

RESOURCE MANAGEMENT LAW ASSOCIATION OF NEW ZEALAND INC.

RM NEWSLETTER

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PRESIDENT'S REPORT

Dear Members

Before I launch into my first report, there are a few words I would like to say as your incoming President. Firstly, I am particularly mindful of the history and legacy of the people who have previously held this position and will work hard to represent you and the Association this year. I have enjoyed serving on the National Committee over the last seven years and am looking forward to continue that service in this new capacity.

I would particularly like to acknowledge the contributions of the three outgoing members of the National Committee, our immediate past President Helen Atkins, Publications and International Relations portfolio convenor, Trevor Daya-Winterbottom and Scholarship and Fellowships portfolio convenor, Craig Mallet. Craig also kept the National Committee updated about developments from Wellington. These three have provided service to the Association that has been of the highest order and much of the strength the Association today is as a result of their endeavours. They deserve our thanks!

It is also appropriate to welcome three new members to the National Committee following this year's election, Andrea Rickard, and Simon Berry from Auckland and Phil Gurnsey from Wellington.

The current year is shaping up to be a particularly exciting and challenging one with increasing demands on our natural resources, our adjustment to international economic trends and national responses in the form of legislative, policy and structural changes. More than ever it is at times like these that our Association's objectives assume increased importance.

I would particularly like to thank Joan Forret from Hamilton and the work of her team with

this year's Annual Conference. I have heard many positive reports about the conference and the incoming National Committee are looking forward to working with the Queenstown Conference committee on suggestions for next year's conference to maintain the high standard.

On that note, the National Committee held its first meeting last week. One of the key actions was the allocation of portfolios. Martin Williams and Kate Barry-Piceno, in addition to their respective Secretary and Treasurer functions, will provide the National Committee's liaison with the Queenstown conference team.

Awards will be the responsibility of Andrea Rickard and Bal Matheson, with Kate assisting with the transition. Courts will be the joint responsibility of Simon Berry and Martin Williams. International relations / ELRANZ will be the responsibility of Simon Berry. Bal Matheson together with Maree Baker and Simon Berry will have responsibility for the Legislation and Special Interest Groups. This is likely to be a very busy work area in the coming year.

Phil Gurnsey has a number of roles, that of representing the Association as a member of the QP Website's Management Board and picking up the Roadshow portfolio. In this he is assisted by Martin Williams. Phil is also picking up the role vacated by Craig Mallet to keep the committee updated on Wellington matters. Ian Fraser and Philip Maw will be working together on the Membership / Recruitment and the Scholarships / Fellowship portfolios.

The Association's branch structure is one of our key strengths and through which we can add value to members particularly through the roadshow series and other networking opportunities. It is my intention to support regional branches and their programmes to engage members in the Association's activities by picking up the responsibility for the Regional

Development and Co-operation portfolio. In this I will be assisted by Andrea Rickard.

As mentioned our Annual Conference for 2012 (20th anniversary since the incorporation of the Association) will be held on 27 – 29th September 2012 in Queenstown and substantial work is already underway by the Queenstown branch organising committee. Please put these dates aside in your diaries.

Blair Dickie
RMLA President

RMLA AWARDS REPORT 2011

Kate Barry-Piceno, Awards Convenor

Firstly, the National Committee wishes to thank all those members who put forward RMLA Award nominations this year. As discussed at the Conference dinner, we really need our members to put effort each year into entering themselves or nominating others in the various categories. The strength of the RMLA awards rests in the caliber and number of entrants and the resultant prestige in being selected as the winning entrant. The RMLA Awards are a great way to annually recognise successes within the resource management profession, celebrate in others or our own success, and reward the professional excellence and hard work that goes on each year in the various RMA fields.

Documentation Category

The Waikato Regional Council was the successful recipient in the RMLA Document category, for Variation No. 5 related to Lake Taupo water quality.

Variation 5 is ground breaking and pioneering on an issue that affects one of NZ's most important water catchments. The lessons learned and the examples set by Variation No. 5 are expected to be reviewed for other catchments and trading schemes internationally and nationally. Variation No. 5 was born out of the efforts of Waikato Regional Council, with District Council, Central Government, Iwi partners and wider community stakeholders all actively engaged and involved in the process.

The RMLA wished to recognise Waikato Regional Council making a bold start on tackling this very difficult environmental issue, starting back in 2000. It has taken some time for Variation No. 5 to complete the RMA statutory processes, primarily due its complexity and significant impact on landowners and

stakeholders. However Variation No. 5 in its final operative form is comprehensive, well thought out and innovative, and will hopefully lead to significant advancements in the way water quality and sustainable land practises around our waterways are managed around Lake Taupo and potentially the rest of New Zealand in the near future.

Projects Category

The criteria for the Project Award is that the project makes a significant contribution to the advancement of best practice and the implementation of the RMA's purpose and principles.

The Project Award recipient this year is Contact Energy's Tauhara II Geothermal Consents project. Tauhara II was the first project to be completed in 2010 under the new "nine month" Board of inquiry process administered by the newly formed EPA.

As such, the project team (comprising Contact Energy, Environmental Management Services, SKM, Buddle Findlay, Trevor Robinson Barrister and Isthmus) was breaking new ground to try to address all of substantive complex issues and deal with new statutory processes, all within a tight time frame. The procedures created and followed were well lead and coordinated. Innovative planning and consultative mechanisms were adopted that resulted in a highly successful outcome, including meeting the scheduled timeframes, and achieving community and stakeholder support through the new legislative process.

Outstanding Person Award

There were no nominees for this award in 2011.

The Judge John Bollard Lifetime Commemorative Award

There were no nominees for this award in 2011.

REGIONAL NEWS

The following are excerpts from the Annual Reports tabled at the recent Annual General Meeting held in Hamilton on 7 October.

Waikato – Dr Joan Forret

This has been a busy year for the Waikato Branch. We have had a big team working hard to bring the national conference to Hamilton for the first time. It would be fair to say that the organizing committee has been surprised and enthusiastic about the many great venues and field trip options that came to light when we started the planning process, this time last year.

Aside from planning for the conference, the Branch has hosted 2 local events as well as the national roadshows on 'Strategic Transport Infrastructure' and 'Spatial Planning'. All events were well attended with attendances ranging between 60 and 100.

I take this opportunity to thank those who have helped with Branch organization and also with planning and preparation for the conference. In particular, I thank my secretary, Joanna Wood who has ably managed the planning for the seminars. Also, Blair Dickie has continued to be a wonderful source of ideas, both for road show events and for the conference itself. It's a great pity that Blair's opportunity for study leave in the USA had to coincide with the conference so he won't be able to enjoy the fruits of much of his hard work.

Finally, I thank Karol, Helen, Martin and the team at Conference Innovators for their help and support this year. I hand over the Branch chairmanship to Lachlan Muldowney who has kindly offered to steer the Branch forward from 2012 and look forward to seeing attendances at functions continue to grow under his stewardship.

Auckland – Rachel Devine

In summary, thanks to a great committee and great support for the RMLA community the Auckland branch presented a number of seminars that reflected the 2009 RMA amendments, the new Council structure in Auckland and the fact that it is election year.

Thanks to a great committee

It has been a busy year for the Auckland branch. This is all credit to the efforts of the committee: Kitt Littlejohn, Siiri Wilkening, Peter Hall, Francelle Lupis, Grant Hewison, Christina Robertson, Marija Baticich, and Jill Gregory. I wish to note the committee's special thanks to Karol Helmink who keeps us on track and implements all of our plans. Also we farewell Jill, who has left us to join the Wellington branch and we wish her our best.

Thanks to great support for the RMLA community in Auckland

I wish to note the support of the law firms who have supported us over the year by providing their premises free of charge: Bell Gully, Kensington Swan, Minter Ellison Rudd Watts and Russell McVeagh. Without their generosity and those in previous years, the costs of each event would be significantly larger.

Bay of Plenty – Brad Coombs

2011 has been an exciting and busy year for the Bay of Plenty Branch.

The BOP Branch held its inaugural AGM on 9 June, in conjunction with the National Strategic Transport Planning Road show presentation, which had an excellent turn out. The AGM yielded a full Committee for the Branch, which met soon after to set up a regular event and Committee meeting timetable. Welcome to the first full BOP Branch Committee: Alistair Muirhead, Vanessa Hamm, Lara Burkhardt, Bill Wasley, Russell deLuca, Buddy Mikaere, Cushla Loomb, Reuben Hansen, and Matthew King. And thanks again to the interim Committee that set up the fledgling Branch over the last few years: Paul Cooney, Christine Ralph, Vanessa Hamm, and Alistair Muirhead. Thanks to our new Committee for putting their energy into the Branch, and to Kate Barry-Piceno, for providing us with our local connection to the National Executive and for convening the awards program.

Thanks to Karol for her ongoing support in running the Branch, even when on the other side of the world! And finally, on behalf of the Branch, I thank the Waikato Branch for hosting the National Conference and awards in Hamilton this year.

Wellington – Angela Rego

The Wellington branch has hosted a number of successful seminars on a wide variety of topics including a pre-election resource management seminar with politicians presenting their ideas and a strategic transport seminar more recently.

A special thank-you to those involved in organising and hosting these events, in particular to Karol Helmink for her assistance and administrative support.

Angela Rego can be contacted on:
Email: angela.rego@justice.govt.nz
Phone: (04) 494 1083

Taranaki – Lauren Wallace

The Taranaki branch has held two events in 2011, one of which was a RMLA road show and the other was an event which the committee organised. Taranaki branch committee members are myself as Chair, Rachael McGee, Secretary; Lauren O'Bryne, Treasurer; Cameron Twigley, Andrea Te Puni and Sarah Ongley. The branch will be organising another Christmas function this year, in either late November or early December.

Contacts:

Lauren Wallace – Chair, (06) 768 3712
Rachael MeGee – Secretary, (06) 759 6060

Canterbury – David Caldwell

It has been a difficult year for many of the members of the Canterbury Branch of the RMLA. Membership remains positive. There are currently 142 members.

The Committee this year consisted of David Caldwell - Chairman, Daniel Murray - Secretary, Phillip Maw – Treasurer, Gerard Cleary, Pip Newland, Amanda Douglas, Andy Carr and Paul Durdin as Committee Members.

Again the Committee has received considerable support from the National Committee and Karol through what has been a difficult year and that help is appreciated.

Otago/Southland – Chris Thomsen

The current Otago/Southland committee is made up of myself as Chair, Michael Garbett as Treasurer and committee members Phil Page, Kirsten Klitscher, Carmen Taylor, David Campbell and Joanne Dowd. The branch has been quiet in and around Dunedin for two reasons:

- (a) An event organised by the Mayor to discuss his visions for a local area known as Harbour Cone was cancelled by him due to availability difficulties. It is hoped to hold this event after the World Cup.
- (b) The two road shows the branch has most interest in (Local Responses to New Zealand National Energy Directions and Emissions Trading Scheme Impacts) have not yet been confirmed.

Environmental and Resource Management Law, 4th edition

Editor-in-Chief: Derek Nolan

The fourth edition of *Environmental and Resource Management Law* features two new chapters, Climate Change and Landscape & Visual, and as with the previous edition, the work provides a comprehensive introduction to modern environmental law. The text deals with substantive topics of environmental law and provides chapters on procedural aspects of environmental law important to practitioners.

Environmental and Resource Management Law is also available as an eBook and as an online or loose-leaf subscription.

To purchase this title or for more information, visit <http://www.lexisnexis.com/store/nz> or call 0800 800 986.

RECENT CASES

James Gardner-Hopkins, Partner and Steve Mutch, Solicitor, Russell McVeagh

The recent case of *Christchurch Ready Mix Concrete Limited v Canterbury Regional Council* [2011] NZEnvC 195 has shed some light on a vexed area of the law which Judge Jackson states in his judgment has "troubled local authorities for the life of the RMA" - namely the issue of the priority to be given to resource consent applications where there are multiple applications for the same resource.

The decision concerned the order in which Canterbury Regional Council should hear consent applications for the extraction of gravel from the Waimakariri River. The central issue was whether ss124A to 124C of the RMA applied in order to determine priority. Section 124A directs when ss124B and 124C apply. Section 124B purports to give priority to renewal applications by holders of existing consents, and s124C relates to fresh applications by persons who are not existing holders of consents.

Christchurch Ready Mix Concrete Limited ("**Ready Mix**") held an existing resource consent to excavate gravel from the Waimakariri River, expiring in July 2011. In October 2010, before Ready Mix had made any application for renewal of its existing consent, Fulton Hogan Limited ("**Fulton Hogan**") applied for consent to also excavate gravel from the river. In December 2010, the Council advised Ready Mix of the existence of the Fulton Hogan application and that it was the Council's view that the priority conferred by s124B of the RMA did not apply to existing consents for gravel extraction. Therefore, Fulton Hogan's new application would be heard before any renewal application by Ready Mix. Within a week, Ready Mix lodged a renewal application on the same terms as its existing consent.

Ready Mix applied to the Court for declarations that its application should be given priority over Fulton Hogan's application under s124B of the RMA. Ready Mix argued that s124 and ss124A to 124C of the RMA, which were introduced by the 2005 amendments to the Act, represent a new method for determining priorities for the hearing of applications for some resources, replacing the "first come, first served" approach laid down by the Court of Appeal in *Fleetwing v*

Marlborough District Council [1997] 3 NZLR 257. Ready Mix contended that these provisions operated to give priority to its renewal application.

In contrast, the main argument for Fulton Hogan was that ss124A to 124C of the Act were not relevant because they only apply to the limited range of natural resources which are specified as capable of being allocated by the Council under s30(1)(fa) of the RMA, for example, water, heat or energy. Therefore, gravel was excluded. The Court first considered the provisions of the RMA relating to gravel extraction. Judge Jackson observed that while s13 covers the excavation and disturbance of the riverbed within the river footprint, it does not cover the taking or removal of gravel beyond the river banks, which the Court held was a separate matter controlled by common law property rights. The Council could only authorise the uplifting of riverbed material and its stockpiling or spreading as far as the riverbank, and this was the limit of the Environment Court's jurisdiction in this case.

Judge Jackson went on to analyse s124 and ss124A to 124C of the RMA. The decision attempts to provide clarification on the working mechanics of the provisions, but notes a number of inconsistencies and uncertainties as to meaning, particularly with s124A. The decision observes that, unlike s124 which applies where only one person is interested in a resource, ss124A to 124C apply where more than one person is interested. These sections have to be read together and in the context of ss12 to 15 and s30 of the RMA. This provides a strong indication that references to allocation or non-allocation in s124A are references only to resources for which it is the function of the regional council to allocate under s30(1)(fa) of the RMA (ie only resources covered by ss14 and 15 of the RMA). Judge Jackson states that "section 124A is meant to be a door, and if it does not open [ss124B and 124C] do not apply".

It was ultimately held, in accordance with the scheme of the 2005 amendments and the RMA as a whole, that ss124A to 124C are a mini-code that only apply to resolve priorities between an application for a renewal consent and a new application *for the same allocatable resource* under s30(1)(fa). This means that ss124A to 124C only apply to resources controlled by ss14 or 15 because only these resources are allocatable under s30(1)(fa). It was held that references to ss12 and 13 (s13 covers gravel excavation) in ss124B and 124C were made in error by the legislature.

Because riverbed gravel is not an "allocatable" resource, applications for its excavation were not covered by s124A. Therefore, neither s124B or s124C applied, meaning the first come, first served principle applied and it was likely that Fulton Hogan's application would have priority, though this was not ultimately decided due to a lack of evidence and the nature of the declaratory proceedings. In light of this, the Court declined to grant any of the declarations for priority sought by Ready Mix. Judge Jackson's pragmatic exercise in statutory interpretation, though expressly acknowledged as not providing a seamless answer (and perhaps not in keeping with the legislature's intention under the 2005 amendments to implement a more comprehensive "new recipe for allocating resources") was, according to Judge Jackson, required in order to make the RMA work.

The decision goes some way to assist interpretation of the priority provisions under the RMA - at least to the extent that it clarifies (rightly or wrongly) that ss124A to 124C only apply to allocatable resources controlled by s14 or s15. It provides food for thought for industry operators and may prompt them to reassess their competitive positions, and the true value of their existing consents. The result in the context of gravel extraction consents may be a practice of seeking renewal consents earlier, rather than later. Given the complexity of the issues and the current state of the law in this area, further legislative reform to provide a workable, fair and predictable priority framework may be a necessary, albeit unenviable, task.

More recent cases will follow in the Resource Management Journal.

CONTINUING PROFESSIONAL DEVELOPMENT

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

RMLA Conference 2012

Mark your diary for next year's Conference – the 20th Anniversary of the Association – **27-29 September 2012** in Queenstown. A committee has been formed already and more details will follow as the theme and programme are confirmed.