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drive a stake
through the
heart of
the RMA**

see page 2

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From Property To Poverty!

The RMA is killing enterprise. Auckland Architect Peter Cresswell argues that the RMA doesn't deserve another review; that instead we should drive a stake through its heart.

Project Aqua cancelled. New prisons delayed. Waikato upgrade of State Highway One delayed by Taniwhas. Plans by US giant Weyerhaeuser for a timber-processing plant in Nelson shelved. A homeowner in Waitakere jailed for cutting down his own tree. Marine farm applications left in limbo until at least the next decade.

Who would want to be planning a big project in New Zealand today? Or any project at all? There is a litany of disasters, outrages, battles, bribes and direct violations of sanity that are either directly or indirectly a result of the Resource Management Act (RMA). After Meridian's Project Aqua was cancelled, Meridian chief Keith Turner concluded: "Large hydro projects are not going to be able to be permitted through the RMA without a significant rethink to the way the RMA works." Farmers, roading engineers, marine farmers, developers and property owners from Kaitaia to Bluff all point to similar problems in their own fields.

Otherwise viable projects are being killed because of the RMA. How many others are stillborn, never to be heard of? We'll never know exactly. When asked recently what big projects the RMA had killed, Simon Carlaw from Business New Zealand said it was better to ask what major projects had proceeded. "The Act was passed in 1991. If you look beyond the odd hospital or jail, what in major dollar terms has gone ahead?" You can answer that question on the fingers of one foot.

Clearly, the RMA does not single-handedly poison every project, but it is a heavy burden for any new enterprise to carry. In force now for over a dozen years, the RMA has proved its most pessimistic critics correct. Barrister Alan Dormer suggested at its introduction that much of the infrastructure we take for granted today would be "difficult, if not impossible to build under the aegis of this Act." He was right. The Libertarianz Party submission to the last RMA review argued, "Our grandchildren will not thank us tomorrow for not building the roads, dams, abattoirs, industrial and chemical plants, canals, sewerage systems, pulp and paper mills, railways and mines that will

be needed in the future." On a cold, grey day in the future those grandchildren will probably turn to us and ask why we were once so stupid.

It's not just large projects that suffer either; they're just the most newsworthy. As Federated Farmers President Charlie Pederson says, "It's little, not large, that suffers most RMA pain." The strangling of smaller projects by red tape is no longer news—it's become a daily occurrence.

An entire Banks Peninsula farm declared a Recommended Area of Protection and made unworkable. New supermarket in Takapuna still awaiting consent after fourteen years. Plans for a new mall and shopping complex in Wanaka abandoned. A new township proposed for Woodend, Canterbury, shelved. Coastal properties effectively nationalised by District Plan declarations of beachfront Hazard Zones and Coastal Wilderness Areas.

Many years ago author Ayn Rand observed that when the productive have to go cap in hand to the unproductive in order to ask permission to produce, then you will know that your society is doomed. There is little doubt that's where we are now; we aren't just heading towards that unfortunate state of affairs—we've arrived! The RMA must go before it strangles us completely. It's empowered a gravy-train full of planners, consultants, and lawyers; it's allowed so many of the "Browntable" stand-over tactics seen in recent years; and it's enacted the greatest theft of property rights since the war. It's really got to go.

The problems are so obvious that they've been noticed even by this Labour minority government. The good news is they say they're planning a review of the Act; the amusing news is the review is to be carried out by David Benson-Pope; the bad news is it's not a review that this Act needs, it's a stake right through its heart.

National, ACT, Labour, Greens ... they all agree the Act needs change, each advocating that it be respectively "updated and reformed," "confined to its original

intent," "enhanced," and (my personal favourite, from the Greens) "strengthened" to provide for "mandatory planning." But not one of these parties—not one—will stand up and admit that the only possible solution for this out-of-control monster is immediate euthanasia.

It's the only answer.

The real problem with the Act is *not* that it is unclear, restrictive or has "gone beyond its original intent"—although all of this is true. The real problem is that its intent is anti-property rights, and anti-human-life. At the heart of the Act is the basic idea that trees, rocks and mud puddles all have rights—but human beings don't. In all its 456 pages the phrase "property rights" does not appear at all; *not even once!* Instead of the idea of property rights that made common law so successful for over seven hundred years, at the heart of this Act are the ecobabble of "sustainable management," "kaitiakitanga" and the dangerous lunacy of so-called "intrinsic values."

The Act also, of course, contains the obligatory Tiriti-babble. You are counselled by the Act that when doing anything more aggressive than mowing your lawn you "shall take into account the principles of the Te Tiriti o Waitangi"—and to this day the country has yet to find a court willing or able to explain precisely how that might be done.

Gridlock in Auckland while much-needed roading projects await consents. Eighty-dollars an hour paid to local Iwi to "ward off mischievous spirits." A ban on filming mountain peaks in Tongariro National Park announced. Whitianga Waterways Project saved (just) despite the best efforts of Sandra Lee, and at a cost of one million dollars per year in gaining consents. Millions of dollars extracted by Iwi around the country under the guise of "consultation."

So, what does all this mean for the average punter? Well, first of all it means that he can no longer rely on infrastructure being there when he might want it. But it also means his property is no longer his own—his home is not his castle. Let's look at an example. Let's say you own a small home on a small site, and you want to extend your carport to accommodate something more sizeable than your grandmother's Morris Minor.

Now, in most instances, that's going to mean you will have to sit down in your local council offices with a planner fresh out of Planning School and talk seriously about whether the extension is a "sustainable use of natural and physical resources"—at which point I'd bet you'll begin scratching your head. Or, whether it will "safeguard the life-supporting capacity of air, water, soil and ecosystems" while "avoiding, remedying or mitigating any adverse effects of activities on the environment." If you're not sure, you could assess whether or not your proposed new parking stall pays "particular regard to kaitiakitanga [or] the ethic of stewardship," to "the maintenance and enhancement of amenity values," or to "the intrinsic value of ecosystems"! At which point you either throw up your hands in horror and run screaming from the planners' offices—or pick your jaw up from the floor and write out a cheque proportional to the amount of crap about to be put into a report arguing such things on your behalf.

Believe me, grown people pulling down sizeable incomes actually spend time in these conversations—they have to, by law! And so do you if you really want that carport extension. Or your new hydro project.

So, you hire a consultant to write a report full of meaningless phrases arguing that the carport extension or new hydro scheme or proposed roading project is a sustainable use of resources and will safeguard ecosystems and so on; meanwhile, objectors hire other consultants to say that it isn't, and won't. Eventually you all end up in the Environment Court, and the one with the biggest pile of nonsense in front of them wins—after which the lawyers and consultants go off to lunch at *Antoine's*; you go off to take out a new mortgage; and the consultants' reports go off to fill up a landfill somewhere.

Eight years of resource consent delays for Orewa to Puhoi Motorway extension, and at least two more expected. Long delays to the development of oil and gas fields and pipelines. Olivine Waste to Energy Plant abandoned in favour of a landfill site next to Auckland's new water supply, and the Meremere plant mothballed. Forestry industry concerns at time and cost of consents for wool-processing plants, and for tree planting, harvesting and roading. Coastal residents refused permission to protect beachside homes from erosion. Globe Hill goldmine project in Reefton vetoed. 1500 projects still left waiting at the Environment Court.

The fact is the RMA *doesn't* protect property rights—as every property owner

already knows—and neither does it protect the environment—as cases like the polluted Rotorua Lakes and Tarawera River show us. It gives money and power to planners and consultants while destroying both property rights *and* the environment. Little wonder, really, as anyone familiar with the concept of the tragedy of the commons already knows—without protecting property rights, you just *can't* protect your environment. That realisation has resonated through the common law for seven-hundred years. Sadly, with the introduction of the Public Works Act and the various town planning regimes, it has been largely ignored here now for nearly half a century.

Where we once observed the common law limit for nuisance that one may not use one's property in such manner as not to injure that of another, the RMA now declares that we may not use our property except with the express permission of the state—you may do only what a Council District Plan considers you should be allowed to do. With that, a basic legal and constitutional protection is overturned: that people could do anything they liked unless it was illegal, whereas government could do nothing at all unless it was empowered by law to do so. That basic concept of jurisprudence has now been explicitly turned on its head; local governments may now do anything they like (except, of course, build infrastructure), whereas in respect of the RMA we ourselves can only do on our own property what a Plan


says we can do. You see the big difference? The process begun by the various Town and Country Planning Acts has achieved its culmination with the RMA: total theft of private property rights, with only its façade remaining. It makes you wonder just what those Anzacs were fighting for!

The *last* review of the RMA took nearly five years, and really did nothing but waste everyone's time. For that reason alone it's desperately hard to take any review of the RMA seriously, and it really is particularly difficult to see this review by David Benson-Pope as anything other than an electioneering sop. And what might another review do anyway? The same people will say the same things they've all said before, and nothing of any consequence will be done to change anything.

The solution is simple. Don't tinker with the procedures for acquiring a Resource Consent. Don't tinker with the Environment Court. Don't "recraft" the RMA. Don't "streamline" it, "fix" it or "reform" it. Instead, drive a stake through its heart.

Draw up transitional measures to reinstate the common law protections of property and environment. And then get the hell out of our way!

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"What Is At The Heart Of The RMA?"

What's the problem with the Act? Why does it need a stake through the heart? Because the very heart of the Act is where its true evil lies. At the heart of the Act lies a number of notions guaranteed to strangle enterprise, initiative and large projects at birth. The very heart of the RMA is Part II—"Purpose and Principles"—which contains its most vicious nostrums.

Sustainable Management

The RMA's explicit and stated purpose, yet the Act contains no clear or meaningful definition. To this day the courts still argue what Section Five of the RMA actually means, the section which purports to define the term.

The Ministry for the Environment suggests "sustainable management" contains two main strands: 1) "recognition of true environmental costs" or "internalising externalities"; and 2) "conservation of resources for future generations" by protecting "the sustainability of the natural and physical environment." So much, so circular.

Now, before planning statutes began to bury it half a century ago, the first idea was more successfully undertaken by common law—and without all the accompanying politically correct garbage. The second idea is a pseudo-concept giving planners power over your land. How does it do this? Because "resources" (i.e., your property) must be protected for "future generations"; in the absence of future generations to speak for themselves, this Act empowers planners to speak on their behalf.

But if "resources" are "conserved for future generations," when in fact will the resources be used? *Which* future generation will be allowed to access them? If "resources" may no longer be used, can they really be called a "resource"? And, finally, just whose bloody resources are they? *Who owns them?* The Act does not care.

"Sustainable management" is a pseudo-concept giving power to planners over land-owners; it demands the sacrifice of the present to a future that never arrives.

Kaitiakitanga

An idea which pays homage to the "guardianship" and "ethic of stewardship" of those great Maori conservators, the Moa Hunters and slash-and-burn farmers.

"Kaitiakitanga" (say it slowly and phonetically, and pretend you're wearing a bone carving: you'll soon be invited to all the best Grey Lynn parties) suggests that we emulate the historical record of environmental guardianship exercised

by tangata whenua; a record which I'm sorry to say is appalling. Extensive deforestation and widespread species-extinction took place in the first stage of tangata whenua settlement in this new land—not really an example of 'the ethic of stewardship' the Act wants us to practise.

Coupled with the accompanying 'Te Tiriti' provision of Section Eight, what it means in practice is an ill-defined ethic at the heart of the Act that advocates "guardianship" by tangata whenua over land they don't own.

"Kaitiakitanga" demands the sacrifice of those who own land, to a Browntable of others who don't.

Intrinsic Value

The ethic of intrinsic values enshrined at the heart of this Act declares that nature is of pre-eminent importance—nature *as is where is*. *Nature, in and of itself!* Under this Act trees, rocks, sand dunes and mud puddles have rights, but human beings don't. By this standard, human beings are required to sacrifice their own well-being to a state of nature. The idea that value is "intrinsic" is of course nonsense in and of itself; the idea of "value" implies that something is of value to *someone* for *some purpose*.

David Graber, research biologist with the US National Park Service, once declared on behalf of mainstream environmentalism that "We are not interested in the utility of a particular species or free-flowing river, or ecosystem, to mankind. They have intrinsic value, more value—to me—than another human body, or a billion of them." Graber gives the game away by declaring the notion of intrinsic values to be valuable to him: as trees, rocks and mud puddles can't speak for themselves, environmentalists like Graber must be paid to do it for them.

But, you say, such an ethic makes it impossible today to build the infrastructure we need for tomorrow. Well, don't be surprised. Graber went on to express the logical conclusion of the idea that man should sacrifice to nature: "Human happiness and certainly human fecundity are not as important as a wild and healthy planet... Until such time as Homo sapiens should decide to rejoin nature, some

of us can only hope for the right virus to come along."

The anti-concept of "intrinsic values" requires the sacrifice of human beings to untrammelled nature "until the right virus comes along." Reflect if you will that such a notion is at the very heart of this Act.

Property Rights

Property rights? Nowhere to be found in this Act despite earlier assertions to the contrary by tweets like Owen McShane.¹

Sober and sane environmentalists like Canadian Elizabeth Brubaker have long known that the concept of property rights underpins any truly sustainable environmental protection and that it was the recognition of property rights that quickly put an end to the "tragedy of the commons"—indeed, she wrote a book expressing exactly that view.

*[Her book] draws on cases from England, Canada and the United States, showing how the common law of property has for centuries been a force for environmental protection, while contemporary statutes have allowed polluters to foul private lands and public resources alike. It argues that individuals and communities should be entrusted with the task of preserving the environment and that, with stronger property rights they would regain the power to prevent much harmful activity.*²

The common law of property has over seven hundred years of sophistication in dealing with environmental problems³—something for which the RMA has barely a dozen years, and an abundance of signal failures.

It's time we abandoned the RMA, and began urgently drawing up transitional measures to reinvigorate the common law protections that were so precipitately buried by the various planning statutes of the last half-century.

(Endnotes)

¹ See, for example, series on previous RMA review, *National Business Review*, 24 June 1998. In fairness to Owen, he has recently conceded that 'the Act is silent on property rights' ('Foreshore for Shore' speech October 4, 2003)

² From the blurb for *Property Rights in the Defence of Nature*, by Elizabeth Brubaker; downloadable at: www.environmentprobe.org

³ For examples, see *Common Sense & Common Law for the Environment* by Bruce Yandle; *The Common Law & the Environment* ed. Roger E. Meiners & Andrew P. Morriss; and *The Common Law: How it Protects the Environment* ed. Roger E. Meiners & Bruce Yandle. All available from www.perc.org