

RESOURCE MANAGEMENT LAW ASSOCIATION OF NEW ZEALAND INC.

RM NEWSLETTER

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PRESIDENT'S REPORT

Happy New Year to all of our members, and best wishes for what will no doubt prove an interesting year for Resource Management practitioners. In my last President's Report (December 2008) I reflected on the amount of change that can be expected under National's banner.

The hundred day's legislation, being the first phase of the reform to the Resource Management Act, should result in a Bill being introduced into Parliament in late February 2009 for public submissions. The Ministry for the Environment has been undertaking intensive work in preparation for this Bill. The Government sought comments on the reform proposals by 18 December 2008 and the Association took the opportunity to provide some general comments on eight process areas that might be reformed, being:

- Security for costs
- Trade competition
- Standing
- The role of the Department of Conservation
- The role of the Environment Court in relation to plan and policy statement appeal
- Further submissions
- National Environmental Standards
- Activity categories

At the same time as views were being sought on the reform process, the Government announced on 16 December the appointment of a Technical Advisory Group to support the Government's programme of RMA reform. Having regard to the following outcomes of the RMA

review the Technical Advisory Group is tasked with:

- Raising New Zealand's rate of productivity and economic growth;
- Increasing the flexibility of the economy in order to facilitate adjustment and to promote confidence and investment in response to the international economic crisis; and
- Providing for sound environmental policies and practices.

The Technical Advisory Group's terms of reference ask them to provide independent advice to Ministers on the implication of the first phase of National's RMA reforms to facilitate the introduction of the Reform Bill by 26 February 2009. The Bill will seek to:

- Streamline and simplify processes;
- Provide priority consenting of major projects;
- Reduce costs and delays;
- Speed up plan making processes;
- Restrict trade competition, vexatious and frivolous objections.

In addition to these terms of reference the Group was also asked to consider other amendments put forward and advise on their suitability for inclusion in the Reform Bill; provide advice on other non-legislative reforms that will assist the effective functioning of the RMA; and identify other RMA reforms that require longer term consideration and that should be considered as part of the second phase of the reform.

The group is chaired by the immediate past President of the RMLA, Barrister Alan Dormer, with the following members:

Guy Salmon (Environmental Consultant); Penny Webster (Mayor of Rodney); Paul Majurey (Russell McVeagh); Dennis Bush-King (Tasman District Council Environment and Planning Manager); Michael Holm (Barrister) Michael Foster (Planning Consultant); and The Right Honourable Wyatt Creech (a previous Deputy Prime Minister).

It is understood that the Advisory Group will provide a report on the Bill which should be available when the Bill is tabled. Given the short timeframes for the terms of reference to be carried out, the Group has hit the ground running in January.

Alongside these major changes have come early indicators from Government of its commitment to following through on matters flagged on the election trail. These include Energy and Resources Minister Gerry Brownlee's legislative amendments, which include the repeal of the Biofuel obligation law on 17 December, which had previously placed an obligation on oil companies to sell a small percentage of their fuel blended with Biofuels. The so called "light bulb ban" has been uplifted and a Bill has been tabled to repeal a 10 year ban on building thermal power stations.

The Government has also indicated that it is reviewing all departmental budgets line by line. Although work streams already within Government departments budgets will be completed, the forthcoming departmental budgets, combined with the economic climate and the anticipated savings, must surely result in a difference in future work streams and priorities. Over the last few years, the concept of resource management has expanded well beyond sound legislation/compliance – to encompass sustainable design, product stewardship, environmental procurement, carbon/environmental footprinting, life cycle assessments, sustainable infrastructure and whole of life costing. The bulk of these "beyond compliance" initiatives sit within the private sector – as organisations increasingly recognise the value in improving the environmental performance of their processes and products. Government's role – to set policy platforms in these areas, has also expanded

considerably and we anticipate that this will be continually evaluated through the proposed government cost-cutting exercise undertaken by various departments. This should not be forgotten by resource management practitioners, as the changes to the Resource Management Act and resource management processes will not be solely through legislative change. The economic environment will also impact on local government with some councils potentially losing budget allocations as investment reduces.

This context is important for those of us who choose to make submissions on the forthcoming Bill, as too often in the past (and possibly also with the benefit of hindsight) the changes to the Act have not been undertaken with sufficient attention to changes in practice that are required at the same time. Alterations to roles and responsibilities, some of which we will particularly see in the second phase of the legislative change, must be accompanied by sufficient budget, expertise and personnel to ensure they attain their objectives. If not, it will be the Act that will once again be targeted as the cause (lawyer jokes aside).

In the meantime, we await the Amendment Bill with interest. The RMLA is ideally placed to alert its members to these potential changes and to respond to them. Watch this space, and our website.

Camilla Owen
President

REGIONAL NEWS

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RECENT CASES

***By James Gardner-Hopkins, Associate,
and Liz Hardacre, Solicitor, Russell
McVeagh***

**WILDLIFE EVERYWHERE: THE
WILDLIFE ACT, COAL MINING
LICENCES AND RESOURCE CONSENTS**

Introduction

Solid Energy operates some of its mining operations under licenses granted under the now repealed Coal Mining Act 1979 ("CMA") (although those licences remain in force until their expiry), with its newer operations authorised by land use consents under the Resource Management Act 1991 ("RMA"). Each of those authorisations contained requirements to protect wildlife, including by translocation (both by individual collection and by using mechanical means to move the snails habitat).

As a test case, Solid Energy sought three declarations from the High Court in relation to one licence and one land use consent, to provide certainty in respect of its other licenses and consents.

In its decision of *Solid Energy New Zealand Limited v Minister of Energy & Ors* CIV-2007-485-001381, the High Court confirmed the need for Solid Energy to obtain authorisations under the Wildlife Act 1953 ("Wildlife Act"), notwithstanding that its CMA and RMA authorisations addressed similar wildlife issues to the Wildlife Act.

Issues

The three matters at issue were:

- 1) Whether Solid Energy's actions to protect wildlife under licence or consent conditions constituted the "hunting and killing" or "possession" of absolutely protected wildlife ("wildlife") under the Wildlife Act.
- 2) If so, whether Solid Energy's compliance with the conditions of its RMA consent constitute a "lawful authority" to "hunt and kill" or "possess" wildlife.
- 3) Further, under its CMA licence, are Solid Energy's activities acts "in respect of wildlife" that require the consent of the Minister of Conservation and the Minister of Energy under s71 of the Wildlife Act, or is the consent of

only the Minister of Energy in accordance with the CMA sufficient.

Hunting, killing and possession of wildlife

Solid Energy sought declarations that, in relation to licences and consents:

- 1) compliance with a condition of those approvals to save wildlife from injury; and/or
- 2) to act in compliance with, or carry out a condition of those approvals which has an incidental effect on wildlife;

is not a prohibited possession of, nor an act to hunt or kill, as defined by the Wildlife Act.

Hunting and killing

Solid Energy adopted a purposive approach, contending that the purpose of the Wildlife Act was not to criminalise actions which are not intended to harm, or involve illegal gain, from wildlife - and particularly where any harm that does occur arises from unintended side effects of an overall protection strategy, or as part of authorised mining activities. On that basis, Solid Energy's actions to protect wildlife would not be caught by the s63 prohibition on hunting and killing.

The position of the Minister of Energy, Minister of Conservation, Minister for the Environment and Royal Forest and Bird Protection Society of New Zealand ("Respondents") was that the definition of "hunt and kill" was an extended one, supported by the strict liability nature of the offence. Their contention was that Solid Energy's actions were caught by the s63 prohibition (unless authorised by lawful authority) whether harm was intended or not.

The Court agreed with the Respondents, holding that s63 is intended to capture deliberate actions in relation to wildlife, and lawful authority is required even where a person has acted with the intention of protecting the wildlife. The basis for such a finding was that the legislation was intended to provide a check on persons

dealing with wildlife, ensuring that those best qualified to determine what protection should be undertaken are involved (ie through Wildlife Act's lawful authority process).

Possession of wildlife

In relation to the prohibition on possession, Solid Energy submitted that to be an offence, there must be an intention to possess wildlife. Its position was, for example, that Parliament would not have intended that by virtue of its lawful occupation of the relevant land (which contains wildlife) it would be in breach of the Wildlife Act.

The Respondents' submissions agreed that simply having an interest in land which has wildlife on it does not amount to possession for the purposes of s63. However, they considered both the catching, and any containment of, wildlife to amount to possession.

The Court agreed that obtaining an interest in land on which wildlife is present could not amount to a prohibited possession, for two reasons:

- 1) when read in context, possession refers to an "action which has removed (whether temporarily or not) the wildlife from its habitat"; or
- 2) a landowner (or licensee or lessee) who has possession of wildlife has lawful authority for that position due to the legal interest in the land. However, it does not gain control of the wildlife or undertake actions in respect of wildlife, as hunting and killing remain prohibited.

Is the land use consent a "lawful authority"?

Solid Energy contended that authorisations outside the Wildlife Act could still constitute "lawful authority" provided they addressed the relevant wildlife issues, as otherwise duplicate authorisations would be required, something unduly onerous for an applicant and with a risk of inconsistent requirements under those multiple authorities.

The Respondents' position was that the RMA does not authorise a consenting authority to deal with crown property - ie wildlife, and further, it is not unusual for "overlapping" authorisations to be required. The Court held that a lawful authority was not confined to an authority obtained under the Wildlife Act, and a consent could in certain cases be a lawful authority under the Wildlife Act. However, it was not so in this case as it did not confer authority to take actions that s63 would otherwise prohibit. Rather, the consent contained conditions which attached to the rights conferred by the consent (ie to mine).

In relation to the Director-General of Conservation's agreement to the conditions of consent, the Court held that this could conceivably be a lawful authority pursuant to s63 if worded correctly, however, in this case that agreement specifically provided that it was not an approval for the purposes of the Wildlife Act.

The result of these findings is that Solid Energy is required to go through two processes, both under the RMA and the Wildlife Act where its mining operations will disturb wildlife. While Mallon J noted that these two processes are intended to be complementary, it was suggested that their rationalisation may be a matter for Parliament.

Joint consent

Section 71 of the Wildlife Act prevents persons from doing any "act in respect of any wildlife" without the prior consent of the Minister of Conservation and the Minister of Energy.

Solid Energy argued that it was not doing any "act in respect of wildlife", instead categorising its actions as acts in respect of mining. Further, when it is moving wildlife pursuant to the condition of the license, it is not acting under the CMA, but under the existing authority of its license, and so the consent of the Ministers under s71 is not required and the Wildlife Act does not derogate from the rights granted to it under the licence.

The Respondents all adopted the view taken in *Royal Forest and Bird Protection Society of New Zealand Inc v The Minister of Conservation* that actions can be undertaken in respect of wildlife even though they are done to fulfil a condition of a license, and that those actions are also done pursuant to the CMA under which the license was issued.

The Court again made a distinction between conditions and authorisations. While a license can often authorise the acts necessary to comply with a condition, a consent under the RMA does not always confer the authority to carry out all the conditions imposed.

Mallon J held that these acts done or authorised by the license are acts under the CMA, which trigger the s71 requirement to obtain approval from both the Minister of Conservation and the Minister of Energy. This approach was consistent with the decision in the *Save Happy Valley* case.

Concluding comments

The decision tends to confirm the 'orthodox' position that an approval under one enactment will rarely constitute an approval under a different enactment. For example, obtaining land use consents do not obviate the need for any Reserves or Conservation Act approvals or concessions.

That said, the Court did appear to leave it open for resource consents in certain circumstances to constitute a lawful authority under the Wildlife Act - but only where the removal or dealing with wildlife is authorised by the consent (ie it is not just a condition).

This highlights the general need for practitioners to keep in mind the difference between a grant of rights (whether in a consent, licence, etc) and conditions attaching to that grant. Conditions requiring certain activities to be undertaken do not necessarily authorise those activities - other authorities may need to be obtained.

More recent cases will follow in the RMLA Journal.

RMLA CONFERENCE 2009 UPDATE

**1 – 3 OCTOBER 2009
(Mark your diary now)**

in WELLINGTON

“Capital Leadership - in the national interest? – Challenges for effective environmental management”

The winds of change have gathered and calls for national responses to environmental issues are increasingly requiring decision makers to weigh the national interest against local effects.

New Zealand is facing an ever increasing number of national environmental issues. Though they require a national response, this needs to be evaluated against local interests and effects to ensure that sustainable management is achieved. Decision makers are increasingly being required to grapple with this complex evaluation task.

The 2009 RMLA Annual Conference explores how national and local interests can be appropriately weighed in resource management planning and decision making.

Leadership from the community, Maori, industry, the Courts, local government and central government is critical to ensure that all interests are properly assessed.

The conference will examine the notion of leadership and how it can be achieved. Leaders from across the resource management spectrum will discuss the need for leadership on critical resource management issues, how it can be achieved and how national and local interests should be assessed.

How decision makers can evaluate national and local interests across matters such as

major infrastructure projects, natural resource use and allocation, climate change and hazard management will be explored in detail.

International, national and local perspectives on how to weigh the national interest against local effects will be discussed.

CONTINUING PROFESSIONAL DEVELOPMENT

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

CHANGE OF ADDRESS?

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