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AT THE EDGE : A VISION FOR NEW ZEALAND

Speech by Kevin Roberts to the Resource Management Law Association Conference, Auckland Friday 6 October 2000.

Good morning. Thank you for the opportunity to talk about vision for New Zealand. This is a big subject.

It's a highly emotionally issue for me because I've chosen to live my life here and I've chosen to champion New Zealand everywhere I go in the world.

You've presented me with an honour and a challenge...and the only way to meet a challenge is to focus single-mindedly on it.

Now to work. Vision.

We don't have one now and God knows we need one. Government aren't providing one, the media aren't, business isn't - so it looks like it's up to you and me to take a crack!

Understanding where we're coming from and

what we're capable of is necessary to create a vision that is relevant and resonant, and not some fantasy.

Jack Welch of GE said you've got to see the world as it is, not as it was or how you would like it to be. Reality bites.

To set context I want to thank this conference for your generous donation to TYLA, the Turn Your Life Around Trust in West Auckland, which I contribute to as a coach and as a funder.



KEVIN ROBERTS

TYLA identifies kids ten to sixteen on the way to wasting their lives. They're involved in, or capable of, violence and crime, against people, property, themselves.

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Most of the kids have had tough starts. Unstable family life, broken homes, gang affiliation. One or both parents may be an alcoholic or gambling addict. There is long-term unemployment. Prison is a factor.

TYLA is a three year programme. It's tough. We try to help them come to choices, to think about possibilities and goals to make constructive futures.

One hundred and seventeen young people have graduated from TYLA. Another 130 are currently in the programme. Kids who were on their way to a life of trouble have turned their lives around. They're achieving at university, in sports, as people, as full members of the New Zealand community.

Community building is where the vision-making process starts. It's that part of us which takes individual and collective responsibility for the society we live in.

As a country we have enormous strengths and advantages. I'm an optimist. I'm a New Zealand patriot. I know there's always a better way and I also know we need to find one quick!

We have black spots. We have gold medal rates of teenage pregnancy and youth suicide. We have generational cycles of abuse of women and children. New Zealand has the most under-fathered generation in the western world.

There is significant social inequality in New Zealand, so much so that an atlas of socio-economic deprivation has been published called "Degrees of Economic Deprivation in New Zealand." The most striking differences are ethnic groups. Over half of Maori lives in very deprived

neighbourhoods and the situation is worse for Pacific Islanders. We can't have "one team one dream" with this imbalance, with this inequity in the system. So we've got to get this fixed.

Having large numbers of people on the edges and on our books as welfare dependants is expensive and explosive. While we're trying to aim our heads to the heavens, it doesn't make sense to have our feet sinking in quicksand.

There is no value in ignoring this and simply saying "get over yourself". We need to deal to race and poverty issues in our vision-making in order to progress.

Ways forward include more resources going to the agencies who protect children and women; creating regional employment, especially for Maori men; affirmative programmes to empower all young people into the cyber-economy; preventative health programmes; prison education programmes; positive parenting programmes; mentoring schemes. This is all common sense stuff - and we need to add major new programmes on education about wealth creation - making money made simple.

Like most of you today I'm paying more tax than I was. I live in hope that the extra funds Government has collected are being used wisely and not being spent politically, stupidly or vengefully. I'm an optimist to the core!

The thing is, many of the things we complain about come down to one fact: we don't generate enough income for our expectations and our needs. Privately and publicly we spend more than we can afford, we waste a lot of

our human resources, we have about the worst savings record in the world - and we somehow expect the money to be there when its needed.

Ideas about making money aren't discussed in New Zealand. They're not discussed in Parliament. How many of our cabinet have successful business or export experience? Two out of 24? There are no targets for national and regional wealth creation. There is rampant ignorance about how to create prosperity. We have a hundred billion-dollar economy and no plan to add fifty billion dollars to it.

We need to spend the next five years on export-driven wealth creation. That's only one year less than World War II. Our only way forward is to export more. When we all get our minds committed to this direction, the job should be easy.

Here's one example. Compudigm, a Wellington software company, was set-up two years ago on an \$80,000 loan. Today the company is valued at seventy million dollars, employs 40 people and is a world leader in 3D data visualisation for massive data users such as insurance companies, airlines, telcos and casinos.

By 2005 they want offices in 10 countries. Says a founder, "we're aiming to become very large very quickly and maintain our [global] market dominance of business intelligence." Bravo! They've got there on compelling ideas about design and computing, and hundred hour weeks. All Kiwi.

New Zealand has the ability to earn exceptionally well from software. Our improvisational skills, our ability to create short cuts and our engineering abilities mean we're born naturals at

IT. The Israelis know this, they know more about our high tech companies and people than most business people here. Israel has about 150 companies listed on the NASDAQ and they love Kiwis! And wander around the labs of US high tech and biotech companies and universities and you'll find New Zealanders. There are ways to get these minds tuned back here.

Novelist John Mulgan pinned down New Zealand character 60 years ago when he wrote:

"That the world should sit up and take notice of what is being done here provides the ultimate authentication of [our] existence, hence the attraction of experimenting. New Zealand is trying new things out not just for itself but for the world at large. It is the world's laboratory, providing radical and progressive solutions to common problems."

This is a visionary insight. Many people in New Zealand are looking for purpose. People ask for vision, and ask "who are we?" People are often suspicious about mass communication and shared visions. Simple messages however can carry spirit into the emotional architecture of our hearts and minds.

There will be few Australians last week who don't believe they are part of "The Lucky Country." I've got just one word to say Australians about the Olympics: "Congratulations."

Who can deny the motivational power of "The American Dream"? Who cannot fail to shiver when you hear the words: "I have a dream." Or: "Ask not what your country can do for you, ask what you can do for your country."

For its colonising power that

impacted for a few hundred years, who could beat "Empire, King and Country". No-one doubts Japan achieved its mission: "Catch Up and exceed the West." Coca Cola's vision is "to have a cold Coke at arms reach wherever you are in the world."

And the mantra that has galvanised my company for over 25 years is "Nothing Is Impossible." 7000 people in 92 countries believe this and act on it every minute. A vision is a soundbite, a memorable signpost that points the way, a singularly effective insight that is suggestive, but not instructive.

For a country that is so good at designing and making things, New Zealand's calls to arms have been ill-directed and lacking in character. The spirit for much of last century was "where Britain goes, we go". The 50s and 60s were underscored with "she'll be right" and "rugby, racing and beer." Disastrous.

The 70s brought the aggressively egalitarian "New Zealand the way you want it." Muldoon's aspirations stretched no further than leaving New Zealand no worse than he found it.

There was the blur of the next 15 years. No one really gave it a name except Rogernomics. These were liberating years for New Zealand. Muldoon's rulebook needed to be thrown out because we were bankrupt, out of money and out of ideas.

These years saw one of the gutsiest acts of global resource management: Nuclear Free. It made the world safer, and gave us an instant environmental edge that helped create the way we are widely perceived internationally: clean and green.

It is an ultimately sad commentary

on this reformist period that the stickiest slogan to emerge is "Closing the Gaps." It's hanging out there as one of our two current pieces of visionary signwriting. As an internally-focused defensive strategy, "Closing the Gaps" is fine. It communicates directly, it has some emotional pull, it describes part of a plan and is action-oriented. But it's limiting and non-aspirational.

And the other visionary signpost - our externally focused offensive strategy! What is this? What is our battle cry into the new millennium? What are we advertising to the world about ourselves? What is the international marketing campaign for our \$100 billion country?

Pure! One hundred per cent!

I know a little bit about this Pure business. My dinner dates may even have had something to do with the brief for this campaign being safe, non-controversial and hygienic. The first thing I would say is that \$55 million is a pathetically small amount of money to spend on branding and marketing this country, especially as there's no point in being brilliant at the wrong thing.

The government is a \$35 billion enterprise, the biggest in New Zealand by a factor of ten. Its revenue is raised almost entirely by taxing citizens and producers. We depend totally on export for new wealth creation. To spend only \$55 million to underpin and market a \$35 billion tax base is totally out of whack. Certainly no business could survive on this equation.

Labour recognised that funding for the arts in New Zealand had been on starvation rations for many years, and

did something to fix this. It needs to do the same for the international marketing of New Zealand. We don't even have a trade brand. Except Pure. The most boring idea I've ever seen. Completely bland.

The Tourism Board says we have to play to our strengths. "We've had something like 60 years of product advertising showing our green fields," the Board says. "That's what people come here for," they say.

Let's interrogate the "Pure" proposition. I've always believed that the way New Zealand markets itself to the world through tourism should also reflect our desired positioning on export, immigration, culture and so on. The way we market ourselves internationally should be honest and engaging, about who we are and not some fantasy.

With "Pure", we have a 1950s style my-alps-are-prettier-than- your-alps template that maxes Clean Green. It looks like Austria, Canada, Denmark, Sweden, Scotland and Iceland.

Worse, it won't actually deliver. "Pure" is at odds with reality. The national mood sure doesn't seem pure at the moment. And is Clean Green sustainable? This is where your interests as resource managers coincide with national image making.

Unlimited magazine says Clean Green New Zealand is a myth. Agricultural pollution, chemical fertiliser run-off into rivers and coastal zones, toxic waste, air pollution in down-town Auckland exceeding World Health standards, failure of most exporters to meet international environmental standards and so on. There is no doubt in global competitive terms that Clean Green is

the premium positioning. We could be number one in the world, but our New Zealand Clean Green must be one hundred percent pure and provable.

I believe Clean Green has to be a big tick in the vision box. We need to innovate to achieve this, but New Zealand is a world innovation champion and we can achieve huge things if our heads are all going in the same rough direction. How do we create a vision for New Zealand, a vision that is about nationhood, about citizenship, about all New Zealanders, and not about government, politics or economics?

Before we can achieve a leadership vision for New Zealand which we can all relate to, we've got to make some changes.

Here are ten ideas I would implement immediately:

1. Create the conditions for New Zealand to become the Silicon Valley of the South. I've already observed that we have an innate ability to design and make breakthrough technologies. We need to construct risk, reward and incentive packages for every high tech company in the world to establish here. We need to persuade Bill Gates to stop donating his vast wealth to charity and instead use it to change the world. He should transform an entire nation, a nation that will match his money dollar for dollar and leverage it. That nation should be New Zealand, because we're fitter and faster, smaller and sharper. With his help we'll equip every child over ten years old with a computing device and fast internet access so that they develop their intuitive computer and networking skills from a young age...before anyone else in the world.

2. Transfer money from defence to offence. We've got a billion-dollar defence budget and less than ten per cent of that for marketing. Quadruple the budget for international trade and tourism marketing and focus the effort on North America, the most affluent country on earth, with a big idea that isn't pure garbage. And we must create an interactive website that acts as the front door to New Zealand. Something cool that your kids will live on. We just don't have a compelling international web marketing strategy.

3. Use the tax system creatively. It's not a simple put taxes up/take taxes down equation. The real question is what innovative ideas to stimulate growth can we find by managing the tax system differently. As a minimum there should be tax benefits for investment in export ideas and high technology.

4. Build bridges to the million New Zealanders who live overseas. I'm not interested in the population of New Zealand; I'm only interested in the population of New Zealanders in the world. I calculate there are about five million of us on the globe. It's a deliberately provocative figure but one that compels people to have ideas about making connections and networks that bring New Zealanders back home - emotionally, virtually and physically. There is Kiwi wealth, ideas and goodwill swimming around the world and as a country we want it!

5. Go all the way for Clean Green. Here's the opportunity: a US government report of 21 developed nations shows that consumers are prepared to pay 35% more for organic products than non-organic products. This is occurring at the same time as world prices for agriproducts are

declining. The study predicts a current market value of more than \$US14 billion. In New Zealand, the annual growth in our organic market is expected to be 50%, with the New Zealand Dairy Board and others recently endorsing organic farming development. New Zealand has a priceless opportunity to establish itself as the high quality, high value, natural food centre of the world. We need to produce, market and brand the highest quality food and make our clean green reputation a reality before we lose it altogether.

6. Encourage immigration. America and Australia were built on waves of immigrants. Let's have out-of-the-box thinking about what others can add to our country. Instead of having the points system starting with "do you have a million dollars," assess people on the I & E words: do they have Ideas, Imagination, Insight, Instinct; do they have Energy, Empathy, Excitement, Emotion and Edge.

7. Encourage procreation! One of the really worrying demographic trends is the decrease in birth rates among young professional people with student loans. They're putting off having children because of their debt. I would advocate an amnesty on student loans in perpetuity. The long term consequences of an ageing population coupled with declining fertility rates among high income earners is a nightmare.

8. Drastically reduce the number of accountants and lawyers we produce. We overproduce bean counters and rule keepers, and under-produce ideas people, engineers, technologists, scientists and people with selling skills. They put a law faculty into that beautiful wooden building opposite

the Beehive when what they should have done is created a globally-focused school of export, tourism, design, information technology and international marketing. An Institute of the Imagination! This is where the new wealth creation is.

9. Exalt in our Maori Edge. With innate design, craft and performance skills, coupled with cultural traditions of networking and co-operation compatible with new economy work styles, I believe Maori skills and traditions are a hugely untapped export resource. Maori are a sophisticated indigenous culture that connects comfortably with the world. These pictures are from the book Moko by New York photographer Hans Neleman and published internationally. From medicine to architecture to peacekeeping to broadcasting to resource management, Maori have natural skills that I don't see being used centre stage in New Zealand and internationally, but should be. It's a final nail into how scared a campaign Pure is that they used a cosmetic Moko in this ad.

10. Ditch the political system! Widespread disenchantment with our governance led to MMP, another seriously stupid idea for a community the miniscule size of New Zealand. Surprise surprise, people are just as disenchanting by the relentlessly adversarial nature of politics. While business has massively improved the way it conducts itself especially in terms of customer service and the use of the web, our parliament is still stuck in a mode that was the same in Dick Seddon's Day. If the government was a business it would be broke! For a country of less than four million people onshore, we have constructed an extremely convoluted political

system. It is a luxurious vanity for such a small country to have so much representation and therefore so much introspection when the main event lies totally overseas.

We have politicians and parties from both sides who have influence that is massively disproportionate to their popular vote. MMP should go, the number of MPs should be reduced at least in line with the referendum recommendations. Politics is a dirty business, especially with the media needing to fill their screens and pages twice a day. I believe we are badly served by the managers of our 35 billion-dollar business. There has got to be a better way. New Zealand must be run as a nation with an export-or-die focus, and not as a political football.

Having done all this, which I reckon a serious CEO could achieve in 100 days, how do we create the new vision for New Zealand for the new millennium?

Well, we've got four tools to use:

#1: Seek the Tipping Point.

In New York we've been working with Michael Gladwell, author of a hot business book called *The Tipping Point: How Little Things Can Make a Big Difference*.

If you're like me and believe the gap between our perceived mediocrity and rip-roaring success might actually be very small, then *The Tipping Point* is a book you must read. Gladwell looks at why major changes in society often happen unexpectedly. Ideas, behaviour, messages and products, he argues, often spread like a virus.

Social epidemics are examples of

contagious behaviour and the phenomenon of word-of-mouth. A small number of people and actions caused crime in New York to drop suddenly and dramatically in the mid 1990s. It wasn't as if some huge percentage of would-be murderers suddenly sat up in 1993 and decided not to commit any more crimes. It was that a small number of changes occurred at the margin - at the edge - and built quickly into a critical mass of attitude and action.

In all your vision-making, look to create a Tipping Point, a small but dramatic moment when everything can change at once.

#2: Operate at Peak Performance.

I am a co-author of the book *Peak Performance: Business Lessons from the World's Greatest Sports Organisations*. Peak Performance is important because it is the story of creating cultures that achieve and sustain success. There are nine principles of Peak Performance. I'm going to offer you three today.

i. Create Your Greatest Imaginable Challenge. The Australian cricketers want to win every single test. Team New Zealand wants to win the America's Cup forever. We've got to set a Greatest Imaginable Challenge for New Zealand. One was offered to me this week: to "transform welfare dependency into entrepreneurial achievement in the new global economy."

ii. The Inspirational Dream must get people wanting to belong. It must capture the spirit of the effort. "Make magic" was the inspirational dream of the Chicago Bulls with Michael Jordan. "The joy of speed" belongs to the Williams Formula One team.

ii. Focus. Achieve a result - this

minute, this week, in a hundred days. Don't choke at the last minute. John Eales showed us how!

There are six more principles - Building Community; Creating the Future; Exceeding Personal Best; The Last Detail; Sharing the Dream and Game-breaking Ideas. You can go to my website www.saatchikevin.com to find out more.

Peak Performance pivots around Inspirational Players. They are gamemakers because they have talent, commitment and a winning ability. These are people who are or whose legend is consistently inspirational. It's a great idea for New Zealand because we breed outstanding people.

Growing up in a mix of sanctuary, incubator, quarantine and asylum, New Zealanders produce a dazzling mix of head in the clouds and feet on the ground. Our grit, guts and genius is highly prized throughout the world. Trouble is, people are leaving, for longer, forever. We've got to engage their hearts and minds so they stay New Zealanders, in touch and grounded, emotionally and then physically.

#3: Make New Zealand a Lovemark

I've been working this year to identify the design elements of sustaining emotional connections with ideas, people, experiences, products, events and beliefs. This is new thinking about how you can create abundance and joy.

Here's the introduction to our website lovemarks.com: "A Lovemark is a state of grace that irrevocably binds the aspirations of your customers, your members, your

believers. It's the emotional connection that lets you go out and conquer the world."

Lovemarks are based around the twin ingredients of mystery and sensuality. When we're creating vision for New Zealand, we need to weigh the presence of these factors:

- i) Inspirational stories and metaphors
- ii) Past present and future together
- iii) Mythic characters and icons
- iv) Strong emotional connections
- v) Plays all the senses: touch, sight, sound, taste and smell
- vi) Above all, is owned, held, wanted by consumers, users and citizens.

The job of creating an international Lovemark for New Zealand is easy given the already positive perceptions in the world about us. Creating the internal Lovemark is the pressing task. Our outward vision - who we are to the world - will help us achieve our inward vision. "Pure" just won't cut it.

#4: Communicate the Vision simply and emotionally

Be brief. Put the vision into one word. We have a global client who has the most comprehensive product range in their sector in the world. To distinguish between products we have together developed One Word Equities. That's all we are allowed, one word to describe and differentiate the personality of the product. It's a great model.

What are some of the words that can be applied to New Zealand's vision? Choose your word. I've heard that a word for an innovation vision

for New Zealand should be “dare.”

A business partner of mine Brian Sweeney and I have a website about New Zealand identity and networking. When we chose our word, we put all the design tools on the desk: Lovemarks, the Tipping Point, Peak Performance and One Word Equities.

Intuitively we kept coming back to one metaphor that we believe describes who we are and what our special quality is. It's not a fantasy word, it's a word that takes us as high as the heavens that Rutherford and Pickering dreamt about, and as low as an abyss.

It's a word that is open and ambiguous. The dots aren't connected so that the people can script their own meaning. It empowers and liberates. It gets people worked up and it plays to our creative and risk-taking side. It's the word the organisers borrowed, with our endorsement, as the theme for this conference.

Our one-word equity for New Zealand is EDGE. This is our word for re-setting our framework, for putting our heads and hearts into an entrepreneurial, internationally focused space. In longhand, we call it The New Zealand Edge. We have our Greatest Imaginable Challenge: that New Zealand should become the world's coolest country. The funkiest. The edgiest.

The country with attitude. Prosperity flows directly from this. We have our Inspirational Dream: Winning the World from the Edge.

Our Focus is simply this: Export or Die. We stand for a massive turnaround in attitude towards

exporting. We kid ourselves that we are a trading nation: only 4% of New Zealand businesses export. Thirty companies earn half of our foreign exchange. This is a narrow and shallow export base. We need to tattoo the words EXPORT onto our foreheads and develop export ideas every day.

The Edge metaphor comes from our extreme physical location on the globe. Edge theory comes from biology, the most important of today's sciences. Change in a species always comes from the edge. Biology explains the internet and exponential growth and increasing returns to scale.

Edge comes from our position relative to the dateline, on the leading edge of time, first to the future everyday. Edge says danger and risk, from our adventure tourism to our volcanic and earthquake lined landscape, to our art through to our economy.

Edge promises thrilling achievement. Competitive edge. Leading edge. Cutting edge. At the edge of your seat.

Edge is a word embedded in that new economy we are trying to develop, the Knowledge Economy. This term is rational, left- brain bunkum and is not the basis for vision. It sounds like three years of algebra. The Knowledge Economy is not a Lovemark. The term disenfranchises the people who have not progressed through the education system. It says unless you're degree'd and diplom'd you can't participate.

I like the term Edge Economy because it plays to our creative and entrepreneurial side. Edge also flips our psyche. David Eggleton describes

the work of New Zealand poet Alan Curnow 40 years ago as dealing with the displacement, dislocation, unease, inferiority, insecurity, insignificance and doubts of Pakeha settler society.

Our Lovemark, The New Zealand Edge, is staunch about the strengths of being where we are and who we are. The Edge liberates us from our post-colonial baggage.

No vision is complete without a website. Ours is nzedge.com and it's our channel to five million Kiwis. You'll find hundreds of stories of inspirational New Zealanders who are rocking the edges of the globe with their imaginations. At nzedge.com I believe you'll find unexpected richness, texture and depth to the New Zealand story. You'll find an evolving community of gung-ho people from here and around the world.

The vision we are creating with the nzedge.com community is for all to share. The New Zealand Edge will become a Tipping Point. It's an outlaw brand, deliberately seeking the edge. It is an empowering tool that liberates the spirit, enables the mind and quickens the heart. It works for me and it will work for you.

Do three things when you leave this conference:

One, embrace your own personal New Zealand Edge, examine it, polish it, sharpen it.

Two, commit yourself to an export idea, it doesn't matter what, just focus on creating and then selling something overseas.

And three, get ready to take on the world from the edge and win.

Resource Consent Durations & Reviews

In this article Rob van Voorhuysen and Murray Cameron discuss current practice in the implementation of the provisions of the Resource Management Act which deal with consent durations and reviews of consent conditions. The article is based on the results of a case study which was undertaken on the subject by Rob van Voorhuysen, a Director of Environmental Management Services Limited. Murray Cameron, a Senior Policy Analyst in the Northern Regions Office of the Ministry for the Environment, coordinated the study.

Introduction

In late 1999, the Ministry for the Environment commissioned Environmental Management Services Ltd to undertake a study of ss.123–133 of the RMA, which are the sections dealing with consent durations, the lapsing of consents, the cancellation of consents, consent holder initiated changes to consent conditions and council reviews of consent conditions. The main purpose of the study was to provide information on current council practice and identify areas where there is the potential to improve practice. The study report, entitled Resource Consent Durations and Consent Reviews, was published in September 2000; it is also available on the Ministry's website <http://www.mfe.govt.nz>

Information was obtained by surveying regional councils and unitary authorities. Territorial authorities were not included in the survey, as land use consents are generally granted for either unlimited or long durations. In addition, much of the recent debate

regarding consent durations and consent reviews has occurred at the regional council level.

Commentary

The consent duration provisions in the Act do not establish any tests to determine the term for which a consent should be granted. Case law, however, states that “the applicant is entitled to as much security of term as is consistent with sustainable management [1]”. There is thus a tension between allocating sufficiently long consent durations to enable continued business viability, and managing the greater environmental risk associated with long duration consents. Over time, circumstances which have a bearing on resource management considerations can change, including changes in knowledge about the environment, community values, and technology.

The Resource Management Act establishes a maximum of 35 years as an upper limit for consent duration and a default duration of

five years. The s 128 consent review provisions in the Act provide an opportunity to allow longer consent durations (up to 35 years) while providing a safeguard to ensure that the requirements of the Act and of s.5(2) in particular are able to be met over time.

The review provisions enable the council to periodically review the consent conditions to ensure they are appropriate for managing environmental effects over a period of time. Specific periods between successive reviews are not specified in the Act, as the review mechanism provides a flexible tool to be used as needed.

Consent Review Case Law

The study report provides a synopsis of the key components of ss.123–133 of the Act, a commentary on those sections and relevant case law relating to them. There has been growing discussion among councils and other stakeholders about the consent duration and review provisions in recent years. The

opportunities and implementation issues concerning s.128 consent reviews have, in particular, been the subject of some debate.

Section 128 provides that a council can serve notice of its intention to review the conditions of resource consent:

- at any times specified in the consent
 - to deal with adverse effects arising after the granting of the consent that are appropriate to deal with at a later stage, or
 - to require the application of BPO to discharges to remove or reduce adverse effects, or
 - for any other purpose specified in the consent, or
- to ensure that existing consents meet the requirements of operative regional rules specifying maximum or minimum levels or flows or rates of use of water, or minimum water or air quality standards, or ranges of geothermal water temperature or pressure, or
- where inaccuracies in the information originally provided by the consent applicant was inaccurate and influenced the decision of the consent authority and the effects of the exercise of the consent necessitate more appropriate conditions.

A number of principles can be extracted from the case law on

section 128 reviews. These include the following (case law references are given at the end of this article):

- The review condition must specify the timing and purpose of any reviews [2].
- Where several consents relate to the one activity, any review conditions must be incorporated separately into each of the resource consents [if it is desired to review all consents simultaneously] [2].
- The review procedure should not be confused with enforcement procedures for the conditions of consent [2].
- The power to review consent conditions is discretionary and cannot be made mandatory by a condition in a resource consent [3].
- Consent conditions cannot be amended upon review to prevent the original activity being undertaken [4].

Consent Duration Practice

A survey of 10,696 consents issued by regional councils over the period January 1998 to December 1999 revealed that the average consent duration for a wide range of consent types was 15 years.

There was considerable variation across councils in the typical consent durations given for each consent category. This is likely to be largely determined by the perceptions of environmental risk in

each region and the professional and political judgements about managing these risks. These judgements would also be influenced by the approach taken by the councils to undertaking consent reviews.

Two practice factors were consistently identified by the councils that limited the consent durations typically imposed:

- Short-duration construction related activities are generally granted consent durations commensurate with the period for which the activity is undertaken. This is a sensible approach for reasons of administrative efficiency.
- Around two-thirds of regional councils assign a common expiry date to water take and discharge consents within a single catchment. This is also sensible as it allows the catchment-wide cumulative effects of multiple resource use activities to be considered and assessed in an integrated manner. The common expiry date periods adopted by

Around two-thirds of regional councils assign a common expiry date to water take and discharge consents within a single catchment.

councils in these situations are either five, 10 or 15 years.

Other common reasons for not utilising longer durations included:

- the need to keep pace with changes in mitigation technology, particularly for discharges to air and water. Requiring a replacement consent was considered to be a more robust and certain means of introducing new technology, as opposed to relying on a review process,
- the desirability of being able to decline a replacement consent application for some types of activities. This option is not available through a review process,
- historical practice (particularly with catchment based common expiry dates),
- a lack of faith in the review process being able to adequately address the issue of ongoing adverse effects, combined with a lack of experience in actually undertaking reviews.

Consent Duration Guidelines

Most regional councils and unitary authorities have some form of consent duration guidelines. Several councils have included this policy guidance in contestable statutory policy or planning documents, thereby facilitating desirable public debate and input on those matters. There is a fair degree of variation in

the consent durations specified in the guidelines used by different councils.

The use of publicly available consent duration decision making criteria is beneficial as it can inform consent applicants about how a council is likely to respond to their application. If consent applicants seek long duration consents, or a duration outside the range specified in the council guideline, then they have a clear idea of what they must do to satisfy the council's interests.

Consent Review Practice

Consent reviews are a powerful resource management tool as they enable long term certainty for resource users while providing flexibility for resource managers. However, reviews should not be used as a substitute for incomplete consent applications where the applicant has failed to adequately identify and evaluate the potential effects of their activities on the environment, or their willingness and ability to avoid, remedy or mitigate those effects.

Consent reviews are subject to council discretion and do not occur unless the consent authority initiates them. Although most councils regularly impose consent review conditions on some or all of the consents they grant, the actual initiation of reviews is rare, accounting for 1.1 percent of the consents processed during the two-year survey period, with the bulk of these being undertaken by a single council.

The reasons for the reviews being initiated by councils included:

There is a fair degree of variation in the consent durations specified in the guidelines used by different councils.

- satisfying submitters' concerns
- changing operating conditions or the decommissioning of plant
- amending the compliance monitoring programme (usually increasing the monitoring required)
- responding to incidents of non-compliance
- responding to complaints.

The councils surveyed identified barriers to the more frequent use of consent reviews, including:

- uncertainty over whether the costs of reviews can be recovered from consent holders
- uncertainty over the permissible scope of consent reviews
- uncertainty over the process for reviews in terms of affected party approvals and public notification
- a lack of information on relevant environmental effects at the time of review. Currently, the burden of proof is on the

- council to show that changes to consent conditions are necessary
- a lack of staff resources to initiate and process consent reviews. Some council staff conceded that they are too busy responding to new and consent replacement applications to undertake proactive consent reviews.

These matters could be addressed through policy guidance, reference to case law, or action by the council. There are therefore no substantive barriers to the more frequent use of consent reviews and the associated granting of longer duration consents.

Consent change applications by consent holders were more common and constituted 6 percent of the consents processed during the two-year survey period. The consent holder has a direct interest in the workability of their consent, and they are therefore more proactive in seeking changes to inappropriate consent conditions, or to accommodate changes in the nature or scale of their consented activities.

Conclusion

There is scope for general practice improvement amongst councils. Specifically, councils could formulate, adopt and publicise guidelines that will assist decision-making on resource consent durations on a case-by-case basis. Such guidelines should make it clear that they are for the purpose of guidance only, and do not restrict the council's discretion in each case

to grant terms based on the particulars of individual consent applications.

Councils could make more use of s.128 reviews to ensure that consent conditions remain appropriate to ensure that any adverse effects are adequately avoided, remedied or mitigated over time. This will necessitate the implementation of robust compliance and environmental impact monitoring programmes for resource consents.

When initiating a review, councils need to be mindful of the costs that a review can impose on the consent holder. Reviews should only be initiated where there is an actual environmental issue that needs to be addressed, rather than being a matter of merely following perceived due process. The study report provides an example consent duration guideline and consent review condition assist with the implementation of these suggested practice improvements.

Acknowledgements

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Thomas (Watercare Services) and Marilyn Bramley and Craig Mallett (Ministry for the Environment).

Case Law References:

1. *Bright Wood NZ Ltd v Southland Regional Council*, C143/99 and noted [1999] BRM Gazette 125
2. *NZ Rail v Marlborough District Council* [1993] 2NZRMA 449
3. *Queenstown Adventure Park (1993) Ltd v Queenstown Lakes District Council* (C96/94).
4. *Medical Officer of Health v Canterbury Regional Council* [1995] NZRMA 49

When initiating a review, councils need to be mindful of the costs that a review can impose on the consent holder.

Resource consent decisions

Notification, variation and extension- what happens after a new district plan is notified?

Body Corporate 97010 v Auckland City Council (CA 64/00, 17 August 2000)

By Matthew Casey, KPMG Legal

Summary

This was an appeal from the High Court judgment of Randerson J discussed in the July issue of the Resource Management Journal. The Court of Appeal rejected all but one challenge to Council's decisions to (i) grant a non-notified consent; (ii) allow a variation to the consent; and (iii) extend the time for implementation. The variation and extension were sought after the Council had notified a more restrictive proposed district plan and the main issues concerned whether this plan was to be taken into account. The Court said that the Council was correct not to take it into account on the variation application, but should have done so on the application to extend time. The appeal was allowed on this point only.

The judgment contains many other observations relevant to issues which often arise in connection with non-notification, variation and extension applications, and encourages a pragmatic approach when an application or consent does not expressly refer to ancillary consents that may be required.

Introduction

Body Corporate, representing the owners of a block of townhouses in Parnell, sought judicial review of three separate decisions by the Auckland City Council for a 30m high apartment tower on former railway land, which would obstruct the outlook from the townhouses. The facts of the case are fairly simple and the decisions of the Council (and the High Court) were upheld in all but one critical respect.

Non-notification of original application – first decision

The Council first granted consent on 1 October 1997 after deciding that the application did not require notification. It was partly for a controlled activity (dwelling units in the Res 9C zone) and the discretionary aspect of the activity (stacked parking) did not involve any off site adverse effects. The Court had little hesitation in upholding the Council's decision not to notify. The appellants had asserted that in accordance with *Bayley v Manukau City Council* [1999] 1 NZLR 568 the Council should have treated the whole proposal as discretionary. The Court of Appeal held that the effects of the carparking did not overlap with the controlled activity matters and there were no consequential or

flow-on effects as there had been in *Bayley*. As a result, the Court upheld the separate treatment of the two consent categories for the purpose of notification.

Eight days after it granted the consent the Council notified its proposed district plan for the Central Area which had a more restrictive 15m height limitation than the previous 30m height limit applying under the operative Auckland District Scheme.

Variation of consent conditions – second decision

In November 1998 the developer applied under s.127 RMA for a variation to the original consent, to replace the original single block with twin towers within the same building envelope. This involved fewer apartments and a reduction in the number of carparks. Because no-one would be adversely affected by the variation the Council decided to treat it as non-notified and granted it.

The challenges to this decision were also dismissed. The Body Corporate claimed that the variation should not have been dealt with under s.127 because (a) this was a whole new development (not merely changes to “conditions”) and required a fresh application; (b) there had been no “change of circumstances” making the original proposal “inappropriate or unnecessary” in terms of s.127; and (c) the Council should have had regard to the proposed plan because s.127(3) imports s.104(1)(e) requiring regard to the relevant parts of a “plan or proposed plan”.

Whether variation in reality a new proposal

The Court held that whether a variation application is in reality an application for consent to a new activity is a matter of fact and degree. Where there are materially different effects, it is better to treat the application as for a new consent. In this case, the adverse effects from a reduced number of apartments were seen to be less. As such the Council was entitled to process the application under section 127.

Section 127 provides for changes to *conditions* and the Body Corporate argued that what was proposed here was a change to the consent itself. The Court distinguished the activity consented to (which can be qualified by conditions) from the conditions themselves. Here the activity was the residential occupation of separate apartments, and that remained the case following the change, with the number and dimensions being matters of conditions. Therefore a change from a single to a twin tower within the overall envelope was not a different activity.

The Court of Appeal also confirmed that the application did not need to be notified, given the reduced adverse effects as compared with the original proposal.

Other consents incidentally required – pragmatic approach

Of particular interest is the Court’s response to an argument by the Body Corporate that further discretionary consents were incidentally required

even under the operative plan and were not specifically sought or granted as part of the variation. It argued that this was contrary to s.9 which only protects activities which are *expressly* allowed by a resource consent.

The Court held that an application can include incidental matters which may technically require separate consents, and consents given will be valid notwithstanding deficiencies in the form of application. “It is undesirable that the law relating to resource consent applications should descend unnecessarily into procedural technicalities. Substance is to be preferred to form”.

This is a pragmatic approach where the applicant or Council may have overlooked the formality of a separate consent but where the matter is nonetheless covered in the application and considered by the Council. In this case the Council officer had considered the matters (relating to vehicle movements and carparks) and the Court described as “ridiculous” the notion that the

Because no-one would be adversely affected by the variation the Council decided to treat it as non-notified and granted it.

variation should be set aside because technically there should have been (further) separate applications for consent.

Variation not to be assessed in accordance with proposed plan

The Court then dismissed the Body Corporate's argument that the variation application also had to be assessed with reference to the proposed plan, pointing out that s. 127(3) stated that ss.88 to 121 - including s. 104(1)(e) - were to apply "with all necessary modifications". To require a consent holder whose plans had changed to satisfy the requirements of a possibly more restrictive regime would allow none of the protection afforded by section 9 of RMA. The effects of a variation with respect to any new planning provisions under s. 127 are to be considered only to the extent that they differ from those effects taken into account in granting the original consent.

Interruptions were caused by the difficulties with Ports of Auckland and the redesign of the project

Change in circumstances making original condition inappropriate

On the issue of whether there had been a change in circumstances making the condition (compliance with the original plans) "inappropriate or unnecessary", the Court accepted as sufficient the developer's claim of a change in market conditions during delays caused by a separate challenge by Ports of Auckland to the development. The Court held that the change of circumstances and the question of what might be inappropriate were not limited to planning considerations.

Extension of time to implement consent – third decision

Council's third decision was to grant an application by the developer to extend the two-year lapsing period of the consent under s.125 RMA beyond its initial expiry date of 1 October 1999.

Substantial progress or effort

The first question was whether there had been substantial progress or effort towards giving effect to the consent as required by s.125. No actual work had been done on site but the developer had spent over \$600,000 and had achieved a significant level of forward sales. While continuity of effort is required, there may be interruptions which do not break the overall picture. Interruptions were caused by the difficulties with Ports of Auckland and the redesign of the project, but it was open to the

Council to conclude that there had been substantial effort, and arguably progress.

Adverse effects of the extension

The second limb of s.125 requires the applicant to obtain consent from every person who may be adversely affected by the extension of time. The only adverse effects to be considered under this heading are those resulting from the extension of time to give effect to the consent, not those of the activity itself unless there have been changes in the surrounding environment in the interim, such that new parties may be affected. In this case the Court was satisfied that the Council could properly conclude that no person would be adversely affected from the extension.

Effects on the policies and objectives of the proposed plan

The third limb of s.125 requires that the extension have only minor effects "on the policies and objectives of any plan", which includes a proposed plan. It was on this issue that the Council's decision faltered and was ultimately set aside. The Court referred to the philosophy outlined in *Katz v Auckland City Council* (1987) 12 NZTPA 211 that there are compelling reasons why a planning consent should not subsist for a lengthy period without being given effect, because physical and social environments change, knowledge progresses and district plans change.

Thus the Council was required to take into account that the planning

situation had altered since the consent was granted, and that extending the consent might compromise the policies and objectives of the new (proposed) plan:

The new plan or amendment may necessitate an entirely new appraisal of the proposal, because what was considered appropriate in the former planning context may have thereby been rendered inappropriate.

Not an exercise of weighting operative and proposed plans

The Council officer had concluded that because the particular rules of the proposed plan were the subject of submissions which had yet to be heard, greater weight should be given to the operative plan. The Court disagreed with this approach, saying that in the case of an extension application the Council is not engaged in a weighting exercise as it is under s.104. The effect on the new plan must be considered separately, although some allowance may be made for the uncertainties still surrounding it.

When the consent was granted it was on the basis that it would be implemented within the two-year period and the position after that was quite different, so that the developer was not entitled to proceed in what might be a very different planning context. The Court held that the Council was not entitled to give greater weight to the operative plan because of the statutory infancy of the proposed plan.

The result was that Council's

decision on the extension of time was declared invalid and set aside. The options available are for the Council to reconsider that application or for the developer to apply for a fresh consent, but in either case the proposal must now be assessed against the new plan.

Rules as well as objectives and policies to be considered

An interesting aspect of the decision is that both Courts rejected an argument by the developer that in considering the "policies and objectives" of the proposed plan the Council should disregard the actual rule about the 15m height restriction. The Courts said that rules are the means by which the policies and objectives are implemented and so to the extent that they give substance to and define the policies and objectives, they ought to be considered.

Comment

The judgment is helpful in explaining the limits to the principle in the *Bayley* case as to when a proposal is to be treated as wholly discretionary (or non-complying) rather than just aspects of it. It also assists in the pragmatic approach required to applications or consents which do not expressly cover every aspect of a proposal requiring consent.

The main point of the judgment is that in the case of an extension of time for a consent, any new or amended plan (or proposed plan) must be taken into account, whereas in the case of a variation of the consent, this is not required. This

can have serious repercussions in the case of a development which is well under way but not completed before the expiry date. A consent-holder is potentially at considerable risk of not qualifying for an extension if a district plan change has been notified in the meantime.

The Court ruled that the Council was not entitled to give greater weight to the operative plan because of the statutory infancy of the proposed plan.

Comparison of Indigenous Land Tenure in New Zealand & Australia

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Scope of this paper

This paper presents a comparison of the indigenous land tenure systems in Australia and New Zealand. A multitude of legislation and traditional practices are relevant to these systems however, due to practical considerations, only those that have a major effect on land tenure systems are considered. This paper addresses traditional land tenure systems, contemporary systems and relevant legislation and the current issues that affect land tenure systems.

1. Introduction

It is now recognised that indigenous people have legitimate rights to their traditional lands and knowledge. Both Maori and Aboriginal people have sophisticated traditional land tenure systems. The basis of these systems are of a spiritual nature, related to the relationship indigenous people have with the land and long term, maintained

presence on the land.

Widespread colonisation of Australia began in the late 1700's and the rights of Aborigines were not recognised at this time, with the concept of *terra nullius* assumed i.e. empty and uninhabited land. In New Zealand colonisation began in the 1800's and the rights of the Maori people were initially formally recognised by the Treaty of Waitangi.

In Australia, under the assumption of *terra nullius*, settlement proceeded unencumbered by such a treaty. In the late 1700's concern was expressed regarding the alienation of Aborigines from their traditional lands. This concern however was effectively ignored until the late 1900's when it began to be recognised that under common law Aborigines did in fact possess rights to their traditional lands.

Due to the recent nature of this recognition and the rapid development of subsequent legislation there are many aspects of land law in Australia that have yet to be fully explored and case law

developed. Currently, in both New Zealand and Australia, there are ongoing land claims being heard regarding rights to land, based on traditional tenure, with final settlements looking to be a long way off.

2. Pre-Colonial Land Tenure

2.1. New Zealand Maori

Traditionally Maori land was communally owned (i.e. without any individual having any title) by *iwi* (tribe), *hapu* (sub tribe) and *whanau* (extended family). Tribal consent was given to individuals to occupy given areas for the sustenance of their families, and groups of families were given rights to cultivate, hunt, and fish within the tribal territory¹.

Establishing claims to land by the first Maori arrivals was done by a formal appropriation and *whenua kite hou* (right of discovery). Right of occupation *ahi ka* (lighted fire) was recognised by all *iwi* as a legitimate right of ownership, which required individuals or groups to

keep their rights to their areas either by living permanently on the land or frequently returning to it. Continuous occupation *ahi ka roa* (long burning fire) transformed ownership into *take tipuna* (ancestral right). If the land was abandoned and the fires became cold (*ahli mataotao*), the rights to occupation were lost. Other rights included the right of conquest (*take raupatu*) and the right of gift (*take tuku*)^{2 3 4}.

Also, legitimizing relationships with the land was the concept of *Whakapapa*, (genealogical descent). Many tribes claim descent from either prominent landmarks, such as *Tapuae O Uenuku* in the Kaikoura Ranges, South Island, or through the naming by ancestors of sites within their area of occupation⁵. Traditional stories and knowledge of the land were required to support claims to ownership of the land. These stories have been important for supporting land claims before the Waitangi Tribunal.

With no documentation of any kind, flat stones, carved posts, paths and wooden fences, marked *whanau* and sub-tribal land boundaries. Prominent natural features such as rivers and mountains often marked boundaries between tribal lands⁶.

2.2. Australian Aborigines

A borigines are traditionally a hunter-gatherer people. This is especially true with the central-Australian people, where the harsh nature of the land precludes long-term settlement and associated cultivation necessary to support such settlement. Aboriginal people have lived in Australia for over 40,000 years⁷. Groups living in different areas have developed

their own language groupings, social structures and traditional lore. It would be an oversimplification to assume that the system of land tenure employed in one area could be applied universally. Therefore, for the purpose of this paper, the land tenure systems traditionally employed by Aboriginal people of the central region will be highlighted, where it is inappropriate to make generalisations.

The Aboriginal people have very strong spiritual connections with their lands that, at least traditionally, pervaded almost all aspects of their life⁸. Throughout Aboriginal culture runs a common thread of ancestral tracks, known as the 'Dreaming'. These tracks are lines of sites relating to events of their ancestors' travels, each site had traditional songs that retell these events⁹. One would not venture onto an estate unaccompanied, unless they knew the location of sites and mythology¹⁰.

The maintenance and transferal of sacred knowledge was a major responsibility. This involves not only transferal to the immediate land-owning group, but also to neighboring estates, due to the connecting nature of ancestral tracks and the frequent overlapping of estates¹¹. It is the traditional knowledge of spiritual matters, and a physical association with the land that forms the basis of the traditional Aboriginal land tenure system.

Rights to lands are held by a group of common descent. Amongst the Pitjantjatjara and Yangkuntjatarra people from the Central Australian region, these rights may be succeeded to, or transferred from either the mother

or the father – Ambilineal descent. If the person joins the mother's land-owning group however, they still hold responsibilities towards their father's group¹². This structure is different from most other parts of the continent, where descent is through the father's line – Patrilineal descent¹³.

2.3. Comparisons

Traditional land tenure systems of the Maori and Aboriginal people are remarkably similar, in that they are both based upon some description of long term residence and an associated knowledge of the spiritual relations with the land. The land owning groups are also usually of common ancestry. There are differences however, relating to the size of the Australian continental landmass, which may have caused differences between traditional Aboriginal groups' land tenure systems. In New Zealand this has not occurred, obviously because of New Zealand's smaller landmass and the fact that most early Maori establishment was in the North Island and northern parts of the South Island, therefore being in close contact with other tribes.

3. Post-colonial Land Tenure

3.1. New Zealand Maori

In 1840, a Treaty was signed at Waitangi by Lieutenant Governor Hobson, for the British Crown, and by 46 North Island Maori chiefs. After the first signing at Waitangi, almost another 500 signatures were obtained from chiefs throughout the country¹⁴. Under the Treaty, the chiefs,

2 Munn, Loveridge & Matunga, 1994
3 Asher & Naulls, 1987
4 Kingi & Maughan, 1998
5 A. Ward, pers. comm.
6 Munn, Loveridge & Matunga, 1994

7 http://www.planet.apc.org/pacific_action/issues/nativetiti.html
[Retrieved 25/8/00]
8 Coombs, 1994 Pp2-19
9 Layton, 1983 Pp21

10 Ibid.
11 Ibid.
12 Layton, 1983 Pp24-26
13 Palmer, 1983 Pp172
14 Munn, Loveridge & Matunga, 1994

representing their respective *iwi* and *hapu*, ceded “all the rights and powers of sovereignty which they possessed over their respective territories to the Queen of England”. In return, chiefs were to retain the *rangatiratanga* over their lands, forests, estates, fisheries, and other prized treasures¹⁵.

Common property rights is a concept that is, in general, inconsistent with Western land tenure. The primary objective of the early pieces of legislation passed in New Zealand after the signing of the Treaty of Waitangi in 1840, to the turn of the 20th Century, focused on the individualisation of communal ownership into a form recognisable under English Common Law.

The Native Land Court (known since 1954 as the Maori Land Court¹⁶) was established under the Native Lands Act 1865, which laid the foundation for the Court with its stated objective ‘to encourage the extinction of (native) proprietary custom¹⁷.’

The initial role of the Native Land Court was to define the land rights of Maori people under Maori custom and to translate those rights or customary titles into land titles recognisable under European law¹⁸. Among other things detrimental to Maori ownership, the Court forced Maori to choose ten or fewer from their number to be named on the certificate of title, which led to fragmentation of titles and land.

Between 1920 and 1980, approximately 2,010,000 acres changed from its designation as Maori land to ‘European land’. The most significant movement resulted from the Maori Affairs Act 1953, which declared that Maori land owned by four or fewer owners would automatically become

European land, lose the protection of the Maori Land Court and be more readily accessible for fragmentation¹⁹. This was subsequently amended in both 1967 and 1974, finally providing the means to retain Maori land by retracting the ‘no more than four owners’ provision.

In 1975, the Waitangi Tribunal was formed as a result of the Treaty of Waitangi Act 1975. Under this Act, Maori are entitled to seek redress for past grievances under the Treaty of Waitangi²⁰, and has formed the legislative basis of current land claims.

3.2. Australian Aborigines

Most of the initial colonial settlement occurred along the coastal, eastern side of Australia. This settlement occurred under the assumption of *Terra nullius*, or that Australia was an empty and uninhabited land. Although this was effective in the areas of colonial government, it failed as the continent opened up and settlement swept inland²¹.

This failure was due to claims by settlers to huge tracts of land and little means of control by the settler Government. In 1842, the Australian Waste Land Act was passed, where by land deemed as ‘waste’ was granted title to the Crown. This was in response to settler pressure for a more secure land tenure system. Concern was expressed, even at this early stage, regarding the alienation of Aborigines from their traditional lands²². The introduction of the Pastoral lease has had the most influential effect on land tenure in

Western and Central Australia²³.

In 1849, an order in Council was made which granted settlers the exclusive rights of pasturage, but not of occupation. Within the terms of Western Australian leases, recognition was provided for the “full right of the Aborigines at all times to enter upon any unimproved leasehold land for the purpose of seeking their subsistence in their accustomed manner”²⁴. This provision however was effectively ignored, and the pastoral leases and their associated, assumed right of exclusivity persist today.

In 1976, the Aboriginal Land Right (Northern Territory) Bill was passed. This Bill was the first major advancement in the recognition of Aboriginal rights to lands. It listed Northern Territory reserves to be granted to Aboriginal land trusts; enabled Aborigines to claim unalienated Crown land; and allowed the conversion of Pastoral leases held by, or on behalf of Aborigines, to freehold land. It also established the Aboriginal Land Commissioner to hear land claims and to make recommendations to the Minister for Aboriginal affairs. Other states however provided little or no recognition in statute.

In 1982, a case (*Mabo v Queensland*) was brought before the high court of Australia relation to the question of extinguishment, or continued existence of Aboriginal rights to land. The final decision, in 1992, of the court effectively discarded the notion of *terra nullius* and recognised, in principle, native title²⁵. This ruling is having wide spread ramifications and has seen the confusing and rapid development of a new series of land related laws and land rights.

[15] *Ibid.*

[16] http://www.courts.govt.nz/maori_land_court/maori_land_court_time.html [Retrieved 28/8/00]

[17] Asher & Naulls, 1987

[18] <http://www.maoriland.govt.nz/whatism.html> [Retrieved 28/8/00]

[19] Munn, Loveridge & Matunga, 1994

[20] *Ibid.*

[21] http://www.planet.apc.org/pacific_action/issues/nativetit.html

[Retrieved 25/8/00]

[22] Pearson, 1993

[23] *Ibid.*

[24] Reynolds 1994. Pp128

[25] Stephenson & Ratnapala 1993 Ppxxvi

As a result of this ruling, native title has been acknowledged as part of the common law of Australia.

3.3. Comparisons

In New Zealand, Maori have the Treaty of Waitangi on which to base their claims to land, as a contractual agreement between the Crown and Maori. Aborigines however do not have such a Treaty. The notion of terra nullius has meant that for over 200 years the Aboriginal people had no legally recognised claim to their lands. It has been slowly recognised that under British common law the Aboriginal claim to native title was in fact legitimate. Possibly due to their unrecognised rights, Aborigines have not undergone the concerted effort to individualise title as occurred in New Zealand.

In both Australia and New Zealand recent legislation has formally acknowledged native title and attempted to provide mechanisms through which land claim issues may be resolved, with the Waitangi Tribunal in New Zealand, and the Aboriginal Land Commissioner.

4. Current Situation

4.1. New Zealand Maori

Maori Land, approximately 1.515 million hectares of the total New Zealand land area of 26.9 million hectares or 5.5%, is currently owned in multiple-ownership under the jurisdiction of the Maori Land Act (Te Ture Whenua) 1993, and registered with the Maori Land Court²⁶.

Te Ture Whenua Maori Act 1993

is the most recent legislative attempt to overcome some of the problems created by the earlier system of Maori land tenure. The objective of this Act is to: (1) promote the retention of Maori land in the hands of its owners, their *whanau* and their *hapu*; and (2) facilitate land use for the benefit of its owners, their *whanau* and their *hapu*²⁷. The Act also provides management structures for the organisation of Maori landowners into two broad categories: share or owner interest structures and land management structures²⁸. These include Maori incorporations and different Maori trusts. The primary objective of Maori Trusts is to concentrate authority in trustees, empowered to manage the land as if it were the property of an individual, but also to protect *turangawaewae* and give owners control over the development of their land²⁹.

The Treaty of Waitangi is the foundation document of New Zealand that acknowledges the Crown's right to govern and protects Maori interests. Many believe that over the past 150 years, the Crown failed to act in utmost good faith and disadvantaged the Maori people. Therefore, Maori are seeking to settle their grievances.

At present any Maori person or group of Maori may bring a claim against the Crown if they believe that some action or omission by the Crown was inconsistent with the principles of the Treaty of Waitangi. Claims are submitted to the Waitangi Tribunal and any claim is a claim against the Crown, not against any individual New Zealander. Therefore, only Crown assets can be used in the settlement of proven claims³⁰.

The Crown is making a distinction between two types of claims - which are known as 'historical' claims and 'contemporary' claims. Historical claims are those which may arise as a result of a Crown action or inaction on or before 21 September 1992. Any claims which arise from actions or omissions after that date are contemporary claims³¹.

4.2. Australian Aborigines

Currently in Western Australia, over 1,800,000 km² is Crown owned land, and almost half of this is under lease. Aborigines own 14.25% of the entire landmass of Australia³². This total does not include land owned by individual people. Most of this land is held by Aboriginal land trusts, made up of members of the land-owning group³³. One of the major issues facing Western Australia is the pastoral lease. Despite assumptions to the contrary, pastoral leases do not automatically give exclusive possession to the pastoralist, and do not necessarily extinguish native title³⁴.

The Native Title Act was enacted in 1993 to provide for the protection of native title. Any actions after the 1st January 1994, are considered a future act, and are heavily regulated when they affect Native Title. However titles, permits and approvals granted before 1 January 1994 are regarded (usually) as valid³⁵. The 1993 Act was amended in 1998 with the enactment of the Native Title Amendment Act. The aim of this act was to provide a comprehensive and workable statutory regime for binding agreements to be made that permits development, while

[26] Kingi & Maughan, 1998.

[27] Maori Multiple Owned Land Development Committee, 1998.

[28] Ibid.

[29] Lyne, 1994

[30] Office of Treaty Settlements, 1995.

[31] Ibid.

[32] <http://www.premiers.qld.gov.au/about/nativetitle.html>
[Retrieved 28/5/00]

[33] Edwards, 1983 Pp294

[34] <http://www.premiers.qld.gov.au/about/nativetitle/dwpages/faqs.htm#whyissue>
[Retrieved 28/5/00]

[35] <http://www.murdoch.edu.au/elaw/issues/v4n3/vanh43.html>
[Retrieved 28/5/00]

[36] <http://www.murdoch.edu.au/elaw/issues/v5n3/vanhatter53.html>
[Retrieved 28/5/00]

safeguarding the interests of aboriginal people³⁶.

The recent recognition of native title, coupled with the Office of the Aboriginal Land Commissioner and the Native Title Act has provided a mechanism where claims to title may be resolved. The process however is time consuming and expensive, especially when it is contested in the Federal Court³⁷. Compounding this is the right of appeal, which may further extend the process. Each determination and details of the case is recorded in a National Native Title Register. It is envisioned that eventually the body of case law developed, and recorded in the register will enable the simpler establishment of a native title right in certain areas.

4.3. Comparisons

Both New Zealand and Australia are going through the painful process of rectifying grievances regarding past actions or omissions of the colonial governments. In New Zealand this is based on the Treaty of Waitangi, and the mechanisms established under the Treaty of Waitangi Act. In Australia this is based on native title in common law and the mechanisms established under the Native Title Act, and amendments and the Aboriginal Land Right (Northern Territory) Bill.

In both countries the main land management tool are trusts, whereby trustees manage the land on behalf of the traditional owners.

5. Discussion/Summary

The traditional land tenure systems of both the Maori and Aboriginal people are communal, based on common

descent, and rely upon long-term residence and knowledge of spiritual relations with the land. Within the overall Aboriginal society of Australia, local variations exist, whereas in New Zealand, there are only small variations between Maori tribes.

After colonization of New Zealand by British settlers, the Treaty of Waitangi (1840) was formed as a contractual land tenure agreement between the Crown and Maori. However, the Australian Aborigines did not have such a Treaty as the notion of *terra nullius* has meant that for over 200 years the Aboriginal people had no legally recognised claim to their lands. The first major legislative advancement for Australian Aborigines was the Aboriginal Land Right (Northern Territory) Bill 1976, which recognized that the Aboriginal claim to native title was in fact legitimate.

Recent legislation e.g. New Zealand Te Ture Whenua Maori Act 1993 and the Australian Native Title Act 1993 has formally acknowledged native title and attempted to provide mechanisms through which land claim issues may be resolved, with the Waitangi Tribunal in New Zealand, and the Aboriginal Land Commissioner in Australia. Both New Zealand and Australia are going through the painful process of rectifying grievances regarding past actions or omissions of the colonial governments.

6. References

Coombs H. (1994) *Aboriginal Autonomy, Issues and Strategies*. Cambridge University Press, Melbourne, Australia.

Edwards. B. (1983). Pitjantjatjara land rights.

Layton. R. (1983a) Ambilineal descent and traditional Pitjantjatjara rights to land.

Layton. R. (1983b). Pitjantjatjara processes and the structure of the land rights act. All in: Peterson. N. & Langton. M. (Eds.) *Aborigines, Land and Land Rights*. Institute of Aboriginal Studies, Canberra, Australia.

Hiatt L.R. (1990) Aboriginal land tenure and contemporary claims in Australia. In: Wilmsen E.N. (Ed.) *We Are Here: Politics of Aboriginal Land Tenure*. University of California, U.S.A.

Kingi T. T. & Maughan C.W. (1998) Legal Devices to Manage Customary Maori Land. *Jurnal Undang-Udang*, pp. 253-267.

Lumb R.D. (1993) The Mabo Case – Public Law Aspects.

Pearson N. (1993) 204 Years of Invisible Title.

All in: Stephenson. M. A. & Ratnapala S. (Eds.) *Mabo: A Judicial Revolution. The Aboriginal Land Rights Decision and its Impact on Australian Law*. University of Queensland Press, St Lucia, Australia.

Lyne M. (1994) *Ownership & Control of Maori Land: Some Lessons for South Africa*. Discussion Paper #138, Lincoln University, Christchurch.

Maori Multiple Owned Land Development Committee (1998) *Maori Land Development*. Multiple Maori Land Development Committee.

Munn S., Loveridge A. & Matunga H. (1994) *Ka Kaupapa Putaka mo Maori. Development Issues for Maori Landowners: Two Case Studies*. New Zealand Institute for Social Research & Development Ltd. (NZISRD), Christchurch.

Nettheim G. (1981) *Victims of the Law*. George Allen & Unwin Australia Pty Ltd., Sydney, Australia.

Office of Treaty Settlements (1995) *Crown Proposals for the Settlement of Treaty of Waitangi Claims: Summary*. Office of Treaty Settlements, Department of Justice, Wellington.

Tonkinson R. and Howard M. (Ed.) (1990) *Going It Alone: Prospects for Aboriginal Autonomy*. Aboriginal Studies Press, Canberra, Australia.

37 <http://www.murdoch.edu.au/elaw/issues/v4n3/vanh43.html>
[Retrieved 28/5/00]

How Many People Could New Zealand Accommodate?

By WH Barker, Barker & Associates

At the recent RMLA conference, the question of how many people we could or should have in New Zealand came up in at least three of the sessions. In each case, the matter was left hanging, with no opinion being stated.

The question is also being raised in other circumstances with various people maintaining we need a substantially greater population to be economically viable as a nation (17 million, 11 million and 8 million seem to be the most popular figures). How many people we need in New Zealand to provide a viable economy, research environment, world class medical care or whatever is one question; the more relevant question is: how many people can our country support from an environmental or ecological point of view? It would be pointless having (say) 17 million people living here, a 'viable' economy, but having to use the 'profits' from the economy to import food to feed everyone. This ecological concept of how many people (or rats, sheep, dairy cows) a defined physical resource base can sustainably support is known as the 'carrying capacity' of that environment. The human carrying capacity of New Zealand is a matter I studied and researched some years ago, so this article is put forward to provide a basis for further discussion in fields (such as base populations to maintain advanced

medical services) unrelated to the critical ecological limits.

The carrying capacity of New Zealand's physical resource base is basically an ecological issue but the pure natural systems view must be modified to allow for constraints that are peculiar to human beings. These are things like 'standard of living' and 'quality of life'. Also, because we are not self sufficient, we need to export in order to be able to import things like oil, pharmaceuticals, and other luxuries we regard as being necessary. Conversely, we have the limited ability to import resources to supplement the local resource base.

There has been much research work done on carrying capacity for animals, both domestic and wild, and some work on human carrying capacity of specific areas of land, but this work is largely on primitive cultures, or for the world as a whole. For an industrialised nation such as New Zealand the problem is complicated by the ability to import resources to avoid limitation of population numbers. We are however

an island nation, so the question of acquiring more resources by expanding our boundaries is avoided. It is worth noting that we could expand our resource base by pushing the boundaries of the sea area we claim control over, but the difference this would make overall to our potential maximum population is relatively small.

The basis for a model to incorporate the various factors and to allow for exploration of the effects of changing assumptions is the amount of food producing land it takes to support a person. Various classes of land are more productive than other classes and this needs to be taken into account. There are approximately 9.6 million hectares of land capable of growing crops (the most productive use of land) in our country, of which somewhere between 6.0 and 8.7 million hectares are likely to be available.

My study looked at the actual productivity of this land (883,039 C/ha/year) over a nine year period, noting that if all the land were used for

cropping, then greater productivity would occur. Another part of the research indicated that New Zealanders consumed 7,987 C/day/person (this did not include food imports and beer). Other ways of using land and sea for food production such as fish farming and hydroponics can give much higher productivity, but usually by means of greater inputs of labour, fertilizer and expertise (all basically energy). The net return is often not greater than conventional cropping. Combining this range in productivity with a range of consumption levels (from 7987C/day to 3500C/day) gave a range of land per person for food figures of 0.006 ha to 3.30 ha.

American studies indicate that about 0.399 ha of non-food producing land is required per person. This takes into account all usual urban land uses, plus highways and airports, water reservoirs and flood control, and wilderness parks, recreation and wildlife reserves. New Zealand studies show we are better endowed with National Parks, reserves etc., (in excess of 0.852 ha per head of our land is used for these purposes, which is 4.5 times the amount per head that citizens of the USA enjoy). Changes in land use patterns such as increases in housing density may change quantum of land required for non-food production per person, but the only study I am aware of showed no change in overall density (in Christchurch) over a ten year period despite very significant moves to town houses and apartments. For calculating population numbers I used two figures: a 'New Zealand' figure of 0.475 ha per person, and the 'American' figure of 0.399 ha per person.

Quality of life factors are by their nature very personal, but it is accepted that a very significant generator of

quality of life is the quality of the environment. There is a relationship between quality of life and standard of living, with each forming a necessary but not sufficient part of the other. There is also a relationship between quality of life and carrying capacity, because at very low percentages and very high percentages of carrying capacity, survival takes up 100 percent of the available time ('subsistence labour'), leaving no time for quality of life activities. My earlier work derived two values for the quality of life factor: 1.0 for the subsistence situation, and 0.45 for the 40 hour week situation.

Because we have to export to buy resources we don't have, the total number of people we could support is reduced. My studies found an average of 31.26 percent of the land and sea based production was exported over a nine year period, meaning we can only support 68.74 percent (.6874) of the theoretical population.

The model I derived is:

$$x = (At - NAf / Au + Af)EQ, \text{ where}$$

X is the extra population

N is the present population (taken as 3.8 million for this article)

At is the total croppable land

Af is the area of land to feed one person

Au is the area of land taken out of production for each extra person added to the population

E is the export multiplier (0.6874)

Q is the quality of life factor.

This gave (using different assumptions as to the factors) a range of 'carriable' populations of between 2.36 million and 17.83 million. The 'most likely' figure was based on

protection of the productive soils, an improvement in food productivity and a medium reduction in food consumption, no change in 'national park' provision, and the quality of life factor that for a 40 hour week. This figure was 6.93 million.

The 'most likely' scenario was only 'most likely' in my eyes, and I have doubts about it. In particular, it used a figure of 0.181 ha for the Af factor (the amount of land to feed one person) and this may be wishful thinking and not sustainable in the long term. If it takes say a third of a hectare to feed each person, then (not changing any other factor) the carrying capacity of New Zealand is 5.2 million people.

The value of this sort of work is not in the population figures that are derived, but in the ability to identify some of the requirements of sustaining different population levels, and the effects of different population levels as compared to our current environment, farm performance, and way of life. Patently I was forced to make many assumptions and to use second best data (e.g. soils data instead of land productivity data.). I have not revisited these lacks in the intervening years even though some of my data problems have since been resolved (e.g. by the Land Use Capability Worksheets).

For myself I think the generality of the possible conclusions is nonetheless sufficient for me to form the opinion that somewhere between 5 and 7 million is the maximum population New Zealand could carry and still be the country I would want to live in.

Primary Reference:

Assessing the Human Carrying Capacity of New Zealand; Barker, W.H. (1978) MSc. Thesis, Joint Centre for Environmental Sciences, University of Canterbury

HSNO and RMA - How Will the Relationship Work?

By Kevin Currie, Manager, Operations, ERMA New Zealand

Introduction

The Hazardous Substances and New Organisms Act 1996 (HSNO) and the Resource Management Act 1991 (RMA) are two key elements of New Zealand's environmental statutes. This paper outlines how they inter-relate in jurisdictional and operational terms. While the HSNO Act encompasses both hazardous substances and new organisms, this paper concentrates on hazardous substances.

HSNO and RMA focus on opposite ends of the lifecycle of substances

The HSNO Act manages the effects of hazardous substances through controls placed on approvals to manufacture or import them. While these controls are imposed at the point of introduction of the substance, they can address aspects relating to its handling, use, and eventual disposal. This can include environmental and public health exposure limits which define the acceptable level of exposure to the substance.

The RMA controls the release of

contaminants into the environment either through permits to discharge to water, and or air, or through rules in a regional plan which can permit discharges subject to meeting certain conditions. In either event, it is the specific act of discharging which is controlled, with conditions imposed to limit the environmental effects of the discharge.

The RMA also provides for controls on land uses through land use consents or by rules, primarily in a district plan. The consents or rules can address hazards, nuisances, amenity values or other environmental impacts arising from land uses. These may relate to the use of hazardous substances. HSNO's focus on the substance, and the eventual demise of the dangerous goods licence, are likely to increase the significance of land use controls under the RMA as the means of addressing site-specific hazards and issues.

Thus HSNO sits at the "introduction" end of the lifecycle of substances, and looks "down the chain" of production, handling, use and disposal. The RMA sits at the point at which the substance gets into the environment, and can look

"up the pipe" to control use, treatment etc

HSNO controls

Under HSNO, substances are hazardous if they meet thresholds of explosiveness, flammability, oxidising potential, corrosivity, toxicity (ie to humans) or ecotoxicity. All such hazardous substances will be subject to a suite of controls which manage the risks to the environment and to human health. Controls are attached to the substance through two mechanisms.

Anyone wishing to manufacture or import a new hazardous substance will require an approval from the Environmental Risk Management Authority. When giving such approvals, the Authority will impose the appropriate controls relating to the hazardous properties of the substance. These controls will be derived from a suite of HSNO regulations but can be varied by the Environmental Risk Management Authority in approvals for individual substances as circumstances require.

Most hazardous substances will be in lawful existence in New

Zealand when this part of HSNO commences. These substances will be transferred to the HSNO regime during a transitional period expected to take 3 - 5 years. The transfer process will replace the existing approvals (under the Toxic Substances, Dangerous Goods, Explosives, and Pesticides Acts), and will assign, through Regulations, HSNO controls to these substances.

For substances having significant toxic or ecotoxic properties, the Authority will include as controls:

- **Environmental Exposure Limits (EELs)** - an environmental concentration of a substance that should not be exceeded, such that there is a low risk of the substance causing an adverse environmental effect in non-target areas. and/or
- **Tolerable Exposure Limits (TELs)** - a concentration of the substance that should not be exceeded in a medium (e.g., water, air) such that a person should not be exposed, from all such media, to more than an acceptable daily exposure (ADE) of the substance over their lifetime. The ADE will be established as a level unlikely to result in adverse health effects.

As most hazardous substances are in fact mixtures of various components, the EELs and TELs will generally be established for their significant toxic and ecotoxic components.

Compliance with controls

HSNO approves substances, not users or premises. Approvals and controls on substances apply throughout the country. There is an onus on all persons using hazardous substances to comply with all the controls on that substance, and there will be a requirement that users are adequately informed of their obligations through package labels, or through accompanying information.

The HSNO controls will be primarily performance-based - that is, they describe the outcome to be achieved, without specifying in detail how this is to be achieved in each specific instance. It is expected that a suite of Codes of Practice will be developed which will provide a definitive statement of good practice which, if followed should ensure compliance. Such codes can be approved by the Environmental Risk Management Authority, in which case they form a statutory defence against prosecution.

For substances posing more significant hazards, HSNO controls can include a requirement that a test certificate be obtained from a person with suitable expertise who has been approved by the Authority as a Test Certifier. The certificate will either certify that the facilities or equipment meet the required specifications (especially for substances with significant explosive, flammable oxidising or corrosive properties), or that the handlers of the substance are approved as competent.

Controls specifying EELs and TELs, can be directly enforced

against non-complying users (e.g. in the event of excessive spray drift), but in other cases will be difficult to enforce directly (e.g. multiple small contributions which cumulatively exceed limits). In such cases plans and consents under the RMA is likely to be a more effective means of addressing the issues.

RMA rules and conditions cannot breach HSNO controls

RMA requirements on the storage, use, disposal or transportation of any hazardous substance can be made more stringent than HSNO controls, but cannot contravene HSNO controls (see section 142 of the HSNO Act). This does not apply to resource consents that precede HSNO, unless the consent is reviewed.

After the HSNO transitional period, it is therefore likely that EELs and TELs established under HSNO will become a primary (but not necessarily sole) reference for Councils fixing rules and consent conditions under the RMA. In effect, these HSNO limits will serve the same purpose as would any National Environmental Standards (NES) established under the RMA fixing acceptable concentrations of contaminants in the environment.

They are not the same thing, but would serve an equivalent purpose. Just as regional and district plans would use a NES, so too will they use EELs (and TELs) as ambient criteria. Thus discharges to the environment involving hazardous substances where EELs have been set under HSNO will be also regulated by plans and/or consent

conditions set under the RMA, with the EEL being the link between the two Acts.

Other controls

There are many other controls on aspects of hazardous substances, including through:

- The Health, Safety and Employment Act
- The Health Act
- Local Authority bylaws (including landfill acceptance criteria and acceptance of wastes into sewers)

These will inter-act with HSNO in a similar way - viz, any other controls or regulations relating to the use of hazardous substances can be imposed independently of HSNO, but can be expected to use HSNO controls as a reference. Such controls must not contravene HSNO.

Conclusions

The HSNO Act and the RMA are complementary elements of the legislative regime for managing environmental effects in New Zealand, which focus on different parts of the lifecycle of substances. Their provisions overlap but should not conflict. The HSNO Act will be the mechanism whereby controls are placed at a national level on hazardous substances, and these controls can then be used as a reference by other jurisdictions in connection with their own processes, including under the RMA.

RMLA 2000 Award



Dave Serjeant, Lindsay Gow, John Gallen

The recipient of the 2000 RMLA Award was John Gallen, Chief Legal Counsel (now semi - retired) for the Ministry for the Environment. In the words of the irrepressible Jim Hopkins, John was our first “Remarkable Remalan” for the new millenium. John had a long and notable career as a Crown legal adviser on planning and environmental matters and has made a significant contribution to the introduction and development of the RMA over the last ten years.

Case Notes

By Martin Willams

Locating The Baseline - A Likely Story

Chilcott v Auckland City Council

(Unreported, High Court, Auckland Registry AP 74-SW/00, 4 September 2000, Salmon J)

This High Court decision is a further ruling providing clarification on the so called baseline approach emerging to the fore in recent decisions under the Resource Management Act regarding resource consent applications.

Readers of the June newsletter will recall the casenote regarding the Environment Court decision *Martinez v Auckland City Council* (A32/2000) concerning an apartment building in Herne Bay. The Court declined the application principally as a result of the impacts on views enjoyed by neighbouring properties. The applicant in that case had argued that permitted activities on the site would have similar impacts on amenities, including views, being no bigger, no closer to the boundary nor covering any more of the site than could be achieved as of right. Applying the

“permitted baseline” approach originating in the Court of Appeal decision in *Bayley v Manukau City Council* [1997] NZLR 568, it was argued that the impacts of the apartments on the neighbour’s views should be ignored as a result.

The Environment Court in *Martinez* accepted the application of the baseline approach as a matter of principle to decisions made about whether or not to grant a resource consent to an application (as opposed to whether it should be notified, being the issue in *Bayley*).

However the Court rejected the particular development which the applicant proposed as a baseline for comparison, on the grounds that it was “not credible”. The Court stated:

We think it far more likely that some type of development containing three units but on a much lesser scale is likely to be the more credible outcome.

As such the Environment Court found that the effects of the apartments, above those of a more a credible permitted development on the site, would be significant, and it declined consent.

The requirement that a baseline development submitted by an

applicant for comparison with the effects of a particular activity be “credible” emerged in the Environment Court decision in *Arrigato Investments Limited v Rodney District Council* (A115/99) which was directly cited in *Martinez* (and which is also the subject of a High Court ruling, discussed elsewhere in this newsletter).

In the Environment Court decision in *Arrigato* it had been found that hypothetical or fanciful activities, as opposed to credible activities based on the evidence, should not be considered in making an effects comparison.

Similarly, in a further High Court decision on this type of issue (*Barrett v Wellington City Council* (Unreported), High Court, Wellington Registry CP31/00, 21 June 2000) the High Court added the credibility requirement to the baseline to be considered under section 94.

In *Barrett* the Court stated, by reference to the Court of Appeal decision in *Bayley*:

But I accept that when the Court of Appeal was referring to what could be done on the site as of right it had in mind credible developments, not purely hypothetical possibilities which are out

The Court cautioned that decision makers must be wary of getting into issues such as financial viability.

of touch with the reality of the situation. A test based on theory rather than reality would place an intolerable burden on consent authorities.

Clearly there is an element of cross-pollination between the various decisions of the courts at each level regarding decisions on the baseline issue, involving both sections 94 and section 104 of RMA.

Returning to the High Court decision in *Miguel*, the Court considered that the Environment Court had gone too far in considering evidence as to whether the applicant's baseline development was "likely" to arise and found that the Environment Court had made an error of law in doing so. The Court cautioned that decision makers must be wary of getting into issues such as financial viability.

The High Court has therefore confirmed that consent authorities do not need to enter into a debate as to what is more or less likely, at a market or financial level, to be established as a permitted activity on a site. Provided a suggested

permitted development is credible in the sense of not being purely hypothetical or fanciful, it can be tendered as a basis for comparison with the actual activity proposed, so as to determine the scale of incremental effects above the permitted baseline.

As a final twist in the emerging line of case law in this area, the High Court also overturned the Environment Court decision *Arrigato*, partly as a result of the Environment Court's approach to the baseline issue in that case. For a fuller discussion of this decision, see the specific article elsewhere in this newsletter.

In a nutshell however, the High Court found the Environment Court was not entitled to have regard to the environment "as it is likely to be varied in the light of existing resource consents" in establishing the baseline. (The Environment Court had considered the effects of the subdivision development as against an environment modified by resource consents yet to be implemented). The High Court found that comparison should only be made with the environment as it exists, or as it would exist if the land were used in the manner permitted as of right by the district plan.

Perhaps ironically, the High Court referred to developments approved by resource consent as being "hypothetical". In fact, baseline developments which an applicant may refer to as being permitted under a district plan may be more "hypothetical" than a development which, while not implemented, has been subject of specific assessment and approval by a consent authority.

Liability For Contractors

Auckland Regional Council v Affco Allied Products

(CRN: 9048006616-9)

This decision of the Environment Court involves a prosecution brought against Affco Allied Products Limited ("Affco"), a subsidiary of Affco New Zealand Limited, regarding a discharge incident in June 1998, from its hide processing plant and fellmongery at Wiri.

The interesting aspect of the decision is that it involved a claim of direct liability as against Affco, for the activities of its independent contractor, HP Rihana Limited ("Rihana"), engaged by Affco to clean out stormwater cesspits on the site. As a result of those activities, Affco was prosecuted for discharging contaminants to the nearby Homai Stream, contrary to s15 of RMA, or for permitting that discharge, being an offence under s338 of the Act.

Affco was prosecuted for discharging contaminants to the nearby Homai Stream

Rihana itself was not prosecuted. Had it been, Affco may have faced indirect liability under s340 of the Act which imputes liability to principals for the actions of their agents and contractors, subject to certain defences.

The incident itself follows a number of observations by Auckland Regional Council ("ARC") enforcement officers of contaminants in the Homai Stream, resulting from failures of the stormwater/trade waste diversion system installed by Affco on the Wiri site. Affco had in place several lines of defence against contaminants discharging to the stormwater system, including bunding of areas of contamination, education and contingency procedures, and a backup diversion system. This

diversion system involved a fox flush valve which was designed to open at the same time as a hose in a vehicle wash bay on the site, diverting a quantity of stormwater to trade waste. There was also a secondary sump that diverted to trade waste when full. These diversion systems had failed on previous occasions due to clogging with debris (leaves and twigs) resulting in contaminants passing via the stormwater system and entering the Homai Stream, rather than diverting to trade waste.

On the day in question, an ARC officer noticed discoloured stormwater discharging into the Homai Stream from a stormwater outlet near the Wiri site. On further investigation, Rihana was seen discharging cesspit cleanings from

its waste disposal truck in the vehicle wash bay area into a bulk container full of solid wastes, with the ground around the bin covered in dirty waste water, draining in to the fox flush valve cesspit. The valve was not diverting to trade waste, again due to blockage by debris both there and in the

These diversion systems had failed on previous occasions due to clogging with debris

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secondary diversion sump, causing the waste water to enter the stormwater system and discharge into the Homai Stream.

There was some dispute as to whether instructions from Affco to Rihana to discharge cesspit cleanings directly to trade waste (rather than via the wash bay) had been formally received by Rihana, with the Court critical of Affco's degree of supervision over Rihana.

Affco accepted that there had been a discharge of stormwater cesspit cleanings to land, namely the wash bay, from the Rihana truck on the day in question. However, following the decision in *Southland Regional Council v Southern Delight Ice Cream*, Affco argued and the Court accepted that this did not constitute a discharge to water in terms of s15(1)(a) of RMA. This is a result of the definition of water in RMA, excluding water in a pipe. This left the offence of discharging contaminants to land in circumstances in which they may enter water, or permitting such a discharge (contrary to s15(1)(b) of RMA).

While being satisfied that there was such a discharge, that left the issue of causation. Did Affco itself "discharge" or "permit the discharge" of the contaminants in question? Affco argued that Rihana was responsible for the discharge not Affco, with the deliberate actions of that third party breaking any chain of causation between Affco and the discharge.

By contrast, the informant argued that there was a direct causal link between Affco and the offence of discharge, with Affco being in

control of the site and able to control the activities of its contractor. In the alternative, the informant submitted that Affco had discharged the contaminants in terms of the "allow to escape" limb of the definition of discharge under RMA. It argued that Affco was responsible in that sense of the term "discharge" by being aware of facts from which a reasonable person would realise such an escape could occur, and failing to prevent that.

In responding to these submissions, the Court referred to a number of previous decisions involving prosecutions for discharges under RMA, noting that the term "discharge" has been interpreted to mean "cause to discharge". The Court rejected Affco's argument about the "chain of causation" by reference to the defence provisions of RMA, where parties can remain liable despite the intervention of events such as sabotage, if that event could have been reasonably foreseen or provided against.

The Court found that the real issue was whether there is sufficient "causal nexus" between the defendant and the discharge, and that the actions of third parties will only be one factor in that assessment.

On the facts, the Court found that there was a direct causal link between the discharge and Affco, such that Affco could be found to have committed the offence itself. In reaching that conclusion, the Court referred to Affco's relationship with the site and the contractor, its ability to control the activities of the contractor on the site, and its failure to do so.

Alternatively, the Court found that Affco allowed the contaminants to escape, given its awareness of previous failures of the stormwater diversion system, and failure by the Company to prevent further escape of contaminants from it. A lack of written instructions to the contractor, supervision, and preparation of performance requirements for its contractor to meet were critical factors in making that assessment.

In the result, Affco was found guilty under s338 of RMA, for discharging contaminants contrary to s15(1)(b) of RMA.

The Court then went on to state that it would have found Affco indirectly liable under s340 of RMA, despite the prosecution not having been based on that section. The defences to a principal under s340(2) (no awareness of the offence by the directors of the defendant, or all reasonable steps taken to prevent the offence etc) were not seen to be available on the facts.

The case illustrates that a party cannot absolve itself of responsibility for the actions of its contractors and agents and must

The Court found that there was a direct causal link between the discharge and Affco

take positive and documented steps to ensure contractors comply with the Act when undertaking activities on its behalf. The interesting aspect of the decision is that it would seem that a party may be found directly liable for the actions of its contractors under s338 of RMA, such that a prosecution brought under s340 of the Act enabling that party to raise a further set of specific defences is not necessary.

A Question of Standing -

Society for the Protection of Auckland City Waterfront Inc. v Auckland City Council (Unreported, High Court, Auckland Registry M1031-F00 19 September 2000, Morris J.)

This decision of the High Court confirmed the standing of an incorporated society to bring judicial review proceedings to have a notification decision overturned, despite the fact that the society was formed after that notification decision was made.

The resource consent application granted by the Council was for the establishment of the PWC office tower on the corner of Quay Street and Albert Street in Auckland, and had been approved without notification to the public by Auckland City Council. Previous judicial review proceedings over the decision not to notify the application brought by the owners of an adjacent property were resolved before judgment was given by the High Court.

The resource consent for the

tower was granted in November 1999 and on 30 June 2000 the plaintiff incorporated society was formed. It lodged judicial review proceedings on 13 July 2000.

The applicant, AMP Asset Management NZ Limited (“AMP”) sought to strike out the proceedings on the grounds of standing, and sought security for costs against the Society. AMP argued that the Society could not have been adversely affected by the decision not to notify its resource consent application, as it did not exist at the time that decision was made.

AMP argued that this was fatal to any claim by the Society under the Judicature Act 1972 which requires a plaintiff to be affected by a statutory power of decision before judicial review proceedings can be lodged by that person. AMP also pointed out that no written approval could have been obtained by AMP from the Society in terms of s94(2)(b) of RMA.

The High Court reviewed the relevant case law which it held demonstrated that decisions about standing are closely linked to the substantive issue in the case, and that the Courts have been reluctant to strike out proceedings.

The High Court held that the Society held genuine views and concerns, comprising individuals with specialised knowledge and understanding on the matters of concern.

It stated that it would be “intolerable and wrong” to shut out a claim which, if meritorious, would demonstrate that the Council had acted incorrectly and permitted the

erection of a very substantial building in a prime area of Auckland, for which consent may well not have been granted.

In doing so, the Court also referred to the liberalising trend on issues of standing. While the Society itself did not exist at the time of the decision not to notify, its members did, and the Court considered it artificial and wrong to strike out the new body formed to carry on the views of the individual members.

The case demonstrates that strict issues of legal personality in this type of claim may yield to more substantive concerns about the nature of the claim involved, and that technical barriers to participation in decisions made under RMA will not likely be upheld. As such, individuals may be found free to form incorporated societies to create personal immunity from costs before seeking to challenge notification decisions in the High Court. However (as in this case) such a society may be ordered to pay security for costs before proceeding.

The case demonstrates that strict issues of legal personality in this type of claim may yield to more substantive concerns

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