management’ in s 5 refers to management of natural and physical resources, not of people and

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<sup>111</sup> Ibid, at 334.

<sup>112</sup> Ibid, at 331, 333.

<sup>113</sup> Ibid, at 335-336.

<sup>114</sup> Simon Upton (9 May 1991) 514 NZPD 1874.

<sup>115</sup> *Long Bay-Okura Great Park Society Inc v North Shore City Council* EC Auckland A078/2008, 16 July 2008 at [319].

communities.<sup>116</sup> Therefore, social, cultural or economic goals are only relevant if people and communities are disenabled from providing for their own welfare as a consequence of the way natural and physical resources are used.<sup>117</sup>

This view was supported in *Marlborough Ridge* which held that the court's role is to create the conditions or environment in which people can provide for their own wellbeing. It is not for the court to make judgments about social, economic or cultural wellbeing of the community.<sup>118</sup> In *Queenstown Property* it was suggested that a council could not direct where a particular activity must take place, except in negative sense. For example, if all alternative locations for development were eliminated because of unacceptable effects under Part 2<sup>119</sup>, then there may only be one site left on which to conduct the activity.<sup>120</sup> This suggests that if the externalities could not be internalized, an alternative site to the one the developer preferred must be used. In *Baker Boys* the Court was reluctant to give weight to a plan which contained a policy to protect existing investments in the central business district. The Court held that it is not their role to protect existing investments, nor to assume that any vacancies created in existing infrastructure would automatically be inefficient.<sup>121</sup> *Golden Bay Marine Farmers v Tasman District Council* held that the enablement thrust meant decision makers should focus on constraining adverse effects, not prescribing the mechanics of how activities should take place. Section 5 is essentially an enabling provision which allows the opportunity for all persons in the community to protect or develop its resources.<sup>122</sup>

In *Countdown Properties (Northlands) Ltd v Ashburton District Council*<sup>123</sup> the Court suggests that plans express the community's views as to where retail activities should be located. However, from a libertarian standpoint the community would be better enabled if it was left up to market to decide, because people will choose what enables them through which stores they frequent. The RMA tells us that local authorities

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<sup>116</sup> J Jackson and others "Economics and the RMA" (New Zealand Law Society Seminar, August 2004) at 3.

<sup>117</sup> *Ibid*, at 3.

<sup>118</sup> *Marlborough Ridge Ltd v Marlborough District Council*, above n 69, at 509.

<sup>119</sup> Resource Management Act, ss 5(2)(a-c), 6 or 7.

<sup>120</sup> *Queenstown Property Holdings Ltd v Queenstown Lakes District Council*, above n 83, at 180.

<sup>121</sup> *Baker Boys Ltd v Christchurch City Council*, above n 59, at 324-325.

<sup>122</sup> *Boon v Marlborough District Council*, above n 109, at 336.

<sup>123</sup> *Countdown Properties (Northlands) Ltd v Ashburton District Council* (1996) 2 ELRNZ 223 at 229.

should not interfere with peoples resources unless good reason exists. Namely they cannot provide for their wellbeing or there will be adverse effects on the environment. The council should let the market operate to allocate resources to their best use unless there are externalities, because the best way for people and communities to express their preferences is through the market. This is not to say that the elements in the RMA such as social wellbeing or heritage values have to be ignored, otherwise their inclusion would be redundant. Where they do arise will usually be as an externality and can therefore be addressed accordingly. The RMA should not be actively used to promote outcomes in relation to these values, as its core purpose is related to promoting positive environmental outcomes. Instead the Act should ensure that any use of resources does not disenable people and communities from pursuing the social, economic and other objectives, outside of the Act.

The libertarian approach is summarized well in *Terrace Tower (New Zealand) Pty Ltd v Queenstown Lakes District Council*.<sup>124</sup> Regulatory control will be authorised if three conditions are met. Firstly, there must be environmental concerns under Part 2. Secondly, the proposed rule, policy or objective must pass the s 32 test. Lastly, the regulatory control better achieves sustainable management than other methods.<sup>125</sup> What these conditions amount to is that there must be an externality before intervention is necessary and that the intervention must be more effective and efficient than any alternatives.

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<sup>124</sup> *Terrace Towers (New Zealand) Pty Ltd v Queenstown Lakes District Council* [2001] NZRMA 23.

<sup>125</sup> *Ibid*, at [31].



## 2. Directive Approach

In contrast to the libertarian interpretation discussed above, some courts prefer to take a more directive approach to the RMA. The directive approach limits the role of the market by directing how resources should be used by specifying where certain activities may take place and other detailed requirements. This approach is less focused on libertarian ideal of leaving decisions to the market and allows much more intervention and control from the council. These cases take a different view in terms of the three criteria discussed above. Firstly, intervention can take place in a much wider range of circumstances as regulation is preferred to market forces. Second, efficiency is not the main driver of decision making under the Act, but there exists a whole range of other relevant factors. Lastly, the RMA requires management from the local authorities, which increases the scope of intervention and includes planning for particular social, cultural or economic outcomes.

### i) Intervention

Intervention under this approach is not viewed as something which must be justified, but as something which may be done as of right. The courts reject a laissez faire approach to land use.<sup>126</sup> In *Westfield New Zealand Ltd v Upper Hutt City Council*<sup>127</sup> the Court expressed reservations about a market driven approach to resource management. They were concerned with situations where locations preferred by individual entrepreneurs could be developed cheaply, were strategically located and could be destructive of existing central business district functions.<sup>128</sup> New entrants should not be able to destroy community resources in order to achieve their aspiration and the form of urban areas should not be placed entirely in the hands of the market place.<sup>129</sup> Resource consent was denied in this case because the proposal to build a large mall would destroy the central business district and this went against sustainable management.

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<sup>126</sup> *St Lukes Group v North Shore City Council* [2001] NZRMA 412 at [66].

<sup>127</sup> *Westfield New Zealand Ltd v Upper Hutt City Council* EC Wellington W44/2001, 23 May 2001.

<sup>128</sup> *Ibid*, at [220].

<sup>129</sup> *Ibid*, at [222] and [295].

## ii) Efficiency

Under a more directive approach, the market is not the main driver of decisions under the RMA. Instead the Council takes a more active role in directing resource usage. *St Lukes Group v North Shore City Council*<sup>130</sup> held that the inclusion of efficiency in the RMA does not mean that the Act should be viewed as embracing a purely economic perspective. This is because there are other threads in the Act, including aesthetic, ethical, equitable, ecological and ethnic. Decision makers must look at all these threads together.<sup>131</sup> A similar view was taken in *McGuire v Hastings District Council*<sup>132</sup> where the Privy Council held that sustainable management does not mean the RMA is concerned solely with economic considerations. It is concerned with other considerations including protection of the environment, social and cultural wellbeing and heritage.<sup>133</sup> These cases hold that efficiency is not the driver behind RMA decisions. Instead efficiency is simply one factor which must be considered along with a broad range of other factors listed in Part 2. This implies that the market will not be relied upon as readily as under a libertarian approach.

Most recently in *Meridian Energy Ltd v Central Otago District Council*,<sup>134</sup> the High Court considered what s 7(b) means in the context of a resource consent application. The Court found that s 7(b) does not require a consideration of alternatives, nor does it require a comprehensive cost benefit analysis.<sup>135</sup> They also found that this efficiency criterion should not dominate other relevant factors in Part 2, but it should be weighed alongside them.<sup>136</sup> A significant finding was that because s 7(b) refers to the efficient use of natural and physical resources, only tangibles are relevant to the efficiency analysis, not intangibles such as landscape values.<sup>137</sup> One commentator has suggested that this severely restricts a traditional efficiency analysis.<sup>138</sup> The Court stressed that the RMA is a regulatory statute which restrains property ownership and the freedom of contract and that there is no duty on applicants to make the best use of

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<sup>130</sup> *St Lukes Group v North Shore City Council*, above n 126.

<sup>131</sup> *Ibid*, at [42]-[43].

<sup>132</sup> *McGuire v Hastings District Council* (2002) 8 ELRNZ 14 at [21].

<sup>133</sup> *Ibid*.

<sup>134</sup> *Meridian Energy Ltd v Central Otago District Council*, above n 88.

<sup>135</sup> *Ibid*, at [76] and [116].

<sup>136</sup> *Ibid*, at [116].

<sup>137</sup> *Ibid*, at [83].

<sup>138</sup> Vernon Rive “Second wind: Project Hayes in the High Court” (2010) 8 BRMB 153 at 157.

their resources.<sup>139</sup> This case tends to support efficiency playing a more limited role in resource management decisions.

### iii) Management

Under the directive approach the council is viewed as having a large role to play in planning for particular outcomes. The courts view s 5 as implying that the council has an important management role.<sup>140</sup> The courts emphasize the ‘managing’ and ‘in a way or at a rate’ elements to justify local authorities directing how or where activities take place. Councils can determine what may provide for the wellbeing of the people and community through studies and consultation. In *St Lukes* the relevant plan contained a centres based strategy which was concerned with ensuring the viability of town centres as a whole.<sup>141</sup> It was therefore very directive and specified where certain activities could occur. In *Countdown Properties*,<sup>142</sup> the Court refused resource consent for a new supermarket to be built outside of the central business district. The Court believed that once the plan review was undertaken it would clearly express whether or not the community wanted the development to occur. Only then could such a development go ahead.<sup>143</sup> The court views the plan as the key to enabling people and communities, not leaving these decisions to the market.

In *Falkner v Gisborne District Council* the High Court held that the whole thrust of the RMA regime is about regulation and control of the land, air and sea.<sup>144</sup> The Act is not about vindication of personal property rights but about sustainable management of resources. The philosophy of Act does not require protection of individuals to be weighed more heavily than protection of the public interest or the environment.<sup>145</sup> This suggests that the local authorities will be more inclined to interfere in market processes and take actions which they believe are in the public interest or provide for the communities wellbeing. However, in *Eldamos Investments Ltd v Gisborne District Council* although the Court was not willing to adopt the economic thread approach, they still considered that plans could not be proactive in promoting particular

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<sup>139</sup> *Meridian Energy Ltd v Central Otago District Council*, above n 88, at [118].

<sup>140</sup> *St Lukes Group v North Shore City Council*, above n 126, at 35.

<sup>141</sup> *Ibid*, at [16].

<sup>142</sup> *Countdown Properties (Northlands) Ltd v Ashburton District Council*, above n 123, at 229.

<sup>143</sup> *Ibid*.

<sup>144</sup> *Falkner v Gisborne District Council* [1995] 3 NZLR 622 at 633 – 634.

<sup>145</sup> *Ibid*.

outcomes.<sup>146</sup> The plan is simply a tool to assist the local authority in carrying out its functions of controlling the effects of use and development of land.

One area in which local authorities take a particularly active role is with provisions in plans aimed at the protection of retail centres. The RMA prohibits decision makers from considering trade competition or the effects of trade competition when determining resource consent applications.<sup>147</sup> For example, if a developer applies for resource consent to establish a supermarket, the local authority cannot look at the detrimental effects this may have on potential competitors. Decision makers are however permitted to consider the wider economic and social effects which are significant enough to go beyond those associated with trade competition to affect the community at large.<sup>148</sup> The social and economic effects do not have to be so large as to threaten the viability of the existing centre, but they must be more than minor.<sup>149</sup> The effects must be significant but not ruinous.<sup>150</sup> The courts have accepted these wider effects include the viability of existing commercial or retail centres.<sup>151</sup> In *St Lukes* the plan contained a centres based strategy aimed at recognizing the value of the centre to people and the communities and enabling the benefits that stem from such centres.<sup>152</sup> In *Westfield v UHCC* a proposal for a large mall development outside of the central business district was refused, as the local authority believed it would destroy the central business district.<sup>153</sup> These cases argue that a centres-based strategy does not protect vested interests but recognises the benefits these centres provide to the community.<sup>154</sup>

The rationale behind consideration of these wider effects is that they affect the community at large, not just individual businesses. Often these wider social and economic effects come up in the context of town centres. It is argued that letting a business locate outside of the town centre may cause negative effects on the centre. Often these effects will be on amenity values as a result of closure of businesses in the

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<sup>146</sup> *Eldamos Investments Ltd v Gisborne District Council*, above n 38, at [157].

<sup>147</sup> Resource Management Act, s 104(3)(a).

<sup>148</sup> *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] 2 NZLR 597 at [119].

<sup>149</sup> *Ibid*, at [26].

<sup>150</sup> *Ibid*, at [120].

<sup>151</sup> *St Lukes Group v North Shore City Council*, above n 126, at [16].

<sup>152</sup> *Ibid*, at [57].

<sup>153</sup> *Westfield New Zealand Ltd v Upper Hutt City Council*, above n 127, at [309].

<sup>154</sup> *St Lukes Group v North Shore City Council*, above n 126, at [57].

centre. For example,<sup>155</sup> some retailers in a centre could close their shops and retailers of a different character may replace them. This could lead to a different mix of customers and some people choosing to shop elsewhere. Patronage of the centre and its facilities may fall. At the extreme the centre or parts of it may cease to be viable at all. This would lead to adverse amenity effects which should be considered by RMA decision makers.<sup>156</sup> If such effects are considered legitimate considerations, local authorities are given a much larger scope to plan for particular social or economic outcomes. Policies in the plan can direct where retail and other activities locate, to ensure these adverse amenity effects are prevented. If a proposal puts community amenities of value at risk, then Council could refuse to allow the proposal to succeed.<sup>157</sup>

The town centre is viewed as important because the clustering of retail activities promotes the establishment of community and social services.<sup>158</sup> Town centres also provide functional and social amenity. Functional amenity refers to the benefits of a centre in providing convenience, choice and accessibility.<sup>159</sup> Social amenity includes the sense of community, familiarity and belonging experienced by a community with a strong town centre.<sup>160</sup> Protection of a town centres viability can therefore be linked to providing for the social welfare of the community. If the location of new developments is not controlled this could lead to vacancies in existing centres which would decrease amenity and security, while increasing vandalism. It could also lead to a reduction in other social and community services which are dependant upon the functioning of retail centres.<sup>161</sup> Therefore under the directive approach courts are inclined to take an active role in securing what they believe provides for the communities wellbeing.

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<sup>155</sup> Per Blanchard J in *Discount Brands Ltd v Westfield (New Zealand) Ltd*, above n 148, at [119].

<sup>156</sup> *Ibid.*

<sup>157</sup> *Westfield New Zealand Ltd v Upper Hutt City Council*, above n 127, at [88].

<sup>158</sup> *Ibid.*, at [148].

<sup>159</sup> *Ibid.*, at [153].

<sup>160</sup> *Ibid.*, at [154] – [155].

<sup>161</sup> *Ibid.*, at [295].

## CHAPTER FOUR: BENEFITS OF A LIBERTARIAN INTERPRETATION

The previous chapter illustrated the divergence in approaches taken by the courts to the RMA. This chapter will present arguments as to why the libertarian approach should be preferred.

### 1. Flexibility

One benefit of the libertarian approach is that councils can adopt more flexible and innovative approaches to environmental problems. In the past, councils options were restricted, as the means by which environmental outcomes were to be met were prescribed by higher level government.<sup>162</sup> Plans required businesses to achieve unrealistically high environmental standards, which limited development and investment activities.<sup>163</sup> The new approach allows the council to choose the most efficient instruments or methods for achieving sustainable management. This results in positive environmental outcomes at a lower cost. For example, an externality could be internalized through pricing, education, voluntary industry codes or regulation.<sup>164</sup> Local authorities need to choose the least cost option, not simply defer to regulation. In particular, economic instruments such as user charges, performance bonds or market mechanisms may be more appropriate than regulations and rules in some situations. Economic instruments encourage technological innovation and encourage efficiency across the whole economy, as people who can lower environmental harm the easiest will do so.<sup>165</sup> The directive approach tends to defer to rules in the planning instruments and is less open to trying different methods of environmental management. The libertarian approach is therefore preferable because it allows flexibility and encourages adoption of the most cost effective methods to achieve sustainable management.

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<sup>162</sup> Dixon and others, above n 42, at 608.

<sup>163</sup> Alan Dormer *The Resource Management Act 1991: The transition and business* (New Zealand Business Roundtable, Wellington, 1994) at 21-23.

<sup>164</sup> *Environment 2010 Strategy*, above n 71, at 16.

<sup>165</sup> *Ibid*, at 17.

## 2. Incentives

Another advantage of a libertarian approach is that it creates the right incentives for people to make resource use decisions that benefit society. If environmental problems are considered under a market framework, resource users have the incentive to use their resources in a more sustainable manner. Environmental degradation, which the Act tries to avoid, is a consequence of market failure. The failure occurs because the environment has no value or price placed on it, even though it provides economic benefits and fulfils economic functions.<sup>166</sup> Environmental resources are therefore over used and exploited. The costs of using environmental resources need to be incorporated into economic activities, so that price reflects the value of these resources.<sup>167</sup> Resource users will then have an incentive to use environmental resources more carefully, because they are no longer free. Also, by requiring resource users to internalize external costs, people have the incentive to try to conduct their activities in ways which do not cause the externality at all, thereby alleviating the need for local government to impose conditions on their activities.

It is important that any actions taken by local authorities create the right incentives for property owners to use their land in the most beneficial way for society. Generally, the market creates the right incentives for property owners to use their land beneficially, as the market tends to align private incentives with social goals.<sup>168</sup> Therefore, when the local authority intervenes via plans or resource consents, it is important they do not create perverse incentives.<sup>169</sup> For example, if rules to protect heritage buildings were unreasonable, this would undermine the market for heritage buildings and promote demolition by neglect. Therefore, any intervention should be the minimum possible, to guard against unforeseen and undesirable outcomes. The government has recognised the need to ensure it does not create undesirable side effects through intervention.<sup>170</sup>

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<sup>166</sup> Sharon Beder “Costing the Earth: Equity, Sustainable Development and Environmental Economics” (2000) 4 NZJEL 227 at 232.

<sup>167</sup> Ibid, at 233.

<sup>168</sup> Kelsey, above n 26, at 86.

<sup>169</sup> *Pacific Investment Trust v Banks Peninsula District Council* EC Christchurch C86/2000, 20 April 2000 at [36].

<sup>170</sup> *Environment 2010 Strategy*, above n 71, at 11.

Section 6(c) provides for protection of indigenous vegetation and fauna. In encouraging property owners to protect these habitats it is important that the owners have a desire to protect the natural areas for themselves and for the community. If this is achieved solely through regulation the property owners may feel like they are having a central directive forced upon them and this may create resistance and animosity.<sup>171</sup> For example, the command and control mechanisms used by the Department of Conservation to protect conservation land have not been very effective.<sup>172</sup> Therefore, exploring other mechanisms may result in a better environmental outcome. For example, education in combination with an economic instrument such as a subsidy may create a better result than pure regulation.<sup>173</sup> The libertarian focus on harnessing the market and using least cost policy tools is preferable because it creates the right incentives for resources to be used in a manner that will maximize society's welfare.

### **3. Benefits of Markets and Economic Instruments**

A libertarian approach advocates the use of markets in resource management. Where there are no markets, as in the case of common resources, a libertarian approach would advocate the use of economic instruments or the creation of markets, to solve environmental issues. There are a number of benefits associated with market processes and economic instruments which would be forgone if the council determined the best use of resources itself. One benefit of markets is that they rely on competition. Market competition encourages waste minimization<sup>174</sup> and it results in innovation and discovery.<sup>175</sup> As a result it is argued that economic and environmental progress occurs simultaneously; a richer country typically has a cleaner environment.<sup>176</sup> Therefore, relying on the market for resource allocation may result in

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<sup>171</sup> Young, above n 26, at 62-63.

<sup>172</sup> Roger Kerr "Market Mechanisms and Conservation" (paper presented to Conference on Environmental Justice and Market Mechanisms, Auckland, 6 March 1998) ["Market Mechanisms"] at 2.

<sup>173</sup> It has been noted that if resources on private land are asked to be protected in nation's interest, the nation should pay something towards this; see Young, above n 26, at 63.

<sup>174</sup> Roger Kerr "The Economy and the Environment" (paper presented to Enterprise New Zealand Trust Congress '95, Wellington, 21 August 1995) at 2.

<sup>175</sup> Roger Kerr "Business, Trade and the Environment" (paper presented to the Export Institute, Wellington, 12 February 2002 at 8.

<sup>176</sup> Ibid.



more innovative and improved outcomes than if these decisions were left to local authorities.

Another reason in favour of a libertarian approach is that markets are thought to produce better outcomes than the government. If the government intervenes in the market and tries to fix market failure, they can often do more damage than good.<sup>177</sup> One reason for this is that markets are unique in their ability to discover information necessary to decision making. The market is better at rationing scarce environmental resources because it gauges consumer preferences better than council surveys can.<sup>178</sup> This is because what a person says in a survey is not necessarily what they would do in the actual market place and because the values individuals attach to resources are very subjective, therefore making it difficult for local authorities to unearth.<sup>179</sup> Some academics assert that market failure is better than government intervention as officials simply cannot know what the optimal allocation of resources is.<sup>180</sup> This equates to the idea that local authorities should not determine how land is used because they do not have enough information. They should let people choose how to use their own land, and focus on ensuring they meet specified environmental standards.

Similarly the public choice theory argues that because government action is so prone to making mistakes, it should be avoided where possible. This school claims that there are limited incentives for people to engage in political processes and this is taken advantage of by concentrated lobby groups. This can lead to interest groups lobbying for regulations to exclude alternative land uses in favour of their preferred use, as occurred under the TCPA. For example, in *Discount Brands*, a group of retailers<sup>181</sup> got involved in a resource consent process, to try and prevent a new discount mall opening.<sup>182</sup> Because they were organized they were able to participate in consent proceedings to try to ensure what they value was protected. However, there may have been many consumers who would have benefited from the new mall, but they lack the

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<sup>177</sup> Harry W Richardson, Peter Gordon and Tridib Banerjee "Market Planning: Oxymoron or Common Sense?" (1993) 59 *Journal of the American Planning Association* 347 at 347.

<sup>178</sup> Kerr "Market Mechanisms," above n 172, at 7.

<sup>179</sup> Pennington, above n 15, at 44-45.

<sup>180</sup> *Ibid*, at 47-48.

<sup>181</sup> Northcote Mainstreet.

<sup>182</sup> *Discount Brands Ltd v Westfield (New Zealand) Ltd*, above n 148. Note: in this case whether or not Northcote Mainstreet was an affected person was at issue, but of relevance to the author's argument is simply that they were able to get themselves involved in the proceedings and get their arguments heard.

organization, resources and know-how to get involved. Another consequence is that the lobby groups may be able to ensure the rest of society has to bear the external costs of activities, instead of the people who benefit from an activity or policy.

#### **4. International Support**

Another reason a libertarian interpretation should be favoured is that it draws support from international bodies. In 2007, the OECD evaluated New Zealand's environmental performance. The investigation found that while New Zealand's commitment to the market is deep rooted, there is limited use of economic instruments to internalize externalities or address other market failures.<sup>183</sup> The main recommendations included increasing use of economic instruments, promoting the user pays principle and making better use of market instruments to control pollution. New Zealand needs to utilize the market based approach it purports to support, to ensure that environmental costs are reflected in price.<sup>184</sup> This report shows that not all decision making bodies in New Zealand are embracing the libertarian market approach and suggests that to do so would make for more efficient environmental outcomes.<sup>185</sup>

#### **5. Licensing and Competition Issues**

A further reason the libertarian approach should be preferred is because the alternative directive approach throws up a number of competition and licensing issues. The RMA does not provide for licensing the number or capacity of commercial enterprises and the effects of competition on existing businesses are not relevant considerations.<sup>186</sup> However, in cases where the libertarian approach is not followed, competition and licensing issues may arise. They arise in the context of wider social and economic effects, particularly in regards to policies in plans which aim to protect the vitality of town centres and avoid adverse amenity effects. An important question is whether it is

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<sup>183</sup> OECD, 2007. OECD Environmental Performance Reviews: New Zealand. OECD, Paris at 24, 110.

<sup>184</sup> Ibid, at 18 and 23.

<sup>185</sup> Ibid, at 110.

<sup>186</sup> *Te Aroha Air Quality Protection Appeal Group v Waikato Regional Council (No 2)* (1993) 2 NZRMA 574, at 585.

desirable to give councils the ability to protect businesses within existing town centres, by refusing consents or plan changes from persons whom seek to develop outside this area? Under a libertarian view it would not be legitimate as it results in an unnecessary interference with the market. Such a strategy interferes with competition and may operate to protect inefficient businesses in the town centre. If competition is restricted, then consumer choice is also restricted and this decreases efficiency. If businesses in the centre were to close down it would be as a result of competitive market forces. The new development better provides for the communities wellbeing, which is why the other businesses did not survive.

This view has been supported under the economic thread approach. The courts are uneasy with policies in plans to avoid dispersion of retail activities in order to protect investment in suburban or city centres.<sup>187</sup> The Court questions whether it is their role to protect investments, to assume that vacancies in existing infrastructure are automatically inefficient, or that decay of one area is inherently undesirable?<sup>188</sup> Where courts attempt to provide for amenity values while simultaneously upholding the competition prohibition, it can cause difficulties and result in inconsistent judgments.<sup>189</sup> If the town centre is useful, efficient and provides for the communities wellbeing then it will survive if new developments are located outside of it. If the businesses do not survive then they are obviously of lower quality, or inefficient because people will only move to the other shops or developments if it better provides for their wellbeing. If people have the freedom to shop where they choose, this will enable them to provide for their own wellbeing.<sup>190</sup> Where town centres are protected the decision makers are deciding which shops and areas should prosper, by placing undue economic protection over existing centres at the expense of others. This could be seen as a quasi licensing regime which is not an appropriate role for decision makers, who are meant to be focused on adverse effects. Ultimately, it amounts to decision makers controlling the commercial success of businesses and this is a role better left to the market. It is not the role of local authorities to allocate retail

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<sup>187</sup> *Baker Boys Ltd v Christchurch City Council*, above n 59, at 324.

<sup>188</sup> *Ibid*, at 324-325.

<sup>189</sup> Compare Elias CJ at [29] and Blanchard J at [119]-[121] in *Discount Brands Ltd v Westfield (New Zealand) Ltd*, above n 148, with Lang J in *Northcote Mainstreet Inc v North Shore City Council* [2006] NZRMA 137 at [200] and [203].

<sup>190</sup> *Imrie Family Trust v Whangarei District Council* (1994) 1B ELRNZ 274 at 285.

opportunities in the plan to avoid duplication or under utilization.<sup>191</sup> Competition law exists to deal with competition issues and the RMA should not interfere with them.

A consequence of this libertarian view is that some centres may decline and this will result in a loss of amenity in the town centre. In this situation the council could not intervene to prevent this loss of amenity because that would require protection of businesses in the centre and this is not a justified intervention in the market place. This does not mean that effects on amenity values are always ignored under a libertarian view. If amenity values were affected in a different situation intervention could be justified. The difference in approaches is based on the classification of these effects as externalities. A pecuniary externality is an effect that is transmitted via the price system, through higher prices or reduced costs. For example, when a large business moves into a residential area and drives up rental prices, they create a negative effect for those people in the area who pay rent.<sup>192</sup> This is *not* a result of market failure and is therefore not an effect that requires intervention. The increase in rent is due to scarcity of rental units. This differs from usual externalities where the negative effect is caused because some cost is not taken into account by the person carrying out the activity. Under this view a building in a coastal area that has an adverse impact on amenity causes a relevant externality, because the visual impact is a cost imposed on others which the resource user does not account for. However, when amenity values are affected because a business shuts down as a result of new competition located outside of the town centre, this is a pecuniary externality. It does not justify intervention because it was simply a result of market processes. The businesses closed down or relocated because it was no longer profitable for them to operate in that area, not because the market failed. Therefore the amenity effects are simply a consequence of competition and there is no market failure. The distinction between pecuniary externalities and usual externalities can act as a guide for determining when intervention is required.

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<sup>191</sup> Ibid, at 285.

<sup>192</sup> Asafu-Adjaye, above n 21, at 73.

## 6. Social and Economic Outcomes

Another benefit of the libertarian view is that it provides for economic and social outcomes without directly planning for them. The legislature has provided some values for which society seeks to sustain, such as the intrinsic value of ecosystems.<sup>193</sup> Because these safeguards are contained within the Act, the council does not need to make judgments about social and economic wellbeing. They need to ensure these environmental safeguards are met as this will provide for the communities wellbeing. Under s 5 decision makers must ensure the outcomes in (a) to (c) are secured, whilst enabling people to promote their own welfare.<sup>194</sup> This requires that the decision makers ensure the externalities<sup>195</sup> are internalized, but it does not enable decision makers to enquire into the merits of welfare enhancing activities.<sup>196</sup> The libertarian approach is preferable because it does not actively achieve social and economic goals; instead it removes impediments to people achieving their own welfare goals, by ensuring the above safeguards are met.

This approach could be criticized as allowing local authorities to abdicate their functions under the Act by deferring all decisions to the market. However, a libertarian approach does not mean completely erasing environmental decision making. In practice the market is not perfect and there are many inefficiencies and market failure. Because theory does not play out perfectly in reality, especially in the environment sphere, local authorities will still have to make important decisions. For example, the intrinsic value of an ecosystem cannot be definitively priced, so in conducting a s 32 analysis, weighing up judgments are required. Also, where there is uncertainty about which outcome best provides for sustainability, s 32 requires that the option with the greatest net benefit is preferred. For example, where there is a tradeoff between environmental and social or economic effects.<sup>197</sup>

A libertarian approach therefore considers cultural, ecological and other values an integral part of decision making. This is because these values are usually represented

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<sup>193</sup> Shonagh Kenderdine “The Best Practicable Option? Accentuate the Positive, Eliminate the Negative” (1999) 7(1) RMJ 1 at 6.

<sup>194</sup> Simon Upton, Helen Atkins and Gerard Willis “Section 5 Revisited” (2002) 10(3) RMJ 10 at 13.

<sup>195</sup> Represented by s 5 (a) - (c), Resource Management Act.

<sup>196</sup> Upton, Atkins and Willis, above n 194, at 18.

<sup>197</sup> *Environment 2010 Strategy*, above n 71, at 17.

as a form of externality and are therefore considered in decision making. For example, in *Pacific Investments Trust v Banks Peninsula District Council*, a property owner wanted to build a house on property situated on an outstanding natural landscape in the coastal marine area.<sup>198</sup> While the house would increase the value of the property, there are costs that would not be considered if the market was allowed to operate. These costs include the negative visual impact of the house and that it would threaten the natural character of the area.<sup>199</sup> As a result of these externalities the landowners could not build on this particular part of their property, though the Court noted that there may be other areas of the property which may be suitable. Here the externality was imposed upon neighbouring landowners, passersby and future generations and was therefore very far reaching.<sup>200</sup> This decision shows that a libertarian approach does not lead to other values being ignored, but they are included in decision making. This scenario can be distinguished from the loss of amenity caused with retail centres because here the development itself was directly responsible for the loss of amenity, as the developer did not take into consideration the visual cost they would impose on others. Conversely, in the retail centre situation the loss of amenity was not a direct cause of the development but a consequence of competitive market forces affecting where retailers could be competitively located.

In *New Zealand Suncern Construction Ltd v Auckland City Council*,<sup>201</sup> a party had resource consent enabling them to subdivide their land. They also applied for consent to fell trees on the property, as the trees posed problems given the way they had chosen to subdivide the land. However, the trees were protected in the relevant plan and the developers were aware of this.<sup>202</sup> The rule protecting the trees can be justified under a libertarian approach. The trees represent positive externalities for the neighbourhood, as they were a local landmark which contributed to the amenity of the area. This is an externality because the owners of the land and trees would not consider these benefits so the resource would be under valued, or the cost to society of removing them would be ignored. Aside from the limitation which prevented the

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<sup>198</sup> *Pacific Investment Trust v Banks Peninsula District Council*, above n 169.

<sup>199</sup> *Ibid*, at [9] and [19].

<sup>200</sup> *Ibid*, at [38]-[39].

<sup>201</sup> *New Zealand Suncern Construction Ltd v Auckland City Council* [1996] NZRMA 411 at 425.

<sup>202</sup> *Ibid*, at 426.

developer removing the trees, they were free to develop the land as they saw fit.<sup>203</sup> The fact that they designed the development in a way which would not work very well without removal of the trees was a poor decision,<sup>204</sup> not market failure.

The above cases illustrate that a libertarian approach does not ignore social, economic and other outcomes, but they are indirectly provided for. The libertarian approach should be preferred because it accounts for the adverse impacts on social and economic outcomes, without actively planning for them. This better expresses individuals and community preferences as it lets them make decisions for themselves. It is also arguable that economic and social planning should be the domain of other legislation, given that the RMA's main focus is the environment.

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<sup>203</sup> This dissertation has not considered compensation and whether or not it should be provided in cases with positive externalities where developers are providing benefits to society at their own expense (e.g. providing heritage buildings, protection of habitats for public benefit), as opposed to simply mitigating costs they impose on others (e.g. noise, pollution, visual amenity).

<sup>204</sup> *New Zealand Suncorn Construction Ltd v Auckland City Council*, above n 201, at 426.

## CHAPTER FIVE: LIMITATIONS AND POSSIBLE SOLUTIONS

The idea that libertarian ideas should drive resource management decision making is by no means unopposed. Critics argue that even famous libertarians accept that planning is necessary in some circumstances.<sup>205</sup> This chapter will present shortcomings of the libertarian approach. It will also counter these limitations or present possible solutions to them.

### 1. Issues with the Market Instrument and Economic Analysis

There are a number of limitations to using economic instruments and relying on the market. Firstly, it can be difficult to value some considerations under the RMA.<sup>206</sup> For example, intrinsic values pose a difficulty as they are not anthropocentric, so how to value and compare them to other costs and benefits is difficult.<sup>207</sup> This makes the s 32 analysis difficult. Secondly, future generations are not accounted for in markets.<sup>208</sup> When economists make decisions about resource uses they discount future costs and benefits; which means they place less weight on them in decision making. However, public goods such as the environment can be enjoyed both now and in the future and the whole of society gets the benefit of environmental preservation.<sup>209</sup> Therefore the focus on externalities does not address intergenerational equality as it does not ensure sufficient resources are preserved for future generations use.<sup>210</sup> The failure of the market to adequately account for the needs of future generations may mean it is efficient to use a resource beyond its capacity.<sup>211</sup>

Critics of the libertarian approach argue that the market takes environmental debates out of the political arena and turns them into economic transactions.<sup>212</sup> Essentially

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<sup>205</sup> Wai-Chung Lai, above n 23.

<sup>206</sup> *Meridian Energy Ltd v Central Otago District Council*, above n 88, at [107].

<sup>207</sup> *Canterbury Regional Council v Christchurch City Council*, above n 91, at [270].

<sup>208</sup> *Environment 2010 Strategy*, above n 71, at 11.

<sup>209</sup> Beder, above n 166, at 237.

<sup>210</sup> Grundy "Statutory Planning," above n 77, at 242.

<sup>211</sup> Kenderdine, above n 193, at 6.

<sup>212</sup> Beder, above n 166, at 242.



private wealth is substituted for nature. This is because economic instruments assume that environmental damage can be paid for, that the environment can assimilate a certain amount of pollution and that environmental benefits can be substituted for other benefits that can be brought on the market.<sup>213</sup> Also, the environment is usually valued by assessing people's willingness to pay to preserve it and this depends on a person's ability to pay, therefore outcomes favour the wealthy, resulting in inequity.<sup>214</sup> As a result, critics argue that the libertarian approach does not do enough to ensure environmental protection and can lead to inequity.

## 2. Social and Economic Planning

In contrast to a purely libertarian approach, a number of arguments can be made to support the view that social and economic planning *is* required under the RMA. Firstly, s 5 is capable of a wide interpretation which allows local governments to cater for people and communities welfare.<sup>215</sup> This is because social, economic and cultural concerns are relevant as they are contained within s 5, the 'environment' is broadly defined to include welfare concerns and schedules 2 and 4 explicitly refer to them.<sup>216</sup> Some critics argue that by using the word 'sustainability,' the government has actually increased instead of lessening the need for intervention and planning.<sup>217</sup> This is because the environmental effects cannot be separated from the social, cultural and economic concerns contained within the sustainability concept.<sup>218</sup> Another reason in favour of social and economic planning is that while markets may achieve efficiency they do not ensure equity, therefore planners need to intervene to achieve more equitable outcomes.<sup>219</sup> Under a libertarian approach the common good is assumed to be provided for through individual choice expressed via participation in the market. However, markets are not the only way for people to express their preferences.<sup>220</sup> Also, the market ignores inequity, power and domination which all have an effect on

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<sup>213</sup> Ibid, at 241.

<sup>214</sup> Ibid, at 234.

<sup>215</sup> Grundy "Statutory Planning," above n 77, at 242.

<sup>216</sup> Kerry James Grundy "Public Planning in a Market Economy" (1994) 114 Planning Quarterly 20 at 22-24.

<sup>217</sup> Ibid, at 21.

<sup>218</sup> Ibid

<sup>219</sup> Richardson, Gordon and Banerjee, above n 177, at 347.

<sup>220</sup> Lindsay Gaw "Integrating Economic, Social and Environmental Policies" (Paper presented to Economics, Environment, Equity Seminar, Wellington, 4 July 1991) at 68.

individual choice.<sup>221</sup> These are valid concerns, but the RMA is concerned with the efficient use of natural and physical resource, not with social justice or equality, which would require redistribution of property rights.<sup>222</sup> This is the reason sustainable management was chosen as the RMA's purpose, not the concept of sustainable development which does encompass these broader equity concerns.<sup>223</sup>

Another suggested limitation of the libertarian approach is that undertaking a rigorous cost benefit analysis may cause inequity, as the benefits of an activity may accrue to only a small group, whereas the costs could be imposed on many.<sup>224</sup> Critics would argue that this should therefore justify the council undertaking some type of economic or social planning to resolve this inequity. The author would argue that the libertarian approach would not always allow an activity simply because the benefits outweigh the costs. Instead in these cost calculations extra weight may be placed on environmental values, and requirements to remedy or mitigate adverse effects can be built into a project, even where benefits exceed the costs. This way even if the benefits are accruing to a small group, they are made to compensate others for the costs they impose on them.

The libertarian approach is also criticised because it does not allow direct planning for social and economic outcomes. In particular if a town centres viability could not be protected in a plan, critics argue this could disenable the community from providing for their own wellbeing, because it leads to a loss of social amenity.<sup>225</sup> Some academics have suggested that the difference in approaches of the courts in relation to town centres, social and economic effects and wellbeing is an evidentiary difference. While some courts are skeptical about whether local authorities are able to ascertain economic and social effects of retail, others think councils can assess these effects. On this view, councils could consider the role played by community centres and provide for their protection directly if adverse social or economic effects could be adequately

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<sup>221</sup> Grundy "Statutory Planning," above n 77, at 238.

<sup>222</sup> J Jackson "Role of Economics in the RMA and Vice Versa" NZJEL (1999) 19 at 26.

<sup>223</sup> Bret Birdsong *Adjudicating Sustainability: New Zealand's Environmental Court and the Resource Management Act* (Ian Axford New Zealand Fellowship in Public Policy, Wellington, 1998) at 7.

<sup>224</sup> Beder, above n 166, at 236.

<sup>225</sup> Jackson, above n 222, at 26.

demonstrated by the evidence.<sup>226</sup> However, the author would argue that this is not an evidentiary issue, it is a competition issue which centres around how effects are classified. Effects on amenity which are simply a result of competition attracting customers and businesses to different locations should be ignored.

### **3. Externalities that Cannot be Internalized**

One shortcoming of the libertarian approach is that it does not offer a solution for situations when externalities cannot be internalized. In some instances there may be some effects of a proposal which cannot be adequately avoided, remedied or mitigated. For example, if a house is built on an outstanding natural landscape it will cause an adverse visual impact on the natural area. If the house could not be properly hidden with vegetation there may be an external visual cost on others that cannot be mitigated. In these situations is it appropriate to deny a resource consent or plan change altogether? Or is it better to let the development go ahead? Environmental compensation could be offered as a solution in resource consent applications where the externalities cannot be internalised. Or alternatively, it could be offered as a way of outweighing the adverse effects of a proposal when a plan change is requested.

Environmental compensation is a type of compensation offered by applicants for resource consents who are not able to adequately avoid, remedy or mitigate the adverse effects of their actions. Environmental compensation was defined in *JF Investments Ltd v Queenstown Lakes District Council* as any action taken to avoid, remedy or mitigate the adverse effects of an activity on the relevant area, landscape or environment as compensation for the unavoidable or unmitigated adverse effects of the activity for which consent is being sought.<sup>227</sup> A justification offered by the court for allowing this practice is that the enabling concept in the RMA means landowners should be able to volunteer environmental compensation as a set off for creating some environmental effects.<sup>228</sup> The courts have held that environmental compensation is appropriate under a resource consent application when certain conditions are met.

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<sup>226</sup> Christian Whata and Claire Kirman “Enabling Communities: Directions for retail strategy under the Resource Management Act 1991” (2001) 9(2) RMJ 21 at [10]-[16].

<sup>227</sup> *JF Investments Ltd v Queenstown Lakes District Council* EC Christchurch C48/06, 27 April 2006, at [8].

<sup>228</sup> *Ibid*, at [19].

Namely, the work must be of the same kind or scale and located on the same area, landscape or environment. There must also be conditions to ensure the compensation is effective, and there must be public participation and transparency.<sup>229</sup>

Compensation has been recognised by the government as a legitimate solution, when externalities cannot be avoided, remedied or mitigated. However, financial compensation is not the preferred option if it would lead to the irreversible conversion of natural resources into financial capital.<sup>230</sup> This means if a development would completely destroy a particular ecosystem it would be unlikely that environmental compensation would be sufficient to allow the development to proceed. In other cases where the externality will not lead to an irreversible environmental loss of great magnitude, environmental compensation would be a legitimate way to deal with market failure.

#### **4. Amenity Values**

Under a libertarian view some amenity values may be ignored because they result from the operation of the market and competition, not as a result of market failure. One criticism could therefore be that the amenity values provide a barrier to the efficient operation of the market. Therefore if the libertarian view were strictly followed, the amenity values of many areas may be ignored and subsequently degraded. This will be true when amenity is lowered due to competitive forces drawing customers out of the town centre and thereby leading to decline in the centre. In response to this, it can be argued that if people and communities were concerned with the decline of their centre they should support it themselves. Also, if other retail locations are preferred to that in the centre it suggests they are no longer enabling people to provide for their wellbeing.

Where amenity values in a town centre are adversely affected by the location of industry outside it, environmental compensation could be offered to revitalize the areas where businesses have shutdown. This would represent a compromise between a

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<sup>229</sup> Ibid, at [42].

<sup>230</sup> *Environment 2010 Strategy*, above n 71, at 16.

market approach and the councils desire to protect the town centre. Developments could proceed provided funds were supplied to help restore any loss of amenity in the centre. This would interfere with competition to a lesser extent than if consent was refused altogether. While it would not allow centres based strategies to protect businesses in the town centre, it would lend some consideration to the impact on amenity as a result of competition.

## 5. Buying Consent

The liberal approach to the RMA allows the purchasing and commodification of resource consents.<sup>231</sup> This is because public notification of a consent application is only mandated where the adverse environmental effects are more than minor.<sup>232</sup> Also, when considering a resource consent application the consent authority must not have regard to the effect of the proposal on any persons who give written consent to the application.<sup>233</sup> Together these provisions allow a potentially affected party to give consent to an application in exchange for some type of compensation. This means a potentially large adverse effect is ignored by the decision makers and public notification may not be mandated, if no other significant adverse effects exist. These sections have been viewed unfavourably, as they essentially enable applicants to buy resource consents.

Purchasing a potential submitters consent is reasonably widespread in New Zealand.<sup>234</sup> The result can be that public notification of a proposal is avoided thereby thwarting the publics opportunity to be heard and the effects on the consenting party can no longer be heard.<sup>235</sup> There can also be inequity, as undesirable land uses may end up locating in less affluent areas.<sup>236</sup> It may also be difficult to determine the 'externality field.' This refers to that area in which people may be adversely affected, who the people are that will be adversely affected and whether the effects are more than minor. If this is determined incorrectly, people will be excluded from the consent

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<sup>231</sup> BT Gleeson "The Commodification of Resource Consent in New Zealand" (1995) 51 New Zealand Geographer 42 at 43.

<sup>232</sup> Resource Management Act, s 95A.

<sup>233</sup> Ibid, s 104(3)(a)(ii).

<sup>234</sup> Gleeson, above n 231, at 44.

<sup>235</sup> Ibid, at 44-45.

<sup>236</sup> Ibid, at 47.

process and effects the development has on them will be ignored.<sup>237</sup> Gleeson argues that less public participation, the commodification of resource consents and environmental injustice are detrimental consequences resulting from the influence of a libertarian market philosophy on the RMA.<sup>238</sup>

However, these provisions could be viewed as an effective means of dealing with externalities. People affected by a proposal can negotiate a solution with the applicant rather than relying on the council to decide.<sup>239</sup> This represents a good example of where the RMA minimizes government interference and leaves it up to individuals to choose the most appropriate solution. Only if the applicant did not reach agreements with people affected by the application would it be necessary for the council to impose conditions to deal with the externalities. Also, the proposal still has to meet the environmental safeguards in s 5. If the proposal does this and the neighbours are compensated for any adverse effect on them, there seems to be no issue.

The author believes the concern is that large developers will be able to buy off people at a huge environmental cost. But sometimes adverse effects are so wide ranging that they are not imposed on a neighbour who can be brought off. For example, if the life supporting capacity of an ecosystem was at risk from a proposal, consent could not be brought, because the effect is not on a person but on the physical environment itself. Therefore, no person could consent to such an effect and the consent authority would always have to consider it. This would safeguard the environment from people who are willing to exploit it for a financial gain. Also, if there is a very large adverse environmental effect it is likely it will harm more than one person, so the larger and more far reaching the adverse effects, the lesser the likelihood of the applicant obtaining every affected persons consent. These provisions are another illustration of the influence of libertarianism on the RMA and how some decisions may be made by simply leaving them up to the market.

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<sup>237</sup> Ibid at 45-46.

<sup>238</sup> Ibid, at 47.

<sup>239</sup> Dormer, above n 163, at 55.

## CONCLUSION

This dissertation sought to address whether the RMA should be given a libertarian interpretation. Such an interpretation would require leaving some resource allocation decisions to the market place and a reigning in of government intervention in resource use decisions. A libertarian interpretation can be justified given specific provisions in the RMA. This is especially true when the RMA is placed in the context of the libertarian reforms in which it was enacted. The author demonstrated that while some courts are opposed to this view, others embrace such an approach as an appropriate way to make resource management decisions.

No doubt this paper will have a number of critics who fear that such an approach would lead to irreversible environmental damage and private property interests being elevated above wider societal interests. However, the aim of this dissertation was not to suggest that no intervention under the RMA is justified. Instead it was to illustrate that the RMA could be interpreted in a less restrictive manner. Not solely because it would promote private property rights, but because utilization of the market may achieve better outcomes for society. The debate is not between pure market and pure interventionary approaches. It is accepted that there will be intervention. The crucial question is how much and when?<sup>240</sup> The libertarian view would answer, only when there is market failure and when intervention can achieve a better outcome at a lower cost.

A libertarian approach is desirable because it encourages reliance on the market and the market is the most effective mechanism at allocating resources to the uses society values the most. It also allows people to make decisions for themselves as opposed to local authorities making predictions about what provides for peoples wellbeing. By encouraging local authorities to intervene only in situations of market failure, they will be using their energy and resources on promoting positive environmental outcomes in a smaller, but more focused range of situations.

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<sup>240</sup> Richardson, Gordon and Banerjee, above n 177, at 348.

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