

# **RESOURCE MANAGEMENT LAW ASSOCIATION OF NEW ZEALAND INC.**

## **RM NEWSLETTER**

**APRIL 2009**

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### **PRESIDENT'S REPORT**

In my February President's Report I looked forward to the introduction into Parliament in late February 2009 of the "hundred days" Bill. We now have the Resource Management (Simplifying and Streamlining) Bill, submissions on which close on 3 April 2009. The National Committee is currently heavily involved in preparing submissions on the Bill.

We also have the report of the Technical Advisory Group, which provided independent advice to Ministers on the implication of the first phase of National's RMA reforms.

I noted in my last report that the Government has also indicated that it is reviewing all departmental budgets line by line, and anticipated that (given the significant increase in recent years of Government's role in the area of resource management) this would be evaluated through the proposed government cost-cutting exercise undertaken by various departments. This has (no surprises) indeed turned out to be the case, and in the attention paid to the Bill and its implications it is easy perhaps to pass over the press announcement by John Key on 10 March. In that announcement Mr Key advised that the restructuring of the Environment Ministry will cost about 20 jobs. The restructuring is understood to result in part from a combination of a 30% cut in the Ministry's funding but also due to Cabinet's decision to axe some programmes. These include the Ministry's "flagship" role in Labour's intended carbon neutral public service; and the Ministry's "govt 3" programme encouraging government

agencies to adopt sustainable policies such as recycling. The sustainable household programme (helping households with energy saving tips) is to be scaled back; and the Ministry's support role on the Bioethics Council is to cease. In addition MfE has scaled back other programmes in order to make savings.

At the same time the Secretary for the Environment (who is the chief executive of the Ministry for the Environment), through clause 36 of the Bill, shall exercise the functions of the new Environmental Protection Authority established under new Part 4A of the Act (see clause 35 of the Bill). Amongst those functions is the ability to recommend to the Minister that applications lodged with the EPA as proposals of national significance should be called in. However if the Minister exercises his powers of delegation the Secretary may find himself making the recommendation to himself - a detail which illustrates the attention to detail that any analysis of the Bill requires. Some of the clauses in the Bill are welcomed as being a long time coming, but others raise potential new areas of law for the courts to determine.

Overall the impression is one of a Ministry and Parliamentary counsel who undertook a significant body of work in a very short timeframe, and whilst there will no doubt be glitches normal to any piece of legislation the people involved can only be commended for their commitment to the task and their understanding of the legislation. The willingness of Labour and the other parties (in the main) to support the passage of the Bill at its first reading, has allowed the Bill to be referred to the

Select Committee, where it will undoubtedly receive intense scrutiny.

**Camilla Owen**  
**President**

## **REGIONAL NEWS**

### ***Northland – Julian Dawson***

The Northland branch now has a new Chair, taking over the role from Graeme Mathias. The new Chair is Julian Dawson, also from Thomson Wilson and under Julian's guidance the Northland branch is holding its first event for the year utilizing the RMA Update roadshow on 1 April. If you have any ideas for future events, or topics of interest you would like raised, Julian's contact details are:

Email: [jcd@thomsonwilson.co.nz](mailto:jcd@thomsonwilson.co.nz)  
Phone: (9) 438 4039

### ***Hawke's Bay – Martin Williams*** ***(Acting Chair)***

As part of the current road show series regarding the Resource Management (Simplifying and Streamlining) Amendment Bill, the Hawke's Bay Branch is hosting the presentation by Alan Dormer and Tim Bennetts on 9 April. The session is being promoted jointly with the Hawke's Bay Gisborne Planners Group that operates in the Bay and organises seminars and activities very similar to those facilitated by RMLA branches in other regions. At this session, I hope to remind members of the benefits of RMLA membership as part of a national network of professionals, consultants and local authority officers and elected representatives. As the first RMLA event for some time, I also hope the session will provide a trigger for re-forming the Branch Committee, as well as electing a Chair and other office bearers so we can promote a greater level of future activity at regional level.

### ***Taranaki – Lauren Wallace***

The Taranaki branch held its first function of the year on 11 March 2009 at the New Plymouth District Council. We heard from Alan Dormer and Tim Bennetts on the RMA Reforms and National Policy Initiatives. We had a great response from members and non-members alike with approximately 70 people attending the morning event. Alan and Tim were informative and the topic sparked some

interesting questions and discussions afterwards.

The committee is now organising its second event for the year. Dr Jan Wright, Parliamentary Commissioner for the Environment is coming to speak to the branch on Thursday 23 April 2009. A flyer will be sent around shortly confirming the time and venue. We intend to combine this presentation with a more social event, so please pencil this date into your diaries.

We are also planning a unique Taranaki event with speakers from the three District Councils who will discuss the rural subdivision and land use issues facing each district at this time. We hope to have a date for this event confirmed within the next few weeks.

Over the past year, membership in the Taranaki branch has grown steadily, perhaps reflecting an increase in resource management practitioners and/or resource management work in the region. We would like to thank our members for their continued support.

Lauren Wallace can be contacted on:

Email: [Lauren.Wallace@gqlaw.co.nz](mailto:Lauren.Wallace@gqlaw.co.nz)  
Phone: (06) 768 3700

### ***Canterbury – David Caldwell***

The Canterbury branch of the RMLA held its Annual General Meeting on 17th March 2009. David Collins, after a number of years as Chairperson stepped down. David's efforts over the last few years are greatly appreciated.

David Caldwell was elected Chair, Chris Fowler Secretary and Philip Maw, Treasurer. Daniel Murray and Janice Carter joined the Committee.

The AGM followed on from the presentation by Alan Dormer in relation to the amendments to the RMA. That presentation was well attended and the level of feedback indicated that this is an area of real interest. An area of focus for the years' Committee will be the Tony Hearn Memorial Lecture and we are considering suitable presenters for this event which is tentatively scheduled for June/July this year.

The hearings on Change 1 to the RPS commence shortly, this is keeping a number of members busy.

### ***Otago/Southland – Michael Garbett***

Otago/Southland will be holding the RMA amendment roadshow in Dunedin and

Queenstown on the 24th March. The committee is currently working on the roadshow programme for the rest of the year. We are aiming to hold an event every couple of months.

Michael Garbett can be contacted on: email: [michael.garbett@andersonlloyd.co.nz](mailto:michael.garbett@andersonlloyd.co.nz)  
Phone: (3) 477-3973

### ***Nelson/Marlborough – Warwick Heal***

The main treat for March in Nelson is the RMLA roadshow on the proposed changes to the RMA. The Minister is our local MP which gives us a good opportunity to grill him if we are unhappy with any aspect of the proposed changes which we will come to grips with when the Roadshow turns up later in the month. Nick Smith has assured us that it is not his intention to upset the conservation/development balance in the present Act so it will be interesting to hear from Alan and Tim and what they say.

Warwick can be contacted on:  
Telephone (3) 524-8696 or email:  
[warwick@whhealbarrister.co.nz](mailto:warwick@whhealbarrister.co.nz)

### **Contact Details**

Contact details for other Regional Chairs and/or National Committee members are given on the RMLA website.

## **REVISED STANDARDS NOW AVAILABLE FOR COMMENT**

Standards New Zealand invites public comment on draft Standard DZ 6808 Acoustics Wind Farm Noise.

The draft Standard is available for public comment for a period of two months, ending 30 April 2009. You can download a free copy of the draft, and explanatory notes for providing comments at <http://shop.standards.co.nz/goto?id=97>, or visit [www.standards.co.nz](http://www.standards.co.nz), click on the 'Public comment' tab and select DZ 6808.

A new draft New Zealand Standard for addressing road traffic noise associated with new and altered roads is also available for public comment. Road traffic noise can have significant adverse effects on health and amenity of people and communities near busy roads. The comment period is expected to be open until June 2009.

The new Standard contains noise criteria to address the effects of road traffic noise associated with new or altered roads through consistent procedures and requirements for the measurement, prediction, assessment, and mitigation of such noise.

To ensure the Standard is well considered and receives input from as wide a range of users as possible Standards New Zealand is inviting comments from the public. The draft can be viewed and downloaded from the Standards New Zealand website <http://www.standards.co.nz> under the *Public comment* tab.

## **FAREWELL TO NEVILLE MARQUET – 16 Feb 2009**

### ***By Dr Royden Somerville QC***

I am grateful to the Court for the opportunity to address it at this final appearance of my learned friend, Mr Marquet. It is fitting that a long and distinguished career, not only in this court, but also in the superior courts including the Judicial Committee of the Privy Council, should be acknowledged publicly.

Neville Marquet has been involved in a wide range of cases over his career at the Bar. He has taken on some interesting and challenging issues and it is perhaps appropriate that his jousting and tilting style should involve windmills in his last appearance.

I must however, raise the real possibility that we may be here on false pretenses. In 2004 the Resource Management Law Association and Otago District Law Society held a valedictory dinner for Mr Marquet on the anniversary of his 50 years in practice. At the time, the organising committee recorded in its minutes that the dinner was to acknowledge an illustrious career and to provide a well-communicated hint to Mr Marquet that he should not feel inhibited about retiring. That was some five years ago.

I was speaking to Derek Nolan this morning, a fellow resource management practitioner, who said that Mr Marquet should be encouraged to finally retire so that the echelons of practitioners around the country who want to retire, but feel they can't until he has, can breathe a collective sigh of relief.

My learned friend's distinguished career has allowed his clients and colleagues to experience a practitioner with acumen, integrity

and a flair for the drama of the Court. I always remember the late Judge Jim Seeman's comments, when he was sitting in a case where Mr Marquet was cross-examining the witness and moving around the room, gesturing and entertaining the gallery with asides and witty comments. At one stage as he moved across the court, the learned judge, was heard to say, "Mr Marquet, next time you are passing I would be interested in your view on a particular point."

One thing that many people will not realize is the compassion of Neville Marquet. There are many practitioners and clients who have received his support and advice, not only out of a sense of obligation and duty but also out of a sense of friendship. That also needs to be acknowledged at a time such as this.

Neville Marquet has served his profession and the community well, holding office in the New Zealand Law Society, the Otago District Law Society, and on law reform committees.

On behalf of the resource management bar, I extend every good wish to our learned friend and say to him, thank you and go well.

May it please the Court.

***By Alastair Logan, Partner, Ross Dowling Marquet Griffin***

May it please the Court:

On one of the rare occasions, when, as a University student, I considered the study of law may actually have a practical application, I made my way to the then Supreme Court in Dunedin. There were in train some rather dreary commercial proceedings about the affairs of an insolvent company and the responsibility of the directors for the parlous state in which the creditors found it. On entering the Courtroom I observed a diminutive man, dwarfed by his wig, enveloped in a large black gown, not at counsel's table, but standing on tiptoes, beside the Registrar, reaching up to the bench and "helpfully" taking the presiding Judge through the financial statements of the company in liquidation. That lawyer was of course Neville Marquet, happily, as he would put it, "assisting the Court".

Neville has practised law for some 55 years. But like most of his generation, his engagement with the law, preceded his admission to the bar.

In a portent perhaps what was to come, he began his working life at the Public Trust Office, under the tutelage of Arnold Turner.

After admission, he went on to practise in all fields of the law, including estates, conveyancing and commercial law, as well as civil and criminal litigation. As a litigator he has appeared before a multiplicity of tribunals, many of which no longer exist, and in almost all Courts, including the Privy Council. As far as I know the exceptions are the Youth Court and the new Supreme Court. He has even been known to do an undefended dissolution in the Family Court.

In latter decades Neville's practice increasingly, almost exclusively, focused on resource management, appearing before, in succession, the Town and Country Planning Appeal Board, the Planning Tribunal and more latterly the Environment Court as well as in the High Court and Court of Appeal on planning issues. Neville must be one of the last to have practised under the Town and Country Planning Act 1953, when resource management and the principles set out now in Part 2 of the RMA, were unheard of concepts.

Neville, together with the late Michael Haggitt pioneered the practise of planning law in Otago. They toured the province from hearing to hearing, representing alternately Councils, applicants and objectors (as they then were). With the constant rotation of roles, from one day to the next, it was surprising the two of them kept track of who they were appearing for.

Ranging across Otago as it did, Neville's career touched on most of the regions major resource management issues in the last 40 years: the Clyde Dam, the Ravensbourne fertiliser works, the proposed Aramoana Smelter, the inception of the Macraes gold project, the Port redevelopment at Port Chalmers, the Remarkables Ski Field, the protection of outstanding landscapes, and the management of development pressures in the Queenstown Lakes District, to name but a few. His involvement in the key resource management issues of the day has continued down to the current Harbourside rejuvenation proposals for Dunedin and, of course, the proceedings presently before this Court, the proposed Project Hayes wind farm.

Over 50 years Neville has experienced considerable changes in law, technology and practice and procedure.

Because of his acute intellect Neville has readily absorbed legislative change and case law development of legal principle.

He has, on occasion, had somewhat more difficulty with technology and changes in practice and procedure.

As for technology, Neville was the first of the firm to equip himself with a cellphone and it quickly became one of his essential tools of trade. His problem was that he could not find the off button.

Proceedings in this Court (and others) were frequently punctuated by the noise of a cellphone ringing, followed by a frenzy of activity as Neville fought to first locate the phone, and then extinguish its sound.

Silencing the phone did not necessarily mean turning it off. As a result, disruptions could continue as the frustrated caller rang back; they became particularly acute when Jim Guthrie, seated behind Neville in Court, mischievously and repeatedly dialled Neville's phone.

Neville's indiscretions in this respect were highlighted for me during the prehearing for the Contact Energy/Clutha River consents. Unlike Neville, I seldom appeared before Your Honour in Central Otago or Queenstown Lakes and Your Honour seldom appeared before us in Dunedin. However, my cellphone rang.

I duly turned it off. Your Honour growled at me "your firm has a habit of that". Nevertheless, Neville derived some satisfaction when I was able to report to him an incident which occurred during the substantive hearing of the Contact appeals. A phone rang. In a flash, Your Honour, like a good halfback, had extracted the offending phone and thrown it to the Registrar with the command to her to "turn that phone off".

At times Neville struggled too with changes in practice and procedure. Neville was particularly discomfited by Your Honour's decision to take written evidence as read. Because of the sheer number of appeals, originating from the Queenstown Lakes District, Neville had developed a system. It was essential to his system that the witnesses read their briefs aloud to the Court.

The first day of the hearing, Neville said, enabled him to find out what the case was about. On the second day, he could actually ask some relevant questions. And on the third day, he was, in his words, "right on top of it" and could secure the desired result with his devastating closing submissions.

The law has been his life. He has aspired to and achieved excellence in the practice of law.

He has had the rare ability to capture the essence of a case in a few simple words – in a question or a submission – clearly, crisply and concisely.

That excellence could not have been obtained without a great deal of hard work. While Neville no doubt did not invent the 24 hour working day or the seven day working week, he was often very close to recording both.

There is a caricature in Neville's office, drawn by a former staff member. Neville, in his suit is at his desk. The inscription reads "where's everyone gone, it's only midnight?".

Neville has an expression, "to be a lawyer, you have to be able to take the heat". For over 50 years, Neville has been taking that heat, with a keen sense of dedication to the task. As a partner he has been loyal and supportive.

When you have been in trouble, and needed help, Neville has never hesitated in taking charge, despite the extraordinary demands on his time and abilities.

Neville has been driven by a sense of service - service to the Court, service to the client, and service to his colleagues and the profession at large. His working life has encapsulated those values.

On 16 January 2009, Neville announced this case would be his last Court appearance.

In my submission, it is particularly fitting that his final appearance should be in this Court, of all Courts, sitting in this town, Queenstown, in this district, dealing with one of the cutting edge cases that challenge decision makers under the Resource Management Act.

## **RECENT CASES**

***By James Gardner-Hopkins, Associate, and Daniel Sadlier, Senior Solicitor, Russell McVeagh***

### **EFFECTS ARE ONLY THE BEGINNING**

The High Court in *McKenna v Hastings District Council* (High Court, Napier, CIV 2008-441-253, Potter J, 15 January 2009) considered the relevance of effects (or lack of them) in the context of a non-complying activity in terms of the s104 and s104D assessments. While non-complying activities as a consent category may not survive the new Bill, this case is an interesting clarification of the tests under the

law as it stands, and may provide some guidance in the context of discretionary consents (particularly if the non-complying category goes).

The McKennas were appealing the Environment Court's decision to decline their application for subdivision consent for their property in Havelock North. The property was a former orchard comprising almost 3 hectares, located in the "Plains" zone, adjacent (across Middle Road) to medium intensity residential development. The McKennas proposed to subdivide the land to create a lot of around 4,000m<sup>2</sup>, and a balance lot of 2.5 hectares. Of the 2.5 hectare balance lot, approximately 5,000m<sup>2</sup> would be taken up by a new building platform, ground and driveway, leaving around 2 hectares for some kind of productive purpose. The proposed subdivision was a non-complying activity under the District Plan as it would not create a balance lot of greater than 12 hectares. The Environment Court declined consent, finding that:

- a) The effects of the proposal are no more than minor for the purposes of s104D, thereby passing through that gateway test.
- b) However, under s104(1), the proposal is contrary to the objectives and policies of the District Plan which aims to promote the sustainable management of the land resource, and also counters the provisions against ad hoc development.
- c) The proposal is right on the border of a residential area, and if insidious movement towards non-complying subdivision of lots were to occur, it would start there.
- d) "Things do not begin and end with effects, but it must be the case that on occasion, the terms of a planning document may prevail, even if adverse effects are not decisive."

The McKennas argued that the Environment Court had erred in applying both tests of s104D (which requires that a non-complying activity have less than minor effects OR not be contrary to the objectives and policies of the plan) by finding that the effects were no more than minor, but declining the proposal on the basis that it was contrary to the objectives and policies of the District Plan (albeit, purportedly in its application of s104(1) rather than s104D). The McKennas posed the question: "If a non-complying activity acknowledged as having no

more than minor effects on the environment cannot be granted resource consent, it is difficult to envisage a non-complying activity that could be granted, based on this type of analysis?"

The High Court considered that the Appellant's argument was fundamentally flawed, and that the question posed above underscored the error in their argument.

The High Court examined the approach of the Court of Appeal in *Arrigato* and *Smith Chilcott*, which both looked at the application of s104D, and found that while it is necessary to consider the District Plan "through the lens" of a determination that the proposal has no more than minor effects, that this is not the end of the matter. The consent authority has an overall broad discretion under s104(1) to consider the actual and potential effects of the District Plan. The Court of Appeal in *Dye* made it clear that there is no strict legal "precedent" and that each case has to be considered on its merits. However, in the same decision it also said that "precedent effect" is a relevant factor to be taken into consideration when considering an application for a non complying activity. The Environment Court was therefore entitled to conclude that because the McKenna's property was hard against the border of the residential area, if there was movement it would start there.

The High Court emphasised that the Environment Court was open to conclude that the effects were not a decisive factor in relation to the proposal, and that the integrity of the District Plan in this situation was more important.

*McKenna* is a helpful reminder that although ss104 and 104D are concerned with effects, it is not the be all and end all of the analysis. Once a proposal has passed through the gateway test under s104D, the consent authority retains a broad discretion to consider actual and potential effects in the overall context of the Plan, including its objectives and policies.

The consent authority, by way of s104(1)(c), can also consider any other matters which it considers are relevant and reasonably necessary to determine the application (as it can in respect of discretionary activities, for example).

This approach appears entirely consistent with existing case law, including for example comments by the Court of Appeal in *Coromandel Watchdog of Hauraki Incorporated*

*v Chief Executive of the Ministry of Economic Development [2007] NZCA 473 at para 50.*

No doubt the principle confirmed in McKenna, that effects are not the only issue under the RMA, could be applied to discretionary activities (particularly given the clear acceptance by the Courts that precedent effects and integrity issues can arise in the context of discretionary activities).

In other words, even if the effects of a discretionary activity are no more than minor, an application could be declined because it is inconsistent with objectives and policies.

*More recent cases will follow in the Resource Management Journal.*

## **FORTHCOMING EVENTS**

### **PROPERTY RIGHTS & SUSTAINABILITY CONFERENCE: April 2009**

The University of Auckland Faculty of Law and the New Zealand Centre for Environmental Law will host a conference on property rights and sustainability 16-18 April 2009 in Auckland.

The conference will bring together leading academics, judges, government officials, policy analysts and practitioners to examine the future of property rights within the context of sustainable development.

The conference will open with a public address from Judge Christopher Weeramantry (former Vice President of the International Court of Justice) and will feature presentations from a number of prominent scholars and commentators on property rights, sustainability, the environment and resource management.

For more information, including a description of key conference topics, visit the conference's website ([www.nzcel-conf.auckland.ac.nz](http://www.nzcel-conf.auckland.ac.nz)).

### **NZPI CONFERENCE : LETTING OFF STEAM – THE PRESSURE ISSUES – 6-9 May 2009**

For full conference details, check out [www.planning.org.nz](http://www.planning.org.nz).

### **EDS CONFERENCE : REFORM IN PARADISE – THREAT OR OPPORTUNITY? 8-10 June 2009**

For full conference details, check out [www.edskonference.com](http://www.edskonference.com)

## **CONTINUING PROFESSIONAL DEVELOPMENT**

Please see the RMLA Website ([www.rmla.org.nz](http://www.rmla.org.nz)) for all other Forthcoming and Future Events – including details of CPD qualifying events.

### **CHANGE OF ADDRESS?**

To: RMLA, C/- Karol Helmink, 4 Shaw Way, Hillsborough, Auckland 1041

Please note my new contact details as follows:

Name: \_\_\_\_\_

Firm: \_\_\_\_\_

Address: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Ph: \_\_\_\_\_ Fax: \_\_\_\_\_

Email: \_\_\_\_\_