

# RESOURCE MANAGEMENT LAW ASSOCIATION OF NEW ZEALAND INC.

## RM NEWSLETTER

**AUGUST 2007**

### **PRESIDENT'S REPORT**

Dear Members

Some important deadlines are almost upon us. First, nominations for the Association's three distinguished awards close on the 3<sup>rd</sup> of August. These are the RMLA award for excellence in statutory resource management documents, to projects which make a significant contribution to the development of best practice and the implementation of the RMA's purpose and principles, and the Association's Outstanding Person Award. Winners are announced and the awards bestowed at the annual Conference, this year in Napier.

The Outstanding Person Award is not awarded every year, indeed usually only every second or third year; but please do put your thinking caps on as it is so often a shame that many folk who give sterling service in our various professional fields of endeavour fail to gain the recognition which they deserve. I had dinner in Christchurch last week with John Gallen, a former recipient of the award many years ago, and he still spoke of how much it meant to him.

The deadline for applications for the Fellowship is the 28<sup>th</sup> September, and obviously those interested in applying for this should be already thinking about how they might best present their application. On a related note, scholarships for the academic year 2008 will close on the 1<sup>st</sup> October.

During the course of this month we will be opening nominations for next year's National Committee of the RMLA, nominations will close on the 31<sup>st</sup> August. Both Dave Serjeant (our long serving Secretary) and I will be standing down; so there will be at least two vacancies on the Committee. If you think you would like to make a contribution, put your name forward!

The roadshow programme organised by Blair Dickie and the capable Karol Helmink continues

to roll along a pace. Last month Prue Kapua took her talk on "The Role of Maori under the RMA" to Blenheim and Tauranga, attracting over 80 at the latter – a local record. The Wind Energy Seminar also attracted good crowds in Hamilton and Whangarei. The concurrent evidence "show" will hit Wellington and Auckland this month.

The Salmon lecture is to be delivered this year by the former Parliamentary Commissioner for the Environment, Morgan Williams in Auckland on the 2<sup>nd</sup> August. The Editorial Committee under the guidance of the apparently tireless Trevor Daya-Winterbottom is arranging for a compilation of all Salmon lectures to be printed, and this should be in your mail boxes before the end of the month.

I am pleased to say that our membership continues to rise ever upward; Karol Helmink tells me that we have just reached a new all time high of 1,108 members.

***Alan Dormer***  
**PRESIDENT**

### **REGIONAL NEWS**

#### ***Auckland – Bal Matheson***

The focus for the Auckland Branch this month was the Salmon Lecture, which was presented by Dr Morgan Williams on 2 August 2007, and was very well attended. The Hon Peter Salmon QC introduced Dr Williams. The title of the lecture was "Sustainability: the 'language' for the 21<sup>st</sup> Century".

As immediate past Parliamentary Commissioner for the Environment, a post he held for 10 years, Dr Williams has been in a very good position to see how sustainability in the broader sense has (or, probably more accurately from his perspective, has not) been implemented in New Zealand.

The lecture identified a number of key drivers for New Zealand's future (particularly the increasing global demand for protein and the issue of water allocation), and highlighted some fundamental structural issues that will need to be addressed if New Zealand is going to be able to implement sustainability in its fullest sense in the future. Considerable focus was placed on the issue of capacity building and education within society and equipping institutions to make decisions on a consensus basis with dialogue between stakeholders on what represents a desirable social, economic and environmental future. On the positive side, there did appear to be some changing attitudes occurring at the individual level in respect of demand for key resources; as an example, Dr Williams identified the shift from a "concerned citizen" (eg about some particular environmental cause), to a "concerned consumer".

To mark the 15<sup>th</sup> anniversary of the foundation of the RMLA, the National Committee has arranged for the previous Salmon Lectures to be published. On behalf of the Committee, Trevor Daya-Winterbottom formally presented a copy of the published lectures to the Hon Peter Salmon QC and Dr Morgan Williams at the lecture, and a copy has also been sent to all members.

The next seminar is the Concurrent Evidence presentation by the Environment Court Judges. This will be held on 22 August 2007 at DLA Phillips Fox.

### **Wellington – Lindsay Daysh**

The Wellington Branch organised the Wind Energy Roadshow at Kensington Swan in May. This was a very informative seminar with over 100 attending including branch members and those from NZPI. The branch also assisted the Environment Court with a farewell function to Commissioner Jenny Rowan in June. Along with other speakers including Judge Bollard, National Committee member Dave Brash thanked Commissioner Rowan for her considerable contribution to both the Court and the very effective way in which she conducted formal mediation. Her success in facilitating resolution to a large number of appeals was a real feature of her Environment Court career.

Future events include a seminar and DVD on Concurrent Evidence in late August which will be combined with a formal welcome to Judge Dwyer who is Wellington based. The Branch is also looking to host further seminars on Defining the Environment Beyond the

Application Site in October and will be seeking a topical but light-hearted subject for the annual Christmas event.

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### **Canterbury – David Collins**

The Tony Hearn Memorial Lecture was delivered by Professor Peter Skelton at our mid-winter dinner held on the 26th July. Professor Skelton was of course an Environment Court judge for 22 years and he gave a thought-provoking address traversing some of the important cases Tony was involved in, and their significance for the development of our resource management law. The lecture will be available in some published form shortly.

We had a fitting venue to honour Tony Hearn - our historic Great Hall at the Arts centre, one of the best surviving examples of neo-Gothic public architecture in the world. My thanks to Chris Fowler and Philip Maw, our secretary and treasurer, who did most of the work organising this event.

The other Branch activity recently was another "travelling roadshow" presentation, this one by Prue Kapua, addressing Maori interests under the RMA. Our next early evening seminar will be on the concept of concurrent presentation of evidence at appeals (i.e. all the traffic engineers, followed by all the landscape architects etc). This will be on Tuesday the 4th September at the Rydges Hotel.

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### **Nelson – Nigel McFadden**

Greetings, from Sunny Nelson, (although it is not particularly sunny at the moment – but good things come to those who wait). Since our last report we have had the IPCC Road Show talk (April) hosted by the Nelson City Council. A really good turnout, and extremely interesting speakers on an issue that is of considerable importance to all of us who live in coastal areas.

The AGM was held on 15 May and we at long last have been able to secure a Marlborough representative – Quentin Davies, a legal practitioner from Blenheim, has joined our Committee.

On 27 June we were hosted by the Marlborough District Council for Prue Kapua's address. The paper was well received and a

suggestion arose from the audience relating to the involvement of RMLA members to assist Iwi personnel by providing training to manage the resource management and other statutory processes. Quite obviously such training would require a joint venture approach, between interested Iwi and RMLA. The Nelson-Marlborough Committee are investigating the pilot programme that could also become a prototype for a nationwide project and our Regional Committee is currently seeking feedback from the National Committee.

Members were involved in seminars relating to urban renewal of fringe design in Nelson and good practice involving Officer's Reports prepared under Section 42A.

Local issues to be followed up by the Nelson-Marlborough Committee include Council practice and administration relating to notification procedures and decision making, development levies and other charges, and it is hoped to have a meeting with Nelson City Council and Tasman District Council (perhaps extended to Marlborough District Council) to discuss issues affecting the public resulting from building application services.

Our next scheduled Road Show paper is Chris Fowler's "Defining The Environment Beyond the Application Site" which we hope to host in November next.

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

The main activities of the Otago Southland Branch over the last month have been to organise the wind seminar which is to be held in Dunedin on 2 August 2007. Wind energy is a current issue in Otago and Southland with the Mossburn Windfarm (Whitehill) beginning to operate recently. Consents are currently being considered by the Central Otago District Council and the Clutha District Council following applications by Meridian Energy Limited and TrustPower. These are both large scale windfarms which have attracted a significant level of public interest

## **RECENT CASES**

**By Kristen Gunnell, Solicitor, Russell McVeagh**

### **Seeing Red in Tasman - are horticultural crop covers permitted?**

Seeking declarations in respect of activities considered by the relevant council to be

permitted activities will, in almost all cases, come down to an interpretation of the particular provisions in the plan. The recent case of *Tasman Action Group Incorporated v Tasman District Council* C96/2007 provides a good summary of how to interpret plan provisions. Also at issue in this case was the extent of the Council's s17 duties, and whether the issuing of certificates of compliance can be subject to the general duties imposed by s17.

Residents represented by the Tasman Action Group Incorporated (TAGI) sought declarations from the Environment Court relating to the legal status of red crop covers, which were becoming more prevalent in the district. TAGI applied for eight declarations from the Court, four of which related to the duties of the Council and the orchardists under s17, and the others relating to the interpretation of rules under the Tasman Resource Management Plan (TRMP).

### **Interpretation of rules in a plan**

The Court discussed the declarations sought in respect of whether the crop covers contravened the rules of the TRMP first. Consideration of those declarations depended on whether or not horticultural crop covers qualified as greenhouses or an artificial shelter. This was important as greenhouses are specifically exempted from the site coverage rules of the TRMP. It was on the basis that the covers were greenhouses that the Council had assessed the crop covers as permitted activities and issued certificates of compliance to some of the respondents. TAGI contended that the covers were not greenhouses, but were buildings within the meaning of the TRMP.

Applying the Court of Appeal's decision of *Powell v Dunedin City Council* the Court looked at the meaning of the word itself and the other parts of the relevant rule and meanings of other words within in the rule that provided an immediate context. In case there was any obscurity or ambiguity the Court also identified other sections of the TRMP and its objectives and policies that could assist in understanding the intended meaning of the rules.

Ultimately, although the Court accepted TAGI's contention that treating horticultural crop covers as greenhouses could be result in greater areas being covered without evaluation under the resource consent process, applying *Powell* the Court could only look beyond the immediate context if there was any obscurity or ambiguity, and in this case the meaning of greenhouses was neither obscure nor ambiguous. The Court found that the meaning of greenhouses applied to horticultural crop covers. This finding meant

that TAGI's argument that the building coverage restrictions in the TRMP applied to the crop covers because they were not exempted as greenhouses failed.

### **Duties under section 17**

TAGI sought declarations that the Council had a duty under s17 to avoid, remedy or mitigate any adverse effects of the use of land in the Tasman District arising from the exercise of its powers under the RMA; and that in granting certificates of compliance to some of the respondents which effectively authorised crop covers without requiring adverse effects to be considered, the Council had acted in breach of its duty under s17. A further two declarations were sought that the orchardists had a duty under s17 and that they had breached that duty.

TAGI's argument in respect of the Council's duty was essentially that the Council had a duty in exercising its functions under the Act to avoid an interpretation of provisions of the TRMP that would lead to significant adverse effects on the environment unless such adverse effects are clearly stated in the plan as being acceptable.

The Council argued that in issuing a certificate of compliance the Council performs a function under Part 6 of the RMA not Part 3 and (relying on *Kaimanawa Wild Horse Preservation Society v Attorney General* [1997] NRMA 356) cannot be subject to the duty under s17.

The Court held that s17 cannot and should not apply to decisions relating to the grant of resource consents, or the granting of a certificate of compliance. Any grant of a resource consent (except a controlled activity) is made on the findings based on the evidence before a consent authority, and on making a judgement taking into account potentially conflicting considerations, about whether granting or refusing would better serve the purpose of the Act. In those circumstances it would be unrealistic for the general s17 duty to apply. In respect of applications for certificates of compliance or applications for controlled activity consents, applying such a duty would be even more unrealistic. This is because the law allows a consent authority no option but to grant consent for a controlled activity and to issue a certificate of compliance for a permitted activity. As the Court put it:

[107] To interpret section 17 as imposing a duty on a consent authority for an activity arising out of an action that it had a duty to perform would be inconsistent with the purpose of section 17

and would be an unsound interpretation.

The Council's finding that the erection of crop covers could be lawfully carried on without resource consent (which was confirmed as correct in law by the Court's finding that they qualify as greenhouses) meant that the Council had no option but to issue the certificates of compliance.

While accepting that the orchardists' activities are subject to s17, the Court held that TAGI had an obligation to prove essential matters of fact (ie that an adverse effect on the environment arises from an activity carried on by the respondents, and that the respondents have not avoided, remedied or mitigated any such adverse effect) and that the evidence provided did not support the declaration sought.

### **Observations about declarations generally**

Throughout the hearing there were a number of matters that were accepted by one or other of the parties. Referring to the Court of Appeal's decision in *Todd Petroleum Mining v Shell (Petroleum Mining) & Ors* (CA 125/05, 22/02/06), the Environment Court observed that in the absence of a dispute, the Court's jurisdiction to make declarations should not be invoked.

While parties may consider that planning provisions give rise to absurd or anomalous results, an application for declarations interpreting and applying the plan is not apt for reviewing whether a policy basis adopted in the plan should be altered.

### **Outcome**

The Court declined to make all eight declarations and reserved the question of costs.

*More recent cases will follow in the RMLA Journal.*

## **FORTHCOMING EVENTS**

### **CONTINUING PROFESSIONAL DEVELOPMENT**

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