
**AN UNCERTAIN PURPOSE:
THE POSITION OF ECONOMIC WELL-BEING IN SECTION
5 OF THE RESOURCE MANAGEMENT ACT 1991**

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INTRODUCTION

This paper takes an in depth look at the underlying purpose of the Resource Management Act 1991 ('RMA') outlined in section 5, and in particular, the inconsistent approach to the economic well-being component of this section. How to interpret this section and indeed whether it is even necessary to subject it to strict judicial analysis continues to be a topic of contention nearly twenty years after it was enacted.

The RMA was enacted as the result of a large reform of environmental law. The objective of this reform was to integrate the laws relating to resource management¹ and in doing so, the RMA repealed over 59 statutes and 19 regulations and amended more than 55 other statutes or regulations.² As a consequence of bringing the regulation of land, air and water under one statute for the first time, a number of issues arose with the application of the Act. This has led to many amendments to the RMA since its introduction.³ However Part 2, which contains the purpose and principles of the Act, remains largely unchanged⁴ and the purpose section (section 5), exists completely in its original form.

Section 5 establishes the primary focus of the Act as the sustainable management of natural and physical resources. This was adopted in New Zealand despite the internationally popular 'sustainable development' approach that was gathering momentum in international environmental law at the same time as the law reform process in New Zealand. This approach had been cemented in the Brundtland Report, which was compiled by the World Commission on Environment and Development.⁵ This Commission was established by the United Nations

¹ Derek Nolan *Environmental and Resource Management Law* (LexisNexis NZ Limited, Wellington, 2005) at 86

² See Schedule 6 and 7 of the Resource Management Act; BV Harris "Sustainable Management as an Express Purpose of Environmental Legislation: The New Zealand Attempt" (1993) 8 Otago Law Review 51 at 52

³ David Kirkpatrick said the RMA "averages an amendment Act every year. To be fair, there were 6 in 2004, which boosts the average considerably": David Kirkpatrick "The Resource Management Amendment Act 2005: evolution or revolution?: a lawyer's perspective" in Phil Gurnsly, David Kirkpatrick and Eileen von Dadelszen *New Zealand Law Society Seminar: Resource Management Amendment Act 2005 – evolution or revolution?* (New Zealand Law Society, Wellington, 2005) 27 at 27

⁴ There have been some changes: section 6(f) was inserted by section 4 Resource Management Amendment Act 2003. Section 6(g) was inserted by section 4 Resource Management (Foreshore and Seabed) Amendment Act 2004. Section 7(aa) was inserted by section 3 Resource Management Amendment Act 1997. Section 7 (ba) was inserted by section 5(1) Resource Management (Energy and Climate Change) Amendment Act 2004. Section 7(3) was repealed by section 5 Resource Management Amendment Act 2003. Section 7(i) and (j) were inserted by section 5(2) Resource Management (Energy and Climate Change) Amendment Act 2004.

⁵ Otherwise known as the Brundtland Commission

in 1983 to address the concern surrounding the increasing deterioration of the human environment and natural resources.⁶

Sustainable development can be defined many ways, but in the Brundtland Report it was defined as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”⁷ This makes sustainable management a “subset of the broader concept [of] ‘sustainable development’”⁸ as the former deals only with natural and physical resources, while sustainable development incorporates a wider range of social and economic, as well as environmental issues.⁹ Sustainable management was incorporated into the RMA as the Act was intended to be environmental legislation, with a focus on environmental effects, rather than on social inequities and redistribution of wealth, which are a feature of sustainable development.¹⁰

Chapter 1 will explore this history behind the RMA and the enactment of the sustainable management purpose in section 5. There will also be an analysis of how this section was initially construed by academics and the courts in light of Parliament’s intention for this legislation to focus on controlling the effects of activities on the environment in the RMA.¹¹ This will be important for the rest of the paper in how it affects the treatment of an individual applicant in comparison to the community in which their activity is to occur.

Chapter 2 will focus on economic well-being and divide this into public and private economic well-being. It is the author’s proposition that there has been an inconsistent application of private economic well-being as a result of the High Court decision in *New Zealand Rail v Marlborough District Council*.¹² The Environment Court (‘EC’) has been the main cause of this inconsistency as, although bound by *New Zealand Rail*, the ratio decidendi from that case is not clear in whether it prohibited all considerations of the applicant’s general economic well-being, or just narrower considerations such as financial viability of the proposal. As a

⁶ World Commission on Environment and Development *Our Common Future* (Oxford University Press, New York, 1987) at 43 and 73-74

⁷ *Ibid*, at 43

⁸ Ministry for the Environment *Post Election Briefing for the Minister for the Environment, November 1993* (Ministry for the Environment, Wellington, 1993) at 12

⁹ *Ibid*, at 12

¹⁰ Anthony Randerson, Prue Crosson, Guy Salmon, Ken Tremaine and Brent Wheeler *Report of the Review Group on the Resource Management Bill* (Ministry for the Environment, Wellington, 1991) at 6-7

¹¹ Hon Simon Upton (4 July 1991) 516 New Zealand Parliamentary Debates 3018 at 3019

¹² *New Zealand Rail v Marlborough District Council* [1994] NZRMA 70 (HC)

result, *New Zealand Rail* has been applied by the EC in varying ways, or ignored altogether depending on whether the court has had regard to the general or narrower considerations which make up private economic well-being. It will be illustrated that while the court may regard these considerations to be different, in reality they should be treated the same due to the inconsistent decision making which has resulted.

In light of this need for consistency, it is contended there needs to be an all or nothing approach and either expressly include or exclude private economic well-being from consideration under the RMA. Therefore chapters 3 and 4 will consider the reasons on both sides of this argument.

Although there are compounding reasons to include private economic well-being, chapter 5 explains why the author believes private economic well-being should be excluded. To achieve this, several additions to the RMA will be discussed, as well as the potential limitations of these amendments.

The author believes the RMA should be taken as politically intended – as “effects-orientated legislation.”¹³ This is because the RMA was intended by Parliament to focus on the effects of an activity on the environment, rather than on the individual applicant.¹⁴ However it is debatable whether this intention was clearly articulated in the RMA.¹⁵ Therefore when applying the Act, the court is under no obligation to follow this intention if they do not perceive this to be what the Act says. The amendments in this paper are proposed as a means of ensuring this intention is made clear in the RMA. Consequently this paper should be read with the bias in favour of incorporating this intention in mind.

¹³ Alan Dormer *The Resource Management Act 1991: The Transition and Business* (The New Zealand Business Roundtable, Wellington, 1994) at 9. This intention is accepted by the Planning Tribunal in *Batchelor v Tauranga District Council (No 2)* [1993] 2 NZLR 84 at 86

¹⁴ Upton, Parliamentary Debates, above n 11, at 3019

¹⁵ For example, the reference to “people and communities” in section 5(2) is ambiguous as it not clear who this is in reference to.

CHAPTER 1: Background to section 5 of the Resource Management Act 1991

1.1 Changing environmental times

Environmental issues were gaining large global recognition in the 1980s as nations began to realise that many resources were not sustainable and must therefore be utilised at a better rate. International bodies such as the United Nations and the Brundtland Commission played a significant role in highlighting this issue, for example through the Brundtland Report. This desire for change was also evident in New Zealand, with the Labour Party's successful 1984 election campaign including a pledge to review planning and environmental legislation.¹⁶ Although this movement was in line with the emerging global sustainability trend, it also coincided with the "climate of extensive social and economic reforms" being undertaken in New Zealand at the time.¹⁷ Despite the pledge and other extensive reforms in the Fourth Labour Government's first term, nothing significant occurred with respect to environmental legislation.¹⁸ However during Labour's second term in July 1988, the Resource Management Law Reform (RMLR) process began.¹⁹

This process was seen as a means to "streamline and rationalise the tangled web" of environmental statutes that had been enacted in a piecemeal way.²⁰ These included the Town and Country Planning Act 1977, the Water and Soil Conservation Act 1967 and the Noise Control Act 1982. At the same time, the Government was also preparing an initial report to the United Nations in response to the Brundtland Report and this subsequently played a part in the RMLR progression.²¹ In December 1988, the Government proposed that in place of existing legislation, there would be a single integrated statute dealing with resource management which included the concept of sustainable development.²² However the Ministry of Commerce and Treasury opposed both the use of sustainable development and the idea

¹⁶ P Ali Memon *Keeping New Zealand Green: Recent Environmental Reforms* (University of Otago Press, Dunedin 1993) at 57-58; and Parliamentary Commissioner for the Environment "History" <<http://www.pce.parliament.nz/about-us/history/>> (accessed 22 August 2010)

¹⁷ AP Randerson "Environmental Law and Justice - A Perspective on Three Decades of Practice and Some Possibilities for the Future" (1999) 3 N.Z. J. Env'tl. L. 1 at 10

¹⁸ Except for the enactment of the Environment Act 1986 which established the Ministry for the Environment.

¹⁹ Rhoanna Stanhope "A Vision for the Future - The Concept of Sustainable Development in the Netherlands and New Zealand" (2000) 4 N.Z. J. Env'tl. L. 147 at 162

²⁰ Memon, above n 16, at 91

²¹ Stanhope, above n 19, at 162

²² Nolan, above n 1, at 86; and Simon Upton "The Stace Hammond Grace Lecture: Purpose and Principle in the Resource Management Act" (1995) 3 Waikato Law Review 17 at 30

that “economic activity should be constrained in order to promote sustainable development”.²³ They also argued environmental protection should not be given any special status above other objectives.²⁴ In December 1989, the Resource Management Bill was introduced to Parliament after substantial lobbying from different interest groups during the RMLR process.²⁵ This lobbying led to the concept of sustainable management being introduced into clause 4 of the Bill and not sustainable development.²⁶

Over the following years, the Bill progressed through Parliament and this continued on under a newly elected National Government in 1990. Following this long reform process, in which clause 4 was altered numerous times²⁷ to eventually become what remains section 5 today, the RMA was enacted and came into force on 1 October 1991.²⁸ Sustainable management was confirmed as the overriding purpose of the legislation and the guiding principle for planning for resource use. Despite initial hostility by some groups towards the Bill, the Government initiated Resource Management Bill Review Group stated in its 1991 report that significantly, there was widespread acceptance amongst industry and resource users, as well as conservation and environmental groups, that there was a need to secure a high standard of environmental outcomes and standards.²⁹ Therefore as it had gained this acceptance, all that was left after this long process was to see how the Act would be interpreted and applied.

Section 5: Purpose

- (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.*
- (2) In this Act, sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—*
 - (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and*
 - (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and*

²³ Memon, above n 16, at 92

²⁴ Ibid, at 93

²⁵ Nolan, above n 1, at 86

²⁶ Found as Text E in Upton, “Purpose and Principle in the Resource Management Act” above n 22, at 48

²⁷ See Text E to Text I in Upton, “Purpose and Principle in the Resource Management Act” above n 22, at 48-55

²⁸ Section 1(2) Resource Management Act 1991

²⁹ Randerson, Crosson, Salmon, Tremaine and Wheeler, above n 10, at 7

(c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

1.2 Initial comments on sustainable management

It is widely acknowledged the RMA was intended to take a new approach to resource management and planning law. This is confirmed by Simon Upton³⁰ in his speech at the third reading of the Resource Management Bill to Parliament, as well as in subsequent publications since the enactment of the RMA. Upton emphasised that in making decisions under the RMA, consent authorities are to focus on the effects (or externalities) of this activity on the receiving environment, rather than attempt to direct or provide for economic activity.³¹ Upton also stated that he saw section 5(2)(a)-(c) as setting an environmental physical bottom line which must not be compromised.³² This is suggesting that, before approval can be granted for an activity under the RMA, it must be demonstrated that the environmental matters in section 5(2)(a)-(c) are in no way diminished by the proposal.³³

However this interpretation is not evident from the wording of the section and therefore it was never clear how much weight was to be given to the different components in section 5(2). It is clear Upton wanted his speech at the third reading of the Bill, (in which he advanced the bottom line approach), to be taken account of by the judiciary. He states this in the speech³⁴ and also later goes as far as to state this approach is the correct way to interpret section 5.³⁵ Clearly the courts are under no compulsion to follow this advice though.³⁶

In contrast, many commentators were critical of section 5. For example, Harris said:³⁷

³⁰ The Minister for the Environment at the time of the passing of the Resource Management Act in 1991

³¹ Upton, Parliamentary Debates, above n 11, at 3019. Also: Simon Upton *The Resource Management Act. Section 5: sustainable management of natural and physical resources: address to the Resource Management Law Association* (Ministry for the Environment, Wellington, 1994) at 6. This was also reiterated by the High Court in *Batchelor v Tauranga District Council (No 2)*, above n 13, at 86

³² Upton, Parliamentary Debates, above n 11, at 3019

³³ John Milligan “Emergent Themes” in John Milligan and Don Turley *New Zealand Law Society Seminar: Resource Management: emergent themes and available techniques* (New Zealand Law Society, Wellington, 1998) 3 at 19

³⁴ Upton, Parliamentary Debates, above n 11, at 3019

³⁵ Upton *Address to the Resource Management Law Association*, above n 31, at 5

³⁶ This is because Upton, as a member of the Legislature, is separate from the Judiciary by the concept of the separation of powers. This concept dates back to the 18th Century writings of French political philosopher Montesquieu. The concept is founded on the assumption that because of this separation of powers, the Legislature has the power to makes laws, while the Judiciary interprets them: Philip Joseph *Constitutional and Administrative Law in New Zealand* (2nd ed, Brookers, Wellington, 2001) at 236-237

³⁷ Harris, above n 2, at 58

...the real difficulties with section 5 are not going to be its relationship with apparently competing provisions elsewhere in the Act, but rather the relationship between the competing interests contained in the subsection 5(2) definition of sustainable management.

Section 5 was also described as “unsatisfactorily vague”³⁸, “carefully indeterminate”³⁹ and “fraught with difficulties”.⁴⁰ However the aspect causing the most controversy was the word ‘while’ in section 5(2), which connects the substantive part of section 5(2) with the latter half (section 5(2)(a)-(c)).⁴¹ How ‘while’ is interpreted determines the weight to give these two parts of section 5(2). This is because treating ‘while’ as a subordinating conjunction would favour the bottom line approach,⁴² while interpreting it as a coordinating conjunction⁴³ suggests following an overall judgment approach (which will be discussed later).⁴⁴ Fisher was critical of this, as the interpretation of “while”, a word with no environmental relevance, effectively determines the direction of the RMA.⁴⁵

Consequently the decision how to interpret ‘while’ and therefore which approach to take to section 5(2) was passed onto local government and to the then Planning Tribunal (which later became known as the Environment Court.⁴⁶) Central government still has the power to intervene, or give guidance about resource management issues, for example by creating National Policy Statements, however this tool has been rarely utilised and not at all with respect to section 5.⁴⁷ Harris is critical of Parliament delegating such an important decision to

³⁸ Dormer, above n 13, at 9

³⁹ Ian Williams “The Resource Management Act 1991: Well Meant But Hardly Done” (2000) 9 Otago Law Review 673 at 677

⁴⁰ Harris, above n 2, at 51

⁴¹ Section 5(2) is commonly split into two parts: (1) The first part of section 5(2): “In this Act, sustainable management... their health and safety while –” (this part is known as the developmental function); (2) The subsections of section 5(2)(a)-(c) (this is the environmental function).

⁴² As the matters in section 5(2)(a)-(c) would have priority over the first part of section 5(2)

⁴³ This would mean the matters in the first part of section 5(2) are considered to have equal status as those matters in section 5(2)(a)-(c).

⁴⁴ Harris, above n 2, at 60-61

⁴⁵ D E Fisher “The Resource Management Legislation of 1991: a Juridical Analysis of Its Objectives” in *Resource Management* (Brooker & Friend Ltd, Wellington, 1991) at 13, as quoted in Williams, above n 39, at 678

⁴⁶ This change was made by the insertion of section 247 into the Resource Management Act 1991 in 1996

⁴⁷ There are currently only two National Policy Statements in force: the New Zealand Coastal Policy Statement (mandatory under section 57 RMA) and the National Policy Statement on Electricity Transmission. See Ministry for the Environment “National Policy Statements” <<http://www.mfe.govt.nz/rma/central/nps/index.html>> (accessed 3 September 2010)

local authorities and the courts, as he contends that in doing so, Parliament has effectively given its law making responsibilities to these bodies.⁴⁸

This criticism is highlighted by the fact that there would inevitably be disputes over the correct interpretation of sustainable management, as different groups in society would strive to have it interpreted in the way most beneficial to them.⁴⁹ It was therefore up to the decision maker to reconcile these differing views.⁵⁰ Despite this criticism, Upton is initially content to leave it up to the courts to determine how this broad concept will be interpreted.⁵¹ He did not dispute there was ambiguity in the section, as he said sustainable management does not have a “literal and absolute meaning”⁵² and nor is it a “concept whose meaning is immediately self-evident.”⁵³ This was why Parliament felt the need to define it at length, as guidance to those who have to interpret it.

These comments show that early on there was no real consensus on how section 5 was to be interpreted and applied. But what is evident from this discussion is the courts would have a major role in determining the scope of section 5.

1.3 Judicial interpretation of section 5

Given what has been said by commentators and the Minister for the Environment, this next section focuses on how section 5 has been judicially interpreted.

The first major judicial discussion of section 5 was in *New Zealand Rail v Marlborough District Council* (*‘New Zealand Rail’*).⁵⁴ In declaring that Part 2 matters should not be

⁴⁸ Harris, above n 2, at 68

⁴⁹ Kerry Grundy “Purpose and Principles: Interpreting Section 5 of the Resource Management Act” in P. Ali Memon and Harvey Perkins *Environmental Planning & Management in New Zealand* (Dunmore Press, Palmerston North, 2000) 64 at 66

⁵⁰ Peter Skelton and Ali Memon “Adopting Sustainability as an Overarching Environmental Policy: a Review of section 5 of the RMA” (March 2002) 10 *Resource Management Journal* 1 at 2.

For example, environmental groups favour the environmental bottom line approach compared with developers who want an approach where environmental factors are considered equally with social and economic factors: Chris Coklin *The Resource Management Act: Issues of Interpretation and Meaning* (Department of Geography, University of Auckland, Auckland, 1996) at 9

⁵¹ Until several years later when he is unhappy with the approach taken by the courts and calls for an amendment to section 5: Simon Upton, Helen Atkins and Gerard Willis “Section 5 re-visited: a critique of Skelton & Memon’s analysis” (November 2002) 10 *Resource Management Journal* 3 at 20; and John Milligan “Equity in the Resource Management Act: Section 5, and a Capability Approach to Justice” (2000) 4 *N.Z. J. Env’tl. L.* 245 at 250

⁵² Upton *Address to the Resource Management Law Association*, above n 31, at 4

⁵³ Upton “Purpose and Principle in the Resource Management Act”, above n 22, at 23

⁵⁴ *New Zealand Rail v Marlborough District Council*, above n 12

subjected to strict rules and principles of statutory interpretation in the aim of extracting a precise meaning, the High Court effectively distanced itself from the plethora of academic discussion which was doing exactly that. Simon Upton supported this broad interpretation of section 5,⁵⁵ however he did not agree with the effect it had in setting in place the movement towards the overall broad judgment approach to section 5.

Two other significant cases in the same year as *New Zealand Rail* can however be seen as following Upton's environmental bottom line approach. The Planning Tribunal in *Foxley Engineering Limited v Wellington City Council* said that sections 5(2)(a)-(c) are "cumulative safeguards...which must be met before the Act's purpose is fulfilled."⁵⁶ There was a statement to a similar effect in *Campbell v Southland District Council*.⁵⁷

Despite these two cases and Parliament's intention to create an environmental bottom line (as evident through Upton's statements), subsequent courts have made it clear that as this intention is not explicit in the legislation, they do not have to follow it. This is because these absolute bottom lines are not always appropriate, as it is sometimes necessary for some compromise to be made on the factors in section 5(2)(a)-(c).⁵⁸ This is arguably allowed by the inclusion of "mitigating" in section 5(2)(c), as this contemplates some adverse effects from a proposal can occur.⁵⁹ As a result, an overall broad judgment approach to section 5(2) has emerged, whereby the developmental interests in the first part of section 5(2) may sometimes override the environmental interests found in section 5(2)(a)-(c). This approach weighs all the factors in section 5(2) according to the matters in the case, with no automatic priority given to environmental matters. Therefore the contentious word "while" has been interpreted by the courts as a co-coordinating conjunction.⁶⁰

This approach evolved out of several leading EC decisions. One of these cases was *North Shore City Council v Auckland Regional Council*,⁶¹ ('*North Shore City Council*') where the EC expanded *New Zealand Rail*'s broad approach to interpreting section 5 into an the overall

⁵⁵ Upton *Address to the Resource Management Law Association*, above n 31, at 5

⁵⁶ *Foxley Engineering Limited v Wellington City Council* PT Wellington W12/94, 16 March 1994 at 40

⁵⁷ *Campbell v Southland District Council* PT Wellington W114/94, 14 December 1994

⁵⁸ *J F Investments Limited v Queenstown Lakes District Council* EC Christchurch C48/06, 27 April 2006 at [19]

⁵⁹ *Trio Holdings Limited v Marlborough District Council* [1997] NZRMA 97 at 116

⁶⁰ This was confirmed in *Long Bay-Okura Great Park Society Incorporated v North Shore City Council* EC Auckland A078/08, 16 July 2008 at [273]

⁶¹ *North Shore City Council v Auckland Regional Council* [1997] NZRMA 59

broad judgment approach. This involves considering the conflicting considerations in section 5(2) according to “the scale or degree of them, and their relative significance or proportion in the final outcome.”⁶² This approach is reiterated in *Kiwi Property Management v Hamilton City Council* where the EC held that the two functions in section 5(2) (developmental and environmental) are of equal importance.⁶³ In fact, the Planning Tribunal in *Royal Forest and Bird Protection Society of New Zealand Incorporated v Manawatu-Wanganui Regional Council* rejected the bottom line approach, as it was held this was not actually the intention of the provision.⁶⁴

The trend towards incorporating the overall judgment approach shows that despite the attempts by Upton to give environmental matters primacy over other section 5 matters, this could not occur on a correct reading of the statute. While Parliament might make the law, it is up to the courts to interpret it and they are under no obligation to follow the directions given in Upton’s third reading speech.⁶⁵ It is clear from *North Shore City Council* the EC did in fact read and apply the section in line with what it actually says, rather than for what it was intended to say.⁶⁶

While the support for the overall judgment method is overwhelming, as it is acknowledged as the most widely accepted interpretation of section 5,⁶⁷ it is not conclusive. This method has been criticised as rendering “the concept of sustainable management virtually meaningless outside the facts” of a particular case.⁶⁸ This is because, while taking into account the relevant RMA provisions, as well as plans or policy statements, it will be up to the individual decision maker to determine the weight it will give to the competing factors in a case and this

⁶² Ibid, at 94

⁶³ *Kiwi Property Management v Hamilton City Council* (2003) 9 ELRNZ 249 at [43]

⁶⁴ Despite what has been said by Simon Upton: *Royal Forest and Bird Protection Society of New Zealand Incorporated v Manawatu-Wanganui Regional Council* [1996] NZRMA 241 at 269. There was a similar rejection of this approach in *Mangakahia Maori Komiti v Northland Regional Council* [1996] NZRMA 193 at 215

⁶⁵ As Cooke P said in *MacKenzie v Attorney-General* [1992] 2 NZLR 14 at 19: “While this Court is prepared to look at Hansard if real help can be obtained thereby, ... [however] reference to Hansard in argument is neither necessary nor desirable as a matter of course.” Also, MacKay J in *Wellington International Airport Limited v Air New Zealand* [1993] 1 NZLR 671 at 675 said that, after being invited to determine the purpose of a provision from Hansard and other Parliamentary materials, “it is inappropriate to do this. The law is to be found in the enactment itself, and not in the subjective intentions of the draftsman or of the department, nor in those of the Minister or of other members of the legislature

⁶⁶ Skelton and Memon, above n 50, at 5

⁶⁷ Williams, above n 39, at 682; Skelton and Memon, above n 50, at 6

⁶⁸ Williams, above n 39, at 682

will change from case to case.⁶⁹ While this is correct, it is a consequence of Parliament's preference to delegate decision making to a local level, as they saw local authorities as better informed to make decisions relating to their own area.⁷⁰ Arguably this approach should not be criticised, as long as all decision makers interpret the components of section 5 (and the rest of the RMA) consistently.

Another criticism of the overall broad judgment approach is that it causes sustainable management to theoretically have a "bias towards tangible economic benefits over the intangible environmental concerns."⁷¹ This is because if all factors are to be weighed up and considered, it is easier to account for economic benefits because they can be quantified, while it is impossible to put a numerical value on adverse environmental effects. Regardless of this criticism, in practice the EC has often held that economic benefits do not always need to be quantified, as increased economic activity can be beneficial in itself.⁷² This is no different from a finding that increased general social or cultural well-being⁷³ are a beneficial factor, or adverse effects on the environment are a negative factor in a decision under the RMA. Therefore this negates this criticism to an extent.

Despite this criticism, the overall broad judgment approach remains the most favoured approach for the courts in interpreting section 5(2).

1.4 Summary

As evident from the above judicial and academic discussions of section 5, Simon Upton's bottom line approach has not been followed. This is largely because the environmental focus of this approach is impeded by the inclusion of other non-environmental considerations in section 5.⁷⁴ These are the references to social, economic and cultural well-being in section

⁶⁹ The EC in *J F Investments Limited v Queenstown Lakes District Council*, above n 58, describes this decision to be made in every case as a "choice or compromise...between limiting the economic and social conditions of people by avoiding the adverse effects of their activities or enabling an individual's well-being by allowing some adverse environmental effects to occur, duly remedied or mitigated to the appropriate extent." ([23]).

⁷⁰ John Hassan and Hannah Sargisson *New Zealand Law Society Seminar: The Resource Management - an update* (New Zealand Law Society, Wellington, 1996) at 10

⁷¹ Nicola When "A history of New Zealand environmental law" in Eric Pawson and Tom Brooking *Environmental Histories of New Zealand* (Oxford University Press, Melbourne, 2002) 261 at 273

⁷² For example, see *Intercontinental Hotel v Wellington Regional Council* EC Wellington W015/08, 14 March 2008 at [118]. As will be elaborated on further in chapter 2, one of the two approaches to considering the applicant's economic well-being is to look at the general increase in this well-being, rather than try to calculate what this increase will be.

⁷³ From section 5(2)

⁷⁴ Dormer, above n 13, at 9

5(2), as well as the inclusion of “social, economic, aesthetic, and cultural conditions” in the section 2 definition of “environment”. So although the political intention may have been to give precedence to environmental protection over other objectives, this cannot be derived from the way sustainable management has been broadly defined and subsequently interpreted by the courts.⁷⁵ The wide scope of section 5(2) has led to the creation of an overall broad judgment approach, which gives judges considerable freedom to treat section 5 factors as they see appropriate in each individual case. As a result, sustainable management has been achieved in many different ways by different courts.⁷⁶ The remainder of this paper will discuss the effect this has had on economic well-being, as a particular component of section 5.

⁷⁵ Memon, above n 16, at 98

⁷⁶ This was stated by the EC in *Unison Networks Limited v Hastings District Council* EC Wellington W011/09, 23 February 2009 at [130]

CHAPTER 2: Economic well-being

2.1 Economic well-being, *New Zealand Rail* and resource consents

Economic effects are clearly relevant to decision making under the RMA.⁷⁷ However the way in which they are taken into account is complex and consequently it is difficult to distil clear and consistent principles from the case law.⁷⁸ This is particularly accurate with respect to how economic well-being in section 5(2) has been applied. The discussion of the RMA's history and the movement towards an overall broad judgment approach is crucial in understanding how and why this has occurred. This chapter will explain how Greig J's warning in *New Zealand Rail* to not extract a precise meaning out of the words and phrases in Part 2 has led to inconsistent interpretations of economic well-being. This is because economic well-being has been an important factor in many decisions, however it is not defined in the RMA, nor has any court conclusively tried to define it, so there have been many different, often contrasting approaches to it. The EC in *Long Bay-Okura Great Park Society Incorporated v North Shore City Council* held that Greig J's warning was the likely reason why subsequent courts have been reluctant to go into the relationship between section 5(2) and sections 6-8⁷⁹ and it is contended the same reasoning applies with respect to the traditional reluctance to analyse economic well-being in any depth.

The rest of this paper will largely focus on how economic well-being has been dealt with in decisions regarding resource consent applications. Consent authorities⁸⁰ must decide whether to grant resource consent based on the criteria in section 104 of the RMA (which is subject to Part 2). This criteria includes having regard to the actual and potential effects⁸¹ of the

⁷⁷ *New Zealand Rail v Marlborough District Council*, above n 12, at 88

⁷⁸ Don Turley "Available Techniques" in John Milligan and Don Turley *New Zealand Law Society Seminar: Resource Management: emergent themes and available techniques* (New Zealand Law Society, Wellington, 1998) 23 at 69

⁷⁹ *Long Bay-Okura Great Park Society Incorporated v North Shore City Council*, above n , at [305]

⁸⁰ Section 2 Resource Management Act 1991 definition: **consent authority** means a regional council, a territorial authority, or a local authority that is both a regional council and a territorial authority, whose permission is required to carry out an activity for which a resource consent is required under this Act. While this definition does not include the Environment Court, it too has the ability, on appeal, to grant or refuse resource consent: section 290

⁸¹ This is from section 104(1)(a). There is a wide definition of "effect" in section 3 of the Resource Management Act 1991.

proposal, any relevant documents⁸² and any other reasonably necessary and relevant matter.⁸³ Economic well-being can be considered as a factor in section 104, for example, it could be seen as an actual or potential effect on the environment.⁸⁴ This has routinely occurred.⁸⁵

Section 104 is generally the starting point for a consent authority in determining an application, unless the proposal is deemed to be a non-complying activity under the relevant Plan.⁸⁶ Once the section 104 factors have been considered, courts look at whether, on an overall broad judgment approach, the proposal will promote sustainable management (the purpose of the RMA from section 5, which includes economic well-being). Therefore there are several ways in which economic well-being can be factored into a decision. But it is only one of the many competing matters the court will weigh up in determining a case.

The focus of the rest of this paper is not on how much weight economic well-being has been given in determining the outcome of a case, as this is often impossible to discern from a judgment. Instead, the intention is to highlight how it has been interpreted and applied as a factor in determining a case, as this can be more easily established.

2.2 Defining private and public economic well-being

Many perceive economics to be all about money. According to Judge Jackson, this has meant some people do not approve of the use of economics in the RMA, as the RMA should be about the environment and not money.⁸⁷ However this is a narrow minded approach, as economics is broadly about the allocation of resources,⁸⁸ and “[m]oney is simply a claim on

⁸² These are defined in section 104(1)(b) as: any relevant provisions of - (i) a national environmental standard; (ii) other regulations; (iii) a national policy statement; (iv) a New Zealand coastal policy statement; (v) a regional policy statement or proposed regional policy statement; (vi) a plan or proposed plan;

⁸³ Section 104(1)(c)

⁸⁴ As the definition of environment in section 2 of the Resource Management Act includes the economic conditions which affect ecosystems, which include people and communities: *New Zealand Rail v Marlborough District Council*, above n 12, at 88

⁸⁵ For example in *PVB New Zealand Group Limited v Kapiti Coast District Council* EC Wellington W064/06, 9 August 2006, the EC (at [17]) held that a positive effect under section 104 of granting a land use consent to store imports in a rural barn was that it would enable the applicant and his employees to be able to provide for their economic well-being. Other examples of where economic benefits to the applicant have been taken account of as a positive effect under section 104(1)(a) are: *New Zealand Historic Places Trust v Waitaki District Council* EC Christchurch C034/08, 3 April 2008 at [88] and *Berry v Gisborne District Council* EC Wellington ENV-2009-WLG-3, 10 March 2010 at [19]

⁸⁶ Here the proposal must first pass the threshold test in section 104D before it can then be considered under section 104.

⁸⁷ J R Jackson “The Role of Economics in the RMA (or vice versa)” (1999) 3 N.Z. J. Env'tl. L. 19 at 21

⁸⁸ Richard Posner *Economic Analysis of Law* (Little Brown and Company, Boston, 1992) at 7

resources.”⁸⁹ To better understand this, Judge Jackson has said that resource management is a subset of economics.⁹⁰ This is because the RMA is only concerned with natural and physical resources, while economics deals with all resources.⁹¹

Despite this, the way economic well-being has largely been approached in resource consent decisions is by considering the monetary costs and benefits of the proposal and the flow on effects of these benefits and costs for the applicant and/or the wider community. Economic well-being has never been conclusively defined in any way, but for the purposes of this paper, it has been split into two different categories: private economic well-being and public economic well-being.

Private economic well-being relates to the private or direct impact on the applicant’s economic well-being from their proposed activity. This may be the revenue generated or the costs incurred from the proposal, which together determine the profitability and viability of the proposal.⁹² In contrast, public or indirect economic effects are issues arising from the applicant’s proposal that affect the economic well-being of those other than the applicant. Some examples of this are travel and congestion costs,⁹³ changes in employment⁹⁴ or loss of income due to the effects of the proposed activity.⁹⁵

2.3 The inconsistency surrounding private economic well-being

How the inconsistency arose

It is important to distinguish between public and private economic well-being to observe how the inconsistent application of private economic well-being has arisen. It is common for the decision maker to take into account the effects on public economic well-being from a

⁸⁹ Jackson, above n 87, at 21; and Posner, above n 88, at 7

⁹⁰ *Marlborough Ridge Limited v Marlborough District Council* [1998] NZRMA 73 at 86

⁹¹ Jackson, above n 87, at 22

⁹² This is drawn from the basic economic concept that revenue minus costs equals profits: Robert H Frank and Ben S Bernake *Principles of Economics* (McGraw-Hill/Irwin, New York, 2004) at 145

⁹³ *Transit New Zealand v Auckland Regional Council* EC Auckland A100/2000, 18 August 2000 (A new highway would make travelling more efficient and safer for those that use it).

⁹⁴ *Exide Pollution Action Group Incorporated v Wellington Regional Council* [2006] NZRMA 293 (EC) (A new battery recycling plant was granted resource consent partly because the direct employment opportunities it created would enable some people in the community to provide for their economic well-being).

⁹⁵ *Te Aroha Air Quality Protection Appeal Group v Waikato Regional Council (No 2)* (1993) 2 NZRMA 574 (PT) (Resource consent for a beef by-products rendering plant was refused partly because of the potential negative economic effect any escaping odour would have on neighbouring businesses).

proposal.⁹⁶ For example, the benefits to public economic well-being from a proposed new motorsport park were a significant factor in *Armstrong v Central Otago District Council*.⁹⁷ These economic benefits included an increase in the amount of tourists drawn to Cromwell because of the park. This would increase the demand for accommodation and other hospitality services (thereby increasing the economic well-being of those who supply these services). Often the court will not attempt to quantify these benefits, as there is no way in which they can predict them, other than in general terms.⁹⁸

However the same consistency does not exist with respect to private economic well-being, as it has been considered by the courts in some cases, but not in others. There are two ways in which private economic well-being has been taken into account. Firstly, the court may consider that in general, a proposal will increase an applicant's economic well-being, as it might allow them to earn an income (this will be referred to as 'general private economic well-being'). With this approach there is no attempt to quantify how much this increase in economic well-being would be, as it is enough that there will be a general increase.⁹⁹

The alternative method is for the court to consider and quantify the specific benefits or costs to private economic well-being. For example, this could be done to determine how much a proposal will cost to develop and run, how much revenue it will generate once it is an operational business and the profits the applicant stands to make from this ('the narrower considerations'). The court will commonly take this approach to determining the effects on private economic well-being if it wants to establish whether a proposal is financially viable. Viability is typically only an issue raised by a party who is opposed to the proposal, as they argue the unviable activity will have a detrimental effect on their well-being.¹⁰⁰ There is no

⁹⁶ Although the court cannot consider the effects of trade competition on a trade competitor of the applicant. See: section 104(3)(a) and sections 308A-308I of the Resource Management Act which prohibit this. See also: *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] 2 NZLR 597 (SC) at 641-642

⁹⁷ *Armstrong v Central Otago District Council* EC Christchurch C131/08, 26 November 2008 at [48]-[49]

⁹⁸ For example, the EC held that although there would be public economic benefits from the proposed marine education centre as it would bring people to Wellington and therefore generally cause an "increased visitor spend" in the region, but it could not (and did not) predict what the extent of this benefit would be: *Save the Point Incorporated v Wellington City Council* EC Wellington W082/07, 20 September 2007 at [220]

⁹⁹ This occurred in *Intercontinental Hotel v Wellington Regional Council*, above n 72, at [118]. The EC held that increased economic activity is of itself beneficial and this does not need to be quantified. This was with respect to economic benefits for the community at large, but there is no reason why the same logic cannot be applied to private economic well-being.

¹⁰⁰ For example, in *New Zealand Rail*, above n 12, the appellant (New Zealand Rail) argued the applicant's proposed port was not viable as it would cost more than the applicant was estimating. The appellant argued the applicant would pass these increased costs onto them which would be to the detriment of their economic well-being.

direction from the RMA as to which approach to take and indeed whether private economic well-being is even to be considered.

Therefore it is up to those who interpret this provision to decide this. The starting point for the judicial discussion on this issue again begins with the High Court decision of *New Zealand Rail*. In this case, there was a dispute over whether or not the proposed port would be financially viable. The High Court held that some economic considerations are relevant because of the reference to “economic well-being” in section 5(2), the efficient use and development of resources in section 7(b) and as effects of allowing an activity under section 104(1). However these are only to be considered in the sense that they involve the “broad aspects of economics.”¹⁰¹ What is meant by this phrase is unclear as the High Court does not clarify what it is referring to.

The Court goes on to say financial viability is not something which the Act explicitly provides for, therefore “the narrower consideration of financial viability which involves the consideration of the profitability or otherwise of a venture and the means by which it is to be accomplished ... are for the applicant developer and, as the Planning Tribunal appropriately said, for the boardroom.”¹⁰² This clearly prohibits the narrower considerations of private economic well-being being taken into account. However it is unclear whether considering the broad aspects of economics allows for general private economic well-being to still be taken into account, or whether the Court is attempting to bar all consideration of private economic well-being (that is, both methods of determining private economic well-being). There has been no other express High Court authority on this point, other than a statement in *Smith Chilcott v Martinez & Auckland City Council* that “[j]udges must be wary of getting into issues of financial viability.”¹⁰³

The EC in *Marlborough Ridge Limited v Marlborough District Council* (‘*Marlborough Ridge*’) noted the direction in *New Zealand Rail* to only consider broad economic aspects is reasonably ambiguous.¹⁰⁴ It held instead that both the broad and the narrower economic

¹⁰¹ *New Zealand Rail v Marlborough District Council*, above n 12, at 88

¹⁰² *Ibid*, at 88

¹⁰³ *Smith Chilcott Limited v Martinez & Auckland City Council* HC Auckland AP74-SW/00, 4 September 2000, at [27]. The High Court’s decision was confirmed by the Court of Appeal: *Smith Chilcott Limited v Auckland City Council* [2001] 3 NZLR 473, although there was no confirmation of the statement about financial viability by the Court of Appeal as this was not a relevant issue on appeal.

¹⁰⁴ *Marlborough Ridge Limited v Marlborough District Council*, above n 90, at 87

aspects should be relevant. But again there is no elaboration on what these aspects entail, although the EC does hold that unlike the High Court in *New Zealand Rail*, “we have some doubts about whether it is impermissible or irrelevant to have regard to the benefits of a proposal for its promoter.”¹⁰⁵ This seems to suggest the Court could consider private economic well-being. However, unfortunately the EC concludes it does not need to decide on this point. This is the only case of note which has appeared to expressly disagree with *New Zealand Rail*, although clearly the Environmental Court has no authority to overrule the High Court decision of *New Zealand Rail*.

However *Marlborough Ridge* has subsequently been questioned in other EC decisions. The EC in *Lower Waitaki River Management Society Incorporated v Canterbury Regional Council* (*Lower Waitaki*) said they saw no reason for the doubts raised in *Marlborough Ridge* about *New Zealand Rail*.¹⁰⁶ This is an odd comment though, as both *Marlborough Ridge* and *Lower Waitaki* were presided over by Judge Jackson. But given that they were, it would seem Judge Jackson is answering the doubts he raised in *Marlborough Ridge* and deciding that it is not permissible to consider the benefits of the proposal for the applicant. This is in line with other comments in *Lower Waitaki*, as Judge Jackson declares it is not the Court’s concern whether or not the applicant makes a profit, the size of this profit, or the wisdom of their investment decision.¹⁰⁷

While it was already clear the Court would not consider the narrower considerations, this case can be seen as clarifying that “the broad aspects of economics” (from *New Zealand Rail*) also prohibits the Court from considering the applicant’s general economic well-being. This is because by saying the Court should not be concerned with whether or not the applicant makes a profit, this implies that it is also not interested in whether there will be a general increase in the applicant’s economic well-being.¹⁰⁸ The author has reached this conclusion because in this case there is no suggestion of calculating the profit or other benefits the applicant will receive, as the Court was not interested in even considering these matters as general private economic well-being issues.

¹⁰⁵ Ibid, at 89

¹⁰⁶ *Lower Waitaki River Management Society Incorporated v Canterbury Regional Council* EC Christchurch C080/09, 21 September 2009. This comment was as a footnote to [202]

¹⁰⁷ Ibid, at [202]

¹⁰⁸ This can be distinguished from the size of the profit (a ‘narrower consideration’), which the Court also prohibits from consideration.

While *Lower Waitaki* is a very recent decision, the conclusions it reaches can be traced through many previous decisions. For example, in *Todd Energy Limited v Taranaki Regional Council*, the EC said it was not for them to determine if the applicant had made a prudent economic decision to seek resource consent for a dual fuel energy centre. Therefore it would not consider issues surrounding whether the proposal would be profitable and viable, unless the applicant's decision resulted in effects on the environment (and on the well-being of the community).¹⁰⁹ This shows the Court was only concerned with the effects on public economic well-being, as it would not consider the effect of the activity on the applicant's private economic well-being, even in general terms.

The justifications for this approach

As demonstrated at the beginning of this chapter, it is possible in theory to distinguish between the general approach and the narrower considerations of private economic well-being. However these cases have shown that in practice, it is difficult for the court to differentiate between them once it starts to analyse these issues. As a result, a general prohibition on considering all private economic well-being has emerged through these cases. This general prohibition has occurred because the court does not want to get involved with the narrower considerations which involve the business affairs of the applicant. This is because the court does not regard itself as having the business acumen to be able to determine whether a proposal will be profitable and viable.¹¹⁰ Consequently, the court views this as a matter for the applicant to determine and if the applicant has decided the proposal will be viable, then the court will not second guess this.

There has also been held to be no justification for considering the general economic well-being of the applicant, as economic theory presumes all people are rational maximisers of their own utility. Therefore an individual will take the course of action which provides the most optimal outcome.¹¹¹ This implies a person will only make a rational decision, for example, to apply for resource consent for a proposal that will be economically viable. On this reasoning, it would seem irrelevant to consider and weigh into the balance the fact that in general terms the applicant's economic well-being would be better off as a result of their

¹⁰⁹ *Todd Energy Limited v Taranaki Regional Council* EC Wellington W101/05, 7 December 2005 at [19]

¹¹⁰ This was a significant reason for the EC refusing to look at any aspect of the applicant's economic in the EC in both *Save The Point Incorporated v Wellington City Council*, above n 98, at [221] and *Todd Energy Limited v Taranaki Regional Council*, above n 109, at [19]

¹¹¹ Frank and Bernake, above n 92, at 120

proposal, as this should occur in all cases. This reasoning was evident in *Koens v Dunedin City Council* as the EC did not place any real weight on the fact the applicant would be able to provide for their general economic well-being from gaining a subdivision resource consent.¹¹² This is because all subdivisions increase the applicant's general economic well-being to some extent.

Therefore as a result of *New Zealand Rail* and the difficulty to distinguish between broad and narrow economic effects to the applicant, a general trend has emerged in EC cases prohibiting the consideration of all forms of private economic well-being.

However...

From the above discussion it would seem there is substantial authority to exclude all private economic well-being from consideration. But there is nothing in section 5 which confirms there should be such a distinction between private and public economic well-being. As a result, there have been many instances in which the court has considered private economic well-being, if only in a general way. This may be due to the fact section 5(2) refers to "people and communities", rather than just communities. This is important as it was said in *McNamara v Tasman District Council* that "the Act differentiates between people and communities. We consider peoples' interests such as the McNamaras [the applicant] are not to be submerged in the interests of the community without good reason."¹¹³ Alternatively, it may be because the main (and sometimes only) benefits to economic well-being will occur to the applicant, therefore it is easier to discern these benefits.

Two examples of this are *Hodson v Wanganui District Council*¹¹⁴ and *Martin v Far North District Council*,¹¹⁵ which were both resource consent applications for small meat processing plants. In both these cases, the decision maker weighed in the applicant's favour the general increase in their economic well-being from their proposal, presumably by way of revenue which their business would generate for them. Other examples of the consideration of private economic well-being include weighing in the financial benefit to a commercial applicant from getting consent to attach advertising signs on their building¹¹⁶ and the rental profits to

¹¹² *Koens v Dunedin City Council* EC Christchurch C020/98, 10 March 1998 at 11

¹¹³ *McNamara v Tasman District Council* EC Wellington W072/99, 16 July 1999 at [124]

¹¹⁴ *Hodson v Wanganui District Council* PT Auckland A36/94, 13 May 1994

¹¹⁵ *Martin v Far North District Council* EC Auckland A097/99, 17 September 1999

¹¹⁶ *JBH Investments Limited v Auckland City Council* EC Auckland A140/06, 3 November 2006 at [59]

the applicant as a result of getting consent to convert a wharf-side building into residential accommodation.¹¹⁷ There was no attempt in these EC cases to calculate what the exact benefits to the applicant would be. This is because it was sufficient that there would be a general increase in the applicant's economic well-being. There is also no reference to the prohibition in *New Zealand Rail* on considering anything but broad economic aspects (as this prohibition has subsequently been expanded by other EC cases¹¹⁸ to include the applicant's general economic well-being).

These cases which consider the applicant's general economic well-being, as well as many other EC cases which take the same approach,¹¹⁹ clearly contrast with the refusal to consider such issues of private economic well-being in *New Zealand Rail* and *Lower Waitaki*. This highlights the inconsistency that has arisen as a result of there being no definition of economic well-being and no apparent guidance on how it is to be interpreted. The EC has been able to overlook the High Court decision of *New Zealand Rail* in some instances and consider general private economic well-being, as the High Court did not specifically prohibit this (as only the narrower considerations are arguably barred by this case). This is despite other EC cases expanding the consideration of broad economic aspects to prohibit any private economic well-being being taken into account. So rather than any definitive authority on this point, there is instead a plethora of inconsistent EC decisions. These decisions only hold persuasive value for the next EC, so this Court then has the ability to decide either way, effectively depending on what evidence and submissions the parties choose to put before it.

2.4 Current difficulties as a result of this inconsistency

In the author's view, the reason why the inconsistent interpretation of economic well-being is a significant issue is because of the difficulties it creates for those who rely on the RMA. This is because the current situation does not give the requisite certainty in the law which someone contemplating whether to apply for a resource consent would expect. It also does not give the necessary guidance to decision makers that is expected from a purpose section.

¹¹⁷ *New Zealand Historic Places Trust v Waitaki District Council* EC Christchurch C034/08, 3 April 2008 at [88]

¹¹⁸ Such as *Todd Energy Limited v Taranaki Regional Council*, above n 109, and *Lower Waitaki River Management Society v Canterbury Regional Council*, above n 105

¹¹⁹ Other examples in which private economic well-being has been a factor in the overall decision are: *Neil Construction Limited v Rodney District Council* EC Auckland A35/06, 27 March 2006 at [82]; *Director-General of Conservation v Wairoa District Council* EC Wellington W081/07, 19 September 2007 at [56]; *Iniatu Limited v Palmerston North City Council* EC Wellington W103/07, 19 December 2007 at [113]

Lack of certainty for the applicant

An applicant deserves to have some confidence in knowing what will and will not be taken into account by the local authority when they apply for resource consent and also if they appeal this decision to the EC. They gain this confidence through the provisions of the RMA which guide the consent process, such as section 5 and section 104. For example, when applying for resource consent for a commercial development or subdivision, the applicant can peruse the provisions of the relevant plan to determine the zone their proposed development is in and therefore the status of their activity in this zone.¹²⁰ This gives some initial indication as to the factors the consent authority will consider. Therefore plans are important in creating certainty and as the Supreme Court noted, allow “[p]eople and communities to order their lives under it with some assurance.”¹²¹

An applicant will also be aware the consent authority will take into account any actual or potential effects on the environment and any other matters it considers necessary.¹²² This, as well as on an overall judgment of the case under section 5, is where the applicant might expect any potential economic benefit they will receive from the development to be taken into account. The court has taken general benefits to private economic well-being into account in many situations, including where the applicant seeks to subdivide their land,¹²³ or set up a business on their land.¹²⁴ Given this, if an applicant was to argue the benefits to their economic well-being should be taken into account, they could duly expect it would be.

However there have been instances where issues involving private economic well-being have been expressly argued and the court refuses to take this into account. While this is evident from the earlier discussion in this chapter, two contrasting examples clearly highlight this point. In *Leonard v Kaipara District Council*, the EC granted the applicant resource consent to subdivide her property, but would not take into account her argument that allowing the

¹²⁰ As the consent authority must have regard to the relevant statutory documents: section 104(1)(b) of the Resource Management Act 1991

¹²¹ *Discount Brands Ltd v Westfield (New Zealand) Ltd*, above n 96, at 609

¹²² Section 104(1)(a)

¹²³ *McLauchlan v Hutt City Council* EC Wellington W062/08, 16 September 2008; *Canal v Rodney District Council* EC Auckland A067/07, 9 August 2007, *Neil Construction Limited v Rodney District Council*, above n 119

¹²⁴ *Berry v Gisborne District Council*, above n 85; *KRJR Properties Limited v Auckland City Council* EC Auckland A088/08, 4 August 2008; *Maskill v Palmerston North City Council* EC Wellington W037/06, 18 May 2006

subdivision would enable her to provide for herself and her young family.¹²⁵ In contrast, the EC in *Intercontinental Hotel v Wellington Regional Council* seemed to be surprised that, considering the large economic benefits in this case, the applicant only argued that the proposed hotel would have economic benefits to the community and did not mention the benefits it would have to the applicant's own private economic well-being.¹²⁶ In the final process of weighing up all the factors in the case, the court went on to have regard to the economic benefits to the applicant, despite the applicant's failure to argue this.¹²⁷

These are notable examples of the difficulty facing the applicant in deciding whether they should go to the expense of presenting evidence to argue their proposal will have benefits to their economic well-being, as there is a chance the court will refuse to consider this. It is for this reason that it is contended there should be more certainty than this as an applicant deserves to have some confidence that there will be a consistent interpretation and application of the factors the consent authority or court will consider. This is regardless of the fact the applicant does not know how much weight these factors will be given in the final decision.

Lack of guidance for the decision maker

Another reason why the applicant deserves more certainty is with respect to the function of a purpose section. Burrows believes there are two different types of purpose sections.¹²⁸ One of these is a section which acts as a summary of what the Act as a whole says and the other type is a section which is used to convey the social, economic or other end that Parliament was hoping to achieve with the Act. Simon Upton believes section 5 is an example of the latter type of purpose section as it sets out the end that is sought – this being sustainable management. This end has been labelled as a goal rather than a directed outcome, as the purpose is to “promote” sustainable management.¹²⁹

¹²⁵ *Leonard v Kaipara District Council* EC Auckland A078/06, 20 June 2006 at [47]

¹²⁶ *Intercontinental Hotel v Wellington Regional Council*, above n 72, at [114]

¹²⁷ *Ibid*, at [396]

¹²⁸ JF Burrows *Statute Law in New Zealand* (3rd ed, Lexis Nexis, Wellington, 2003) at 146-147

¹²⁹ Harris, above n 2, at 59. This is compared to a similar purpose section in the Fisheries Act 1996. Section 8(1) says the purpose of the Fisheries Act is to “*provide for the utilisation of fisheries resources while ensuring sustainability.*” [own emphasis.] Ensure is clearly a higher standard than “promote” from section 5(1) of the RMA: Marguerite Quin “The Fisheries Act: Context, Purpose and Principles” (1998) 8 Auckland U L Rev 503 at 527-528

Even though sustainable management maybe more of a goal,¹³⁰ it is still important in the overall scheme of the RMA in providing direction to decision makers. As Cooke P in *Northland Milk Vendors Association Incorporated v Northern Milk Limited* said, “it can be helpful, even crucial, to have statements of general principle or purpose in the Act itself.”¹³¹ This is because one of the roles of a purpose section is to provide guidance to the court in interpreting and filling gaps in a statute, for example, to resolve any ambiguity in a section. However the courts must take great care in doing so as they cannot take it upon themselves to make policy or law in place of Parliament.¹³²

The author contends that section 5 was politically intended to guide decision makers to interpret the Act in line with the “broad philosophy”¹³³ of greater environmental protection in the RMA.¹³⁴ Although the broad nature of section 5 suggests it was not intended to be subjected to strict interpretation,¹³⁵ there still needs to be uniformity in how the components within it are interpreted. This is necessary because a purpose section will not provide adequate guidance to decision makers if the components within it are not interpreted consistently. This is because this will lead to the purpose section being applied in different ways, thus creating a line of inconsistent case law. Therefore it is evident that given the varying case law which has resulted from the differing interpretations of economic well-being, there is a valid argument that the purpose section in its current form cannot provide adequate guidance.

Therefore clearly the economic well-being component of section 5(2) is causing current difficulties for those that rely on it.

¹³⁰ Although it has been argued that section 5 does not contain any measurable goals or standards and is therefore unhelpful and indeterminate: Janet McLean “New Zealand's Resource Management Act 1991: Process with Purpose” (1992) 7 Otago Law Review 538 at 555. Arguably this is correct to the extent that there is no indication given by section 5 as to when one will know that sustainable management has been achieved, but this is not how the section should be interpreted, as it is instead a guide as to how (not when) sustainable management is to be achieved.

¹³¹ *Northland Milk Vendors Association Incorporated v Northern Milk Limited* [1988] 1 NZLR 530 at 537

¹³² Burrows, above n 128, at 141

¹³³ Upton, “Purpose and Principle in the Resource Management Act”, above n 22, at 31

¹³⁴ This is in comparison to previous environmental legislation: *Machinery Movers Limited v Auckland Regional Council* [1994] 1 NZLR 492 at 499

¹³⁵ As the High Court held in *New Zealand Rail v Marlborough District Council*, above n 12, at 86

2.5 The way forward

In light of the above discussion it is asserted that there needs to be a change, as the current inconsistent approach to applying economic well-being cannot continue. It has been said by many commentators after the RMA was enacted that the Act, and in particular section 5, would be given more explicit meaning through the ongoing debate over how it should be interpreted.¹³⁶ As the discussion of economic well-being in this chapter has revealed, the RMA has been in force nearly twenty years and section 5 has not been given the explicit meaning some thought it would. Instead there is growing inconsistency in how it is interpreted. This therefore justifies an amendment to the section. There have been repeated amendments to the RMA, but section 5 remains in its original form, despite some suggestions it should be clarified.¹³⁷ The following two chapters will examine arguments for and against including private economic well-being, in an attempt to clarify what the courts can take into account under the economic well-being component of section 5(2).

¹³⁶ Grundy, above n 49, at 66

¹³⁷ Kirkpatrick, above n 3, at 42; Upton, Atkins and Willis, above n 51, at 20

CHAPTER 3:

The reasons to include private economic well-being

This chapter will propose three arguments in favour of including private economic well-being as a matter which can be considered by the courts in section 5(2). These arguments will focus on the wording of the section as it is arguably wide enough to include private economic well-being.

3.1 Nothing in the RMA supports the line taken by *New Zealand Rail* and later cases

On a literal reading of the statute, there is nothing to suggest private economic well-being should be excluded in the manner supported by *New Zealand Rail* and the subsequent cases which expanded on this decision. This is why in some instances, as evident by the cases discussed in chapter 2, it has been taken into account, even if only in terms of providing for general economic well-being. But as Greig J notes in *New Zealand Rail*, there is nothing which expressly provides for matters such as financial viability to be considered either. This is why the High Court would only look at the broad economic effects of the proposal and not issues specific to the applicant, such as financial viability.¹³⁸ It is submitted that if an argument advancing the inclusion of private economic well-being is to succeed, *New Zealand Rail* would have to be held to be incorrect in determining this.

There is a stronger argument for including private economic well-being as the Act does not define economic well-being. Therefore this phrase is open to interpretation by the courts to include in it what see appropriate, within the broad scope of section 5. It is harder to justify Grieg J's argument that an issue of private economic well-being, such as viability, should not be taken into account just because the section does not expressly provide for it. Section 5 is incredibly wide and therefore to expressly exclude these matters seems contrary to the advice given in *New Zealand Rail* not to extract a precise meaning from the matters in Part 2. This is because the High Court was indeed subjecting economic well-being to a strict interpretation when it held viability could not be considered because it was not mentioned. It is on this basis *New Zealand Rail* should be held to be incorrect in prohibiting private economic well-being being taken into account.

¹³⁸ *New Zealand Rail v Marlborough District Council*, above n 12, at 88

On a related note, there is also nothing which expressly allows the applicant's social or cultural well-being to be considered. However these matters have been considered numerous times without the same controversy that surrounds private economic well-being. For example, the detriment to the applicant's social well-being from a large tree on their property was a major factor in the EC granting them resource consent to remove it in *The John Woolley Trust v Auckland City Council*.¹³⁹ The reason there has been no such controversy in considering the applicant's social or cultural well-being is because these two factors cannot be specifically quantified and instead require a value judgment as to whether they will be impacted on. The court is clearly more comfortable with making this value judgment. Therefore social and cultural well-being are not in the same position as economic well-being, as the court often refuses to consider the latter as it would have to quantify it in order to take it into account and it is not comfortable doing this.¹⁴⁰

The EC in *Judges Bay Residents Association v Auckland Regional Council* said the Act contains no preference for enabling economic well-being over social and cultural well-being and section 5(2)(a),(b) matters.¹⁴¹ Clearly the reverse should also be correct. Therefore excluding private economic well-being, while still factoring in an applicant's social or cultural well-being, would be giving the latter preference over economic well-being. This, as well as the fact section 5 does not expressly exclude private economic well-being, supports its inclusion as a factor in decision making under the RMA.

3.2 Consistent decision making with benefit to both big and small applicants

This argument is advanced on the premise that in general, the court's unwillingness to delve into private economic well-being mostly occurs in cases involving either large proposals, a large commercial applicant, or most likely a combination of both.¹⁴² In these situations, the proposals require complex business decisions with significant capital expenditure. But the court leaves these matters to the applicant, as it will not get involved in viability or profitability issues, which are clearly the key components to the applicant's economic well-

¹³⁹ *The John Woolley Trust v Auckland City Council* (2007) 13 ELRNZ 243 at [93]

¹⁴⁰ This unwillingness is evident in: *Save The Point Incorporated v Wellington City Council*, above n 98, at [221] and *Todd Energy Limited v Taranaki Regional Council*, above n 109, at [19]

¹⁴¹ *Judges Bay Residents Association v Auckland Regional Council* EC Auckland A72/1998, 24 June 1998 at [457]

¹⁴² Examples of this are the proposed port in *New Zealand Rail*, above n 12; a marine education centre in *Save the Point Incorporated v Wellington City Council*, above n 98; and a prison in *Beadle v Minister of Corrections* EC Wellington A74/02, 8 April 2002

being. In contrast, private economic well-being has most commonly been considered in small-scale proposals where there are only economic benefits to the applicant and little or none to the public. In these smaller cases, it is a general benefit to the applicant's economic well-being which is taken into account, rather than any narrow consideration of viability or profitability.¹⁴³

This is a general trend which the author has observed from the analysis of many cases on this issue, therefore it is accepted that there are limitations to this argument. In particular, it does not apply to every situation as there will be exceptions (for example, if private economic well-being is excluded from consideration in a small case). Also, this observed trend does not have any precedential value, as, to the author's knowledge, it has not been expressly recognised by the courts. However, the reason for this trend may be because it has been said that the RMA only deals well with small developments or resource use and fails to provide an appropriate framework to address issues with large proposals where viability issues arise.¹⁴⁴

Whatever the reason for the difference between how large and small applicants are treated, if private economic well-being was to be included as a consideration under section 5, there should finally be consistency in decision making. This is because it could be considered in all cases where it is a relevant issue, instead of mainly just in cases involving small proposals. It is acknowledged that there would also be consistency if considering private economic well-being was prohibited, however this would, for the most part, only be to the detriment of small applicants. This is because they would be the only ones who would really be affected, as the status quo would essentially remain for larger applicants. So by expressly providing for the inclusion of private economic well-being, it is envisaged that this should enable larger applicants to benefit. It would also benefit small applicants who miss out on having these issues considered (as a result of *New Zealand Rail*), but it is contended this has occurred much less frequently.

There are several counter arguments to this. Firstly, it must be considered whether it is even important that in large cases the applicant will be able to weigh in the benefits to their economic well-being. With a large proposal, there will generally be benefits to public

¹⁴³ Examples of this are *Martin v Far North District Council*, above n 115, at [39]; *McLauchlan v Hutt City Council*, above n 123, at [32] and *Glentarn Group Ltd v Queenstown Lakes District Council* EC Christchurch C010/09, 18 February 2009 at [109]

¹⁴⁴ Stanhope, above n 19, at 168

economic well-being in some form, whether it is the additional jobs created or the increased spending within the community by the applicant in developing the proposal. These benefits will commonly be much larger than the benefits to the applicant. As it has been said that “the size and potential benefits of a project cannot be ignored in section 5”,¹⁴⁵ this then implies the larger the benefits, the more weight they will be given in determining a case.

Therefore on an overall scale, these public benefits will undoubtedly be given more substantial weight than the smaller economic benefits to the applicant (if these private benefits are even considered at all). The effect of significant public benefits is evident in a number of cases, including a proposed large wind farm,¹⁴⁶ a new highway,¹⁴⁷ a large coalmine¹⁴⁸ and a hotel.¹⁴⁹ A factor common to all these cases is the focus on the enablement of the community to provide for their economic well-being due to the benefits or costs of the project, with little or no consideration of the benefits to the applicant. So in reality, even if private economic well-being was to be included in these above examples, there will likely be little difference in how it will affect these big cases. This is because the benefits to private economic well-being will not be a big enough issue, compared with other considerations in the case, to have any substantial weight in the outcome.

This is further supported by the court’s approach to a conflict between public and private economic well-being. If granting resource consent to the applicant (and enabling them to provide for their economic well-being) will then disenable the community from providing for its economic well-being, the court has traditionally been extremely reluctant to grant consent. This was highlighted by two early RMA cases. In *Manos and Coburn v Waitakere City Council*, the applicant was refused land use consent to operate a clothing manufacturing business on his land.¹⁵⁰ This proposal was a discretionary activity in this zone, however there were empty buildings on appropriately zoned land nearby. The applicant argued his site would benefit his economic well-being as the business would not be viable on an alternative site. The Planning Tribunal rejected this as it believed it would be viable elsewhere. Most importantly, it held the applicant should contribute to the community-wide investment in

¹⁴⁵ *Takamore Trustees v Kapiti Coast District Council*, [2003] 3 NZLR 496 at 502

¹⁴⁶ *Maniototo Environmental Society Incorporated v Central Otago District Council* EC Christchurch C103/09, 28 October 2009

¹⁴⁷ *Takamore Trustees v Kapiti Coast District Council*, above n 145

¹⁴⁸ *Solid Energy New Zealand Limited v West Coast Regional Council* EC Christchurch C74/2005, 24 May 2005

¹⁴⁹ *Isola Estates Limited v Auckland City Council* EC Wellington W42/06, 1 June 2006

¹⁵⁰ *Manos and Coburn v Waitakere City Council* [1993] 2 NZRMA 226 (PT)

services and land which the community has set aside for this use.¹⁵¹ Therefore enabling others in the community to provide for their economic well-being was favoured over the applicant's economic well-being.

There was a similar outcome in *Te Aroha Air Quality Protection Appeal Group v Waikato Regional Council (No 2)* where the applicant was refused land use consent for a beef rendering plant.¹⁵² This was due to the potential for adverse effects on neighbouring businesses from the unpleasant odour emitted by the plant, should the air filtering system at the plant breakdown. A more recent example of the court favouring public over private economic well-being is *Lakeview Properties Limited v Queenstown Lakes District Council*.¹⁵³ In this case, the ability of the applicant to provide for their economic and social well-being by building a house on their land was outweighed by the detrimental effect this would have on the landscape. This detrimental effect would consequently disenable those in the Queenstown region from providing for their economic well-being through tourism ventures which are centred on these outstanding natural landscapes.

This shows that by including private economic well-being as a consideration in section 5, there should be consistency in how large and small applicants are treated. Although how much difference this would make in practice is debatable, given the court's clear preference for favouring public economic well-being over private economic well-being. Despite this, it will be explained in the next argument that it is because the applicant's economic well-being is being considered that certain effects on the environment, including factors which influence public economic well-being, can be taken into account at all.

3.3 The consequences

Given there is nothing in the Act which supports excluding private economic well-being and that including it would mainly benefit medium to large applicants, it is argued that including private economic well-being is justified due to the consequences of what it then allows the court to consider. This is because if the decision maker cannot consider matters such as a proposal's profitability or viability, then they should also be unable to consider the potential flow on effects to the environment which occur as a result of these private economic well-

¹⁵¹ Through the zoning provisions in the plan: Ibid, at 14-15

¹⁵² *Te Aroha Air Quality Protection Appeal Group v Waikato Regional Council (No 2)*, above n 95

¹⁵³ *Lakeview Properties Limited v Queenstown Lakes District Council* EC Christchurch C80/06, 19 June 2006

being matters. These flow on effects could occur as a result of, for example, the proposal failing, it only being half built, or if it ended up costing substantially more than originally anticipated and these costs were passed onto the public. Including private economic well-being is justified on this basis as the RMA requires the decision maker to consider the effects of a proposal on the community. This can only occur if there is first a consideration of whether it is likely these effects will eventuate. Clearly there must be sufficient evidence that these scenarios are possible before the court can even consider this. It should also be noted that these issues will arise predominantly with larger proposals and this also justifies including private economic well-being as the discussion above demonstrated how private economic well-being is largely ignored with bigger proposals.

This issue is highlighted in *New Zealand Rail*. New Zealand Rail (the appellant) argued Port Marlborough (the applicant) had significantly underestimated the cost of developing the proposed port. Therefore to finance this extra cost, the applicant would have to increase port fees, which would be to the appellant's detriment as they were the principal user of the port. This argument was dismissed by the Planning Tribunal and on appeal, the High Court held that the financial viability of the port was not a matter for the Court to consider. However it is contended that if the Court was to consider the effects on the appellant (as an adverse effect of the proposal on the environment), it would first have to establish that the proposal was indeed not viable. But the Court refused to take this first step and consequently would not consider the effects on the appellant.

A similar issue arose in *Te Rangatiratanga O Ngati Rangitihi Incorporated v Bay of Plenty Regional Council*. In this case, the ratepayers of a small community fought to stop proposed public works in their area, as they would have to contribute half of the \$1 million cost through their rates.¹⁵⁴ The council argued *New Zealand Rail* and its successors barred the Court from considering viability factors such as the cost of the proposal and this therefore prohibited consideration of the effects on the ratepayers.¹⁵⁵ The Court acknowledges "section 5 is not specific as to the economic factors the Court can take into account",¹⁵⁶ but it does not express a final view on whether or not the cost can be considered.¹⁵⁷ However it does

¹⁵⁴ *Te Rangatiratanga O Ngati Rangitihi Incorporated v Bay of Plenty Regional Council* EC Auckland A035/09, 24 April 2009

¹⁵⁵ *Ibid*, at [90]-[91]

¹⁵⁶ *Ibid*, at [143]

¹⁵⁷ This is because it finds the works are justified by another means: [144]

significantly state that “the cost consequence to an individual may be a matter that can be considered in cases where the flow on effects would serve to disenable people and communities or prevent them from providing for their economic well-being.”¹⁵⁸

These cases both show the potential for adverse effects on public economic well-being to occur because of a proposal. However these effects can arguably only be taken into account if the court first considers viability and cost issues. This is because it would be illogical for the court to refuse to state whether a proposal will be viable, but then to go on and weigh up against the proposal the possibility that, if it was only to be half built, there would be adverse effects on the environment. This justifies considering private economic well-being.

However if these issues are to be considered, this may in fact be damaging for the applicant. This is because their proposal may get turned down because it will disenable others from providing for their economic well-being. However the end result is arguably achieving what the RMA set out to do – to control the effects on the environment from activities.¹⁵⁹ But including private economic well-being in this way does not have to be so detrimental to the applicant. In fact it may allow for more consents to be granted as there is a full discussion of the potential adverse effects from the proposal. These effects, which will most likely be raised by someone who opposes the proposal, can be addressed by imposing strict conditions on the consent. These could be conditions such as review clauses in which the consent conditions are frequently reviewed in line with section 128 of the RMA, or imposing a bond or other relevant condition¹⁶⁰ which could negate effects on the environment if, for instance, a project was to be half completed and then abandoned. Using conditions to mitigate effects is a common approach taken under the RMA,¹⁶¹ as it allows the court to grant consent, while addressing the concerns noted by those who oppose the proposal.

However the court has said numerous times that a resource consent is only an opportunity to do something and whether the activity goes ahead is not the court’s concern.¹⁶² But arguably

¹⁵⁸ *Te Rangitiratanga O Ngati Rangitahi Incorporated v Bay of Plenty Regional Council*, above n 154, at [143]

¹⁵⁹ Upton, Parliamentary Debates, above n 11, at 3019

¹⁶⁰ As provided for in section 108 of the Resource Management Act 1991

¹⁶¹ The EC took this approach in: *Maclean v Marlborough District Council* EC Christchurch C081/08, 8 July 2008 at [65]; *Pope v Auckland Regional Council* EC Auckland A138/08, 23 December 2008 at [69]; *Sea-Tow Limited v Auckland Regional Council* EC Auckland A066/06, 30 May 2006 at [564]

¹⁶² *Todd Energy Limited v Taranaki Regional Council*, above n 109, at [22]; *Mangakahia Maori Komiti v Northland Regional Council*, above n 64, at 217

it is indeed the court's concern. This is because they must uphold section 5 and deal with effects on the environment from a proposal by avoiding, remedying or mitigating them where possible. These effects (as defined in section 3 of the RMA) include potential effects,¹⁶³ so while the court cannot predict what will happen in the future, it is the author's view that the court could receive expert evidence on issues of private economic well-being, which will give them some indication as to what may occur. If this evidence reveals there may be an effect which falls into section 3(e) or (f), then they can act on this, rather than outright refusing to hear anything relating to viability, cost or profitability and then having the negative effect on the community eventuate if the proposal is not completed. This shows the importance of considering private economic well-being with respect to the flow on effects a proposal may have on others.

¹⁶³ These are: *Section 3: Meaning of effect:*

...

(e) any potential effect of high probability; and

(f) any potential effect of low probability which has a high potential impact

CHAPTER 4:

The reasons to exclude private economic well-being

This chapter will focus on reasons why private economic well-being should not be a factor the courts are able to consider under section 5(2). This would result in the economic well-being component of section 5(2) only referring to the economic well-being of those other than the applicant.

4.1 “People and communities”

The first argument to support the proposition that private economic well-being should not be considered in decision making is that “people and communities” in section 5 is referring to anyone but the applicant. This means enabling “people and communities...to provide for their...economic...well-being” does not include the applicant and instead it is referring to those who will be affected by the applicant’s proposal. It was said in *McNamara v Tasman District Council* that as the RMA differentiates between people and communities, people’s interests (such as the applicants in this case) should not be submerged with the interests of the community without good reason.¹⁶⁴ However it is asserted that due to the arguments given for excluding private economic well-being from consideration, there is sufficient reason to not only submerge, but ignore the economic interests of the applicant altogether.

This is predominantly because, as outlined in chapter 1, the RMA provided a shift in focus from planning for activities to controlling the externalities or effects arising from the activities themselves.¹⁶⁵ This was the political intention behind the enactment of the RMA and it was also accepted by the High Court in *Batchelor v Tauranga District Council (No 2)*.¹⁶⁶ Externalities are defined as a cost or benefit incurred by the environment or a person who did not agree to the activity which caused the cost or benefit.¹⁶⁷ An example of this is the social cost imposed on the neighbours of a factory that emits an unpleasant odour.¹⁶⁸ This demonstrates how the RMA is concerned about the effects of resource use on the well-being

¹⁶⁴ *McNamara v Tasman District Council*, above n 113, at [124]

¹⁶⁵ *Batchelor v Tauranga District Council (No 2)*, above n 13, at 86; Upton, Parliamentary Debates, above n 11, at 3019; Grundy, above n 49, at 70

¹⁶⁶ *Batchelor v Tauranga District Council (No 2)*, above n 13, at 86

¹⁶⁷ Frank and Bernanke, above n 92, at 277; see also: *Meridian Energy Limited v Central Otago District Council* HC Dunedin CIV-2009-412-980, 16 August 2010 at [113] and *Auckland Regional Council v Rodney District Council* [2009] NZRMA 453 at 471-472

¹⁶⁸ As was the situation with a compost factory in *Waikato Environmental Protection Society Incorporated v Waikato Regional Council* [2008] NZRMA 431 (EC)

of those other than the applicant. Therefore this is who the reference to “people and communities” should be aimed at. Consequently, decision makers should not be worried about issues surrounding private economic well-being, such as whether or not the applicant makes a profit, or is getting consent for a viable proposal, but instead what the effect this activity will have on the social, economic and cultural well-being of others.

This approach is supported by the many cases, initially starting with *New Zealand Rail*, which have refused to look at the direct economic effects of a proposal on the applicant. Instead these cases focus on the impact this proposal will have on the environment in which it is to occur. For example, in *Todd Energy Limited v Taranaki Regional Council*, the EC said that they are not concerned with the proposal’s benefits or costs to the applicant, as the Act is instead focused on whether the proposal will result in adverse effects on those other than the applicant.¹⁶⁹ It is only if such effects will accrue that “the court has a role” in examining these issues.¹⁷⁰

In looking at this issue, when the incoming National Government was briefed by the Ministry for the Environment in 2008, they were told that the biggest environmental issue facing New Zealand is not the resource use itself, but ensuring that “resources are used efficiently by those who value them most...and that resource users face the costs they impose on others or the environment [as an externality].”¹⁷¹ This supports the argument that the RMA should only be focused on controlling the externalities arising from resource use. By definition, externalities do not affect the applicant, therefore private economic well-being should not be considered.

Given this, it is argued “people and communities” should be interpreted so as to include anyone who will be affected by the applicant’s activity, but not the applicant themselves. While the wide drafting of this phrase may have inadvertently allowed for the private economic well-being of the applicant to be considered, it is still necessary to have both “people” and “communities” in the section. This is because as the Planning Tribunal in *Armstrong v Waimakiriri District Council* said, “‘people and communities’ should take its meaning from

¹⁶⁹ *Todd Energy Limited v Taranaki Regional Council*, above n 109, at [19]

¹⁷⁰ *Ibid*, at [19]

¹⁷¹ Ministry for the Environment “Briefing to the Incoming Government 2008: Environmental Sustainability” at [11] < <http://www.mfe.govt.nz/publications/about/briefing-incoming-minister-2008/briefing-environmental-sustainability/index.html> > (accessed 5 March 2010)

the context” of the case.¹⁷² So if the case involves regional issues, then the phrase will have a wider meaning than in a case which only involves district-wide issues. For example, if the potential escape of a noxious odour from the applicant’s activity will only affect the well-being of several neighbours,¹⁷³ then these neighbours are the “people” who section 5(2) is referring to. This is because the odour does not affect enough people to warrant referring to them as a community.

This discussion shows strong support for the argument that “people and communities” was not intended to refer to the applicant, in particular because of the RMA’s focus on controlling externalities. But as was argued in chapter 3, the effects on others which result from the proposal not being profitable or viable cannot be considered if the court does not look into whether the proposal will be viable. This may only be an issue in a small number of cases, but regardless of this, it justifies looking at viability and other relevant, specific issues, but not necessarily private economic well-being generally. This distinction will be elaborated on in chapter 5 when the solution to the issues raised in this paper will be discussed.

4.2 The RMA is not concerned with hardship or need

The next reason to exclude private economic well-being is because traditionally there has been a general tendency for the courts to ignore an applicant’s argument that granting them resource consent will lessen their hardship, or fulfill some need they have for the consent.¹⁷⁴ Clearly the focus of these ‘hardship’ or ‘need’ arguments is on the applicant endeavoring to improve their economic well-being. Therefore because the court is unwilling to consider these issues (as it does not see these as a matter of their concern), this supports expanding this and excluding all private economic well-being from consideration. This is especially because it has been said that it is undesirable to talk about meeting the needs of people and therefore it is not appropriate “to equate needs with social, economic and cultural wellbeing.”¹⁷⁵

Therefore as in the above argument about the interpretation of “people and communities”, the focus should not be on the applicant and how an activity will affect their well-being. The court should instead only be focused on the effects on the environment from an activity (or

¹⁷² *Armstrong v Waimakiriri District Council* PT Christchurch C33/95, 1 May 1995, at 29

¹⁷³ As was the situation in *Te Aroha Air Quality Protection Appeal Group v Waikato Regional Council (No 2)*, above n 95

¹⁷⁴ Upton, “Purpose and Principle in the Resource Management Act”, above n 22, at 41. Also reiterated in *Fletcher v Auckland City Council* EC Auckland A082/07, 28 September 2007 at [43]; and in *Burcher v Masterton District Council* EC Wellington W110/07, 13 December 2007 at [8]

¹⁷⁵ *Armstrong v Waimakiriri District Council*, above n 172, at 17

the effects that may occur if a consent is not granted). This distinction is apparent in the following cases.

*Todd v Queenstown Lakes District Council*¹⁷⁶ and *Peters v Franklin District Council*¹⁷⁷ are examples of how hardship arguments have been rejected. The Planning Tribunal acknowledged the respective applicants in these cases would receive a much needed financial gain from being able to sell off their land if they were granted a subdivision resource consent. However both were declined consent as the District Plans in each case did not support their proposals and the Tribunal refused to give the applicants' hardship any real weight as it was not a relevant consideration.

In a similar situation, the court has also been unwilling to grant consent for one activity to allow the applicant to relieve the financial burden it is under with respect to another activity.¹⁷⁸ This is because there is no guarantee the money will be used in this way, so the benefit to be gained (which is alleviating the applicant's financial hardship) was not a legitimate actual or potential effect under section 104(1)(a). There also are many other examples of the court refusing to take into account the applicant's need for the consent, as the court is only focused on the effects of the activity on the environment.¹⁷⁹

However in some cases, the court has considered hardship to be a determinative factor. This occurred in three cases ('the demolition cases') where the applicant sought permission through a plan change or resource consent to demolish their building (all of which were of historical significance). These cases are *Steven v Christchurch City Council*,¹⁸⁰ *New Zealand Historic Places Trust/Pouhere Taonga v Manawatu District Council*¹⁸¹ and *Shell Oil New*

¹⁷⁶ *Todd v Queenstown Lakes District Council* [1992] 2 NZRMA 182 (PT)

¹⁷⁷ *Peters v Franklin District Council* [1993] 2 NZRMA 421 (PT)

¹⁷⁸ This occurred in *Baker v Franklin District Council* EC Auckland A70/98, 19 June 1998, as the applicant was refused a subdivision consent which it had sought so they could use the revenue from selling part of their subdivided land to finance the restoration of a historical building on another part of their land. The EC also refused subdivision consent in *Pinehaven Orchards Limited v South Wairarapa District Council* EC Wellington W054/06, 4 July 2006 where the applicant proposed to use the revenue from selling part of their subdivided land to keep their struggling apple orchard going

¹⁷⁹ For example in *David Burling and Ors v Horowhenua District Council* EC Wellington W99/97, 12 November 1997 and *Motorimu Wind Farm Limited v Palmerston North City Council* EC Wellington W067/08, 26 September 2008, the applicants were initially granted consent for their proposals, but they appealed the conditions as they argued they needed to change the conditions of the consent in order to ensure the commercial viability of their proposal. But the EC in both instances refused to consider this need as viability issues were a matter for the applicant, not the court.

¹⁸⁰ *Steven v Christchurch City Council* [1998] NZRMA 289

¹⁸¹ *New Zealand Historic Places Trust/Pouhere Taonga v Manawatu District Council* [2005] NZRMA 431

Zealand Limited v Wellington City Council.¹⁸² These can be distinguished from the subdivision cases in which the court would not look at hardship, as in the demolition cases the applicants do not want the building on their land and they stand to incur substantial cost if the buildings are not demolished. For example, in *New Zealand Historic Places Trust/Pouhere Taonga*, the building at issue had well exceeded its economic use and the applicant could not afford to preserve it for what would only be a “form of museum exhibit.”¹⁸³

Therefore the distinguishing feature between the subdivision and the demolition cases is the court sees itself as forcing the applicant into financial hardship in the latter category. This is because if it does not grant consent, they are effectively requiring the applicant to repair an unwanted, derelict building.¹⁸⁴ This is compared with the subdivision cases, where the applicant is already in financial hardship and seeks consent to resolve this. The most important distinction however is if the applicants’ in the demolition cases do not get consent, there will be adverse effects on the environment, for example, as a result of the unsafe and unattractive buildings not being demolished. No such adverse effects are apparent in the subdivision cases. This focus on effects warrants the exception to granting consent in the demolition cases. Therefore as those making decisions under the RMA should be focused on controlling the effects of activities on the environment, rather than controlling development and granting consent because the applicant needs it to resolve financial issues, this justifies excluding private economic well-being from consideration.

4.3 Section 7(b) and the ‘economic thread’ cases

As outlined above, arguably one of the biggest resource management issues currently facing New Zealand is ensuring an efficient use of resources by those that value them the most.¹⁸⁵ This issue comes into the RMA predominantly through section 7(b) of the RMA, which states decision makers “shall have particular regard to... (b) the efficient use and development of natural and physical resources.” The relationship between the economic issues of economic well-being in section 5 and efficiency in section 7(b) has been a common issue since the RMA was enacted. In fact it has led to the introduction of a specific line of thinking that the RMA has an ‘economic thread’ running through it. This concept originates from Judge

¹⁸² *Shell Oil New Zealand Limited v Wellington City Council* (1993) 1A ELRNZ 383 (PT)

¹⁸³ *New Zealand Historic Places Trust/Pouhere Taonga v Manawatu District Council*, above n 181, at 439

¹⁸⁴ For example, see *Shell Oil New Zealand Limited v Wellington City Council*, above n 182, at 11

¹⁸⁵ Ministry for the Environment, “Briefing to the Incoming Government 2008”, above n 171, at [11]

Jackson and his decisions in the EC, in particular cases such as *Marlborough Ridge* and *Baker Boys Limited v Christchurch City Council*.¹⁸⁶

Judge Jackson argues the court should take a hands off approach and leave it up to the market to determine how best for people to provide for their well-being.¹⁸⁷ This is because the market will guide resources to their most productive and efficient use to achieve sustainable management.¹⁸⁸ Therefore the court only has to “provide the environment or conditions in which people can provide for their well-being”,¹⁸⁹ rather than directly provide for this well-being. In doing so, as Judge Jackson said in *Lower Waitaki River Management Society Incorporated v Canterbury Regional Council*, the consent authority’s role, where possible, is to ensure “the cost of the externalities [from the activity] are imposed on the consent holder. It is then left to that person to decide whether their proposal can compete against others in the market.”¹⁹⁰

Therefore this ‘economic thread’ approach certainly does not support inquiring into whether the applicant’s private economic well-being is enabled by allowing a proposal. This is because it is up to the applicant to determine if their proposal is viable and this will be influenced by the market. Consequently, the market has the role of determining the most efficient use of resources, not the courts. The court’s role is instead to control the effects of the activity on the environment.

However this economic thread approach has not come without criticism. *St Lukes Group v North Shore City Council* said the RMA is “not purely ‘economically’ based” as there are many other types of threads in the Act, such as ethnic, aesthetic, ecological and ethical.¹⁹¹ Regardless of this criticism, these arguments involving efficiency and the economic thread justify excluding private economic well-being from consideration. This is because by not directing how well-being is to be achieved and instead providing the environment in which

¹⁸⁶ *Baker Boys Limited v Christchurch City Council* [1998] NZRMA 433. This economic thread argument was also expanded on by Judge Jackson in *Queenstown Properties Limited v Queenstown-Lakes District Council* [1998] NZRMA 145 and in his extra-judicial article “The Role of Economics in the RMA”, above n 87.

¹⁸⁷ *Baker Boys Limited v Christchurch City Council*, above n 186, at 451-452; and Christian Whata and Claire Kirman “Economics and the Resource Management Act 1991” in Jonathon Jackson, Claire Kirman, Basil Sharp and Christian Whata *Economics and the RMA* (New Zealand Law Society, Wellington, 2004) 37 at 61

¹⁸⁸ Whata and Kirman, above n 187, at 53

¹⁸⁹ *Marlborough Ridge Limited v Marlborough District Council*, above n 90, at 94-95

¹⁹⁰ *Lower Waitaki River Management Society Incorporated v Canterbury Regional Council*, above n 105, at [201]

¹⁹¹ *St Lukes Group v North Shore City Council* [2001] NZRMA 412 at 425-426 and 432

people can best provide for their well-being, the focus is on controlling the externalities which result from an activity. This is in line with the other arguments in this chapter which reveal why private economic well-being should be excluded from consideration under section 5(2).

CHAPTER 5: Solution and further implications

5.1 Overview

From the evidence presented in this paper, it is apparent that, despite private economic well-being not being expressly excluded from consideration under the RMA, this is indeed what is often occurring as a result of *New Zealand Rail* and the cases which have expanded on this decision. There are exceptions to this, such as the demolition cases outlined in chapter 4 and more commonly, where the court refers to an activity having a general benefit to the applicant's economic well-being. As a result of these differing approaches and the arguments advanced in chapter 4, it is submitted that private economic well-being should be excluded from consideration as part of the definition of sustainable management.

This is predominantly because one of the reasons the RMA attempts to restrict what an individual can do on their land is to control the effects their activities may have on others.¹⁹² To achieve this, the focus should not be on the applicant, but instead on the externalities imposed on the environment as a result of their activity.¹⁹³ Although the definition of 'environment' in section 2 of the RMA has the potential to include effects on the applicant, the author's proposal for the addition of a definition for 'people and communities' will prevent this. Therefore the changes proposed in this chapter are important to clarify the philosophy on which the RMA was enacted and to give decision makers more guidance so they can achieve this.

This approach is not akin to Simon Upton's physical bottom line approach, as economic and social considerations are still weighed up with environmental factors, without giving environmental matters priority. However the only focus when considering all these factors should be on the people and communities to which the proposal will affect and not on the applicant. To achieve this end, the following changes are suggested:

¹⁹² *Wilson v Selwyn District Council* [2005] NZRMA 76 at 89

¹⁹³ Grundy, above n 49, at 70 and *JF Investments Limited v Queenstown Lakes District Council*, above n 58, at [40]

5.2 The addition of section 5A

Section 5A: Social, economic and cultural well-being

- (1) *In achieving the purpose of this Act, all person exercising functions and powers under it must not have regard to the social, economic or cultural well-being of the applicant.*
- (2) *The direction in subsection (1) applies to sections 5, 104 and any other section in the Act to which such well-being could be considered under.*
- (3) *The direction in subsection (1) does not prohibit the consideration of the viability or otherwise of an application, proposal or activity, but –*
- (a) the issue of viability must first be raised by one the parties involved in the proceedings other than the decision maker; and*
 - (b) there must be evidence presented on this issue by one or more parties involved; and*
 - (c) the consideration of viability must only relate to concerns about the effects on the environment, social, economic or cultural well-being of people and communities.*
- (4) *Subsection (3) is subject to the prohibitions on trade competition in sections 61(3), 66(3), 74(3), 95D(d), 104(3)(a)(i), 149E, 168A(2A), 171(1A), Part 11A and Schedule 1*

Section 5A(1)

The most striking feature of this proposed section is the ban on considering the applicant's economic well-being, as well as their social and cultural well-being. It is illogical to exclude economic but not social and cultural well-being, as there is nothing to suggest they should not have equal status in section 5.¹⁹⁴ Economic, social or cultural well-being will not be defined but they should be viewed as any direct benefit, cost or other impact which will affect the applicant's well-being.

Further implications

While in the author's view it may seem somewhat uncontroversial to prohibit economic well-being from consideration, it is certainly more difficult to justify excluding cultural well-being. This issue can be illustrated through the hypothetical example of an application for a land use consent to establish a marae. The main argument in support of this application would likely be that it will enable the applicant to provide for their cultural well-being. However

¹⁹⁴ *Judges Bay Residents Association v Auckland Regional Council*, above n 141, at [457]

section 5A(1) would now exclude this from consideration. This will unquestionably make it more difficult for the applicant to be granted consent as they lose the benefit of the main factor which was weighed in their benefit. This would also appear to be in conflict with other Part 2 matters, such as section 6(e), which states those exercising powers under the RMA must recognise as a matter of national importance, “the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga”. So it is hard to see how these matters could still be recognised, while prohibiting the consideration of the applicant’s cultural well-being.

However there is still a valid argument that the cultural well-being of the wider Maori community will be provided for through the granting of consent, therefore there is no need to consider the specific well-being of this applicant, as they are still a member of this community.

Also, the applicant’s cultural well-being does not have to prevail at all costs. For example, in *Cook Island Community Centre (HB) Incorporated v Hastings District Council*, the application for consent for a funeral parlour to be used predominantly by Maori was opposed by the minority Cook Island community, as they would be restricted in the use of their neighbouring community centre.¹⁹⁵ This was because out of respect, they would not do anything in the centre while there was a deceased body in the funeral parlour. The Planning Tribunal held sections 6(e) or 8¹⁹⁶ did not automatically permit Maori “to carry on an activity offensive to other cultures”¹⁹⁷ and declined consent.

Therefore it is contended with section 5A(1) there is still scope to provide for the cultural well-being of the wider community, in which the applicant will be a part of. There is also no justification for the applicant’s cultural well-being to always prevail. However it is acknowledged other matters in Part 2 make it harder to justify excluding the applicant’s cultural well-being.

¹⁹⁵ *Cook Island Community Centre (HB) Incorporated v Hastings District Council* [1994] NZRMA 375

¹⁹⁶ Section 8 of the Resource Management Act is also important, as it states: “*In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).*”

¹⁹⁷ *Cook Island Community Centre (HB) Incorporated v Hastings District Council*, above n 195, at 382

Another issue which arises because of this subsection is how far this prohibition extends. To answer this with respect to private economic well-being, it is the direct economic benefit from the proposal which is excluded from consideration. For example, for a proposal which involves the commercial development of the applicant's land, this prevents the applicant arguing that the benefit to his family's economic well-being can still be taken into account, even though the benefit to his well-being cannot. This is because it is the direct benefit of the revenue generated from this development which is prohibited from consideration. This is regardless of whether it accrues to the applicant, or to his wife or children.

It is contended there is an obvious distinction between this, as a matter of private economic well-being and where this revenue creates an indirect benefit to public economic well-being, for example, it enables the applicant to afford to employ more workers from the community. The latter benefit can still be taken into account. It should also be noted this section is not intended to prohibit the consideration of a community-wide benefit, which the applicant indirectly benefits from, through being a member of that community.

Section 5A(2)

To avoid doubt that this section applies to all instances in which economic benefits to the applicant are considered, section 5A(2) refers, in particular, to section 104.

Section 5A(3)

Another important point to note with section 5A is it does not exclude the possibility of the financial viability of a proposal being taken into account. But this can only be discussed in relation to the effects of a proposal on others. As already outlined, viability comes within the "rubric of economic well-being"¹⁹⁸ and it clearly falls within the definition of private economic well-being. But if it is excluded from consideration, chapter 3.3 revealed there is a valid argument the court also cannot consider any flow on effects to the economic well-being of the community which occur as a result of an unviable or unprofitable proposal.¹⁹⁹

Therefore the court can now consider viability issues, but these issues will only have weight in the overall decision in relation to the effects the unviable proposal may have on the environment. This is in line with the argument in chapter 4.1 that the RMA should only

¹⁹⁸ *Save The Point Incorporated v Wellington City Council*, above n 98, at [220]

¹⁹⁹ Examples of these flow on effects would be increased rates (*Te Rangatiratanga O Ngati Rangitahi Incorporated v Bay of Plenty Regional Council*, above n 154) or increased fees (*New Zealand Rail v Marlborough District Council*, above n 12)

focused on the effects of an activity on others. For example, the fact a proposal will be profitable for the applicant will have no weight in the decision as a result of section 5A, as it is only the effect this profitability will have on people and communities which is relevant.

This provision does not force the decision maker to consider viability issues, even if it is raised by one of the parties, as it may not feel it has the ability to determine these issues. However section 5A(3) expressly allows the possibility for this to be considered if there is sufficient evidence. This clarifies to the court they can take this issue into account, as currently they often seem to be unwilling to do on the basis of *New Zealand Rail* and other cases which prohibit it as a consideration. Arguably it also codifies what has been mentioned by the courts, but not acted on.²⁰⁰ This is that although it is not the court's role to determine whether the applicant has made the right decision with respect to a business proposal, it will get involved if its decisions or strategies produce effects on the environment.²⁰¹

Section 5A(3) is similar in theory to the prohibition on trade competition from the leading authority of *Discount Brands Ltd v Westfield (New Zealand) Limited*.²⁰² Here the Supreme Court held trade competition effects cannot be taken into account, but the Court can consider any significant adverse social or economic effects on the community (and the environment) as a result the trade competitor's business being affected by the applicant's proposal. To do this, the Court must first consider whether there will be effects from trade competition, then determine whether these will affect the environment.

Further implications

The one main issue with section 5A(3) is with regard to the situation where, for example, an applicant applies for resource consent for a small proposal, such as a subdivision of rural land. There will be no economic benefits from this which can be taken into account (that is, no benefits to public economic well-being). This is because the only benefits will accrue to the applicant, but these will not be able to be considered because of section 5A(1). Any benefits to the applicant's social well-being will also be unable to be considered. Commonly with a proposal of this kind, there will be environmental effects such as the permanent

²⁰⁰ Although the EC came close in *Te Rangatiratanga O Ngati Rangitahi Incorporated v Bay of Plenty Regional Council*, above n 154, at [143], but it did not need to decide the case on this point.

²⁰¹ This was said in *Todd Energy Limited v Taranaki Regional Council*, above n 109, at [19] and in *Save the Point Incorporated v Wellington City Council*, above n 98, at [221]

²⁰² *Discount Brands Ltd v Westfield (New Zealand) Ltd*, above n 96, at 641-642

fragmentation of productive farm land in a way which will disadvantage future generations.²⁰³ Clearly the relevant plan will also be important in determining the status of this activity and the rules surrounding when it can occur.

But in an overall judgment of the factors in the case, the only section 5 factors to be considered will be environmental effects (that is, the factors in section 5(2)(a)-(c)), and it would seem that provided the court is satisfied with any possible effects on these provisions, then consent can be granted. This is verging on the bottom line approach as the matters in section 5(2)(a)-(c) essentially become safeguards when there are no factors in the first part of section 5(2) to consider.

However the inclusion of ‘mitigating’ adverse effects allows the possibility of some adverse effects to occur, so environmental protection is not required at all costs.²⁰⁴ Another redeeming factor is if benefits to the applicant’s economic well-being were to be considered, it would often only be in a broad sense anyway (as the court would not attempt to calculate how much money the applicant would make from selling off the subdivided land). Arguably any small proposal, especially for residential development, should increase an applicant’s economic well-being in some regard,²⁰⁵ so it does not matter that this is no longer considered.²⁰⁶ Given these factors, there is arguably no real change from what is already occurring in small cases such as this example. This is because the external effects of the activity should remain the focus of the decision maker, whether these effects involve the environment or the social, economic and cultural well-being of anyone other than the applicant.

Section 5A(4)

Section 5A(4) is included to ensure there is no confusion over who can argue a proposal is not viable. This is because section 5A is an additional provision to interpret section 5, which is the overriding purpose of the Act. Therefore a potential argument could arise that section

²⁰³ This is important given section 5(2)(a) of the Resource Management Act 1991. Preventing the fragmentation of productive farmland was one of the reasons given to refuse a subdivision consent in *Baker v Franklin District Council*, above n 178, at 28 and also in *Bruce v Wellington City Council* EC Wellington W124/99, 16 December 1999 at [36], [44].

²⁰⁴ *Trio Holdings Limited v Marlborough District Council*, above n 59, at 116

²⁰⁵ *Blyth v Tasman District Council* EC Christchurch C175/05, 15 December 2005 at [42]

²⁰⁶ There was a statement to this effect in *Koens v Dunedin City Council*, above n 112, at 11. The EC placed little weight on the economic benefits to the applicant’s well-being from the subdivision consent they sought, as these benefits are generic to every subdivision case.

5A takes priority over prohibitions on trade competitors being involved in proceedings which are in later sections in the RMA, with these later sections being subject to section 5. This should not occur anyway, as it was held in *Batchelor v Tauranga District Council* that while all other sections are ancillary to section 5, there are other measures in the Act, such as the trade competition provisions, which Parliament has used to spell out the general purpose in more detail.²⁰⁷ However by adding this subsection there is no possibility of such as argument.

5.3 Definition of “people and communities”

Section 2: Interpretation

(1) In this Act, unless the context otherwise requires,—

...

people and communities means anyone other than the applicant

It was argued in chapter 4 that one of the reasons to exclude private economic well-being was that ‘people and communities’ in section 5(2) is intended to refer to anyone but the applicant. This new definition, in conjunction with section 5A, will ensure this is how section 5(2) is to be interpreted. The definition also emphasises that when the economic viability of a proposal is being considered under section 5A(3)(c) as an effect on people and communities, this is only to the extent it has an effect on the economic and social well-being of those other than the applicant.

This addition also resolves an issue surrounding the section 2 definition of ‘environment’. This definition refers to the social and economic conditions which affect or are affected by ecosystems, including people and communities. By applying the new definition of people and communities, which includes anyone but the applicant, the applicant’s private economic well-being cannot be considered as an effect on the environment.

This new definition of ‘people and communities’ does not affect any other section in the Act other than the definition of ‘environment’ in section 5 and section 5(2), as the phrase is not mentioned anywhere else in the RMA.

²⁰⁷ *Batchelor v Tauranga District Council* [1992] 1 NZRMA 266 (PT) at 269

CONCLUSION

Section 5 was enacted with the broad goal of promoting sustainable management. This provision was never intended to be a purpose section that gave precise direction both in how to interpret the section itself, and also other sections in the Act. However as a result of its broad scope, in particular the undefined reference to “people and communities”, an inconsistent approach to the application of economic well-being has transpired. In the author’s opinion, this inconsistency does not give the applicant the certainty in the RMA and its processes which they are entitled to and this has led to the difficulties alluded to in this paper. An example of this is the uncertainty for the applicant in whether to produce evidence of the potential benefit to their economic well-being from their proposal. Such an argument has been expressly ignored by the EC in some cases,²⁰⁸ or in contrast, not argued at all in one case, but still taken into account.²⁰⁹

This paper has attempted to resolve these issues. In doing so, it was demonstrated that there are valid arguments in favour of expressly including private economic well-being as a consideration in section 5(2). However these arguments do not stand up against the “effects-orientated” intention behind the enactment of the RMA.²¹⁰ It is the author’s belief that this intention should be adhered to, unlike the political intention of Simon Upton to take an environmental bottom line approach to the interpretation of section 5(2).²¹¹ To achieve this, several amendments to the RMA have been proposed, as section 5A and a definition of “people and communities”. It is contended these will give decision makers clear direction in what can be considered.

This is because it is both the general and the narrower considerations of private economic well-being which are excluded from consideration under section 5A, as in practice it will be difficult for the court and those involved in the process to distinguish between them. To ensure the focus does remain on the externalities created by the applicant’s activity, this proposed new provision allows the court to consider the effects on the environment from the viability, profitability or otherwise of a proposal. But these matters of private economic well-

²⁰⁸ This occurred in *Leonard v Kaipara District Council*, above n 125, at [47]

²⁰⁹ For example, see *Intercontinental Hotel v Wellington Regional Council*, above n 72, at [396]

²¹⁰ This intention is acknowledged by many sources, including commentators and the EC and High Court (for example, see *Batchelor v Tauranga District Council (No 2)*, above n 13, at 86

²¹¹ Which has been categorically rejected in many EC decisions as it is unworkable and

being are only to be considered for this purpose and are not to be weighed in as a positive benefit in favour of the proposal.

Finally, these two proposed amendments are not without their limitations, especially in regard to the exclusion of the applicant's cultural well-being. However it is contended these changes are justified as they provide more clarity and guidance to decision makers than section 5 as it currently stands.

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Quality Planning: www.qualityplanning.org.nz

Resource Management Law Association of New Zealand: www.rmla.org.nz