Implementing the law on consent application priority — powers and potential pitfalls

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Introduction
The Court of Appeal decision in Central Plains Water Trust & Anor v Synlait Limited & Anor [2009] NZCA 609 (Central Plains) confirms that priority for a "full hearing" is determined by the date of lodgement of a complete consent application with the consent authority, rather than the previous test based on the date the application was ready for notification. The Court also held that priority may be lost where there is unreasonable delay by the applicant.

The decision provides clarity on some matters but potential issues still arise. In particular:

• When should an application be regarded as complete?
• What authority does a consent authority have to delay the hearing of an application where there is a prior application?

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Editorial

The United Nations has declared 2010 the “International Year of Biodiversity”. As a result, this issue of Resource Management Journal has a special focus on biodiversity and the paper by Mark Christensen on biodiversity offsetting previously published in Resource Management Theory & Practice is republished to mark this occasion.

Biodiversity is a critical issue for New Zealand given the large number of endemic species of animals and plants (over 90,000) that are native and unique. They form part of our national identity and our natural capital. While significant effort continues to be made by successive governments, the outlook remains a grim reminder that we could perhaps do better in managing these natural resources. At an international level the IUCN has expressed concern that:

Continued loss of biodiversity will result in a rapid decline of the Earth’s natural wealth and a dramatic reduction of future ecosystem services. Agricultural production will dramatically decrease if bacteria and fungi, which make soil fertile and breakdown wastes disappear. The same will happen if insects, bats and birds — which ensure flower pollination — reduce in numbers. With 42% of anti-cancer drugs coming from natural sources, biodiversity loss will force us to face unprecedented challenges.

The agricultural focus of the New Zealand economy means that such concerns will be critically important in relation to any debate regarding the efficiency and effectiveness of environmental regulation, or international competitiveness. The report card provided periodically by the Paris based OECD presents a stark contrast with the clean and green image projected by New Zealand onto the international stage. For example, the latest environmental performance review found that:

... nature and biodiversity conservation still faces major challenges in New Zealand. Despite sizable decreases in the numbers of certain pests (e.g. rats, possums, rabbits) in some areas, invasive species continue to pose serious risks to indigenous ecosystems and species and inflict high economic damage overall. Land use change analysis shows a net loss of nearly 175 km² of indigenous habitat between 1996 and 2002. The central government recently decided not to proceed with a national policy statement on biodiversity, a draft of which was presented for consultation in 2001, but instead to pursue biodiversity objectives through a non-statutory approach. In the absence of data on ecosystem conditions and trends, conservation objectives continue to be defined in terms of agency output rather than performance outcomes. Efforts to put ecosystem survey and monitoring techniques into use have been slow and sporadic. Conservation of freshwater and wetland ecosystems has trailed that of other biotopes, even as pressures on them from diffuse pollution and water abstraction have grown. The rapid and prolonged increase in numbers of tourists to a few places in national parks and conservation areas has led to deficits in waste and wastewater capacity and damage to habitats. Although New Zealand’s marine environment is very vulnerable to alien species, control of risks from ballast water and vessel hull fouling is in its infancy. (p5)

The failure to provide national guidance on critical resource management issues noted by the OECD, is one of the matters focused on by Mark Christensen. He puts forward an argument for the preparation of a National Environmental Standard (NES) by the Minister for the Environment. Currently, the debate regarding biodiversity offsets is played out in the context of resource consent hearings. As a result, Christensen argues that preparing a NES would provide greater certainty for applicants and submitters. In contrast, Dr Susan Walker in paper available on the RMLA website “Why bartering biodiversity fails”, argues that the policy framework that underpins biodiversity offsets is “symbolic” and fails to achieve the objective of “no net loss”. In her view, biodiversity offsetting is not consistent with promoting sustainable management of natural and physical resources.

This issue of RMJ also contains a series of articles on other topical issues. Priority of competing applications for the take and use of freshwater resources continues to haunt RMA process, and a timely article from Phillip Milne and Matt Conway provides comment and analysis on the latest instalment from the Court of Appeal (Central Plains Water Trust v Synlait Ltd) on this topic. Similarly, Helen Atkins and Vicki Morrison return to the spectre of contaminated sites management.

Streamlining and simplifying resource consent application and appeal processes under the RMA
are also featured in the articles by Bal Matheson and Kate Macdonald on dealing with competing experts evidence at local authority hearings, while Daniel Minhinnick deals with s 290A of the RMA. The topic is continued by James Gardner-Hopkins who considers the direct referral process in the context of the decision in Progressive Enterprises Ltd v Rodney District Council.

Finally, this issue of RMJ is the first to be published jointly by the RMLA and Thomson Reuters in a new venture designed to enhance the quality of publications, and marks an historic point in the ongoing development of the journal.

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General Editor
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- How will consent authorities and the Court determine whether there has been unreasonable delay by an applicant in progressing an application?
- Is the competing applicant’s level of knowledge relevant, as was suggested in the Central Plains v Ngai Tahu decision (noted below)?

**Background — Central Plains v Ngai Tahu**

In *Central Plains Water Trust v Ngai Tahu Properties Limited & Anor* [2008] NZCA 71 (*Ngai Tahu*), the majority of the Court of Appeal held that a consent application obtains priority for determination at the time of filing, provided it is complete:

“An application for resource consent to take water which is not disqualified by unreasonable delay and which, although recognising the need for subsequent use applications could not as filed be rejected as a nullity, takes priority over an application which relates to the same resource and which, although complete in itself, was filed later by a party with knowledge of the earlier application.” (paragraph 80)

The minority view (Robertson J), which reflected prior decisions, was that an application obtained priority for hearing when it was ready for notification and lost it if the consent authority determined that further consents were required. An appeal to the Supreme Court was abandoned.

**Central Plains v Synlait**

In *Central Plains* the Court adopted the *Ngai Tahu* majority view and provided further clarification, unanimously holding that:

- The first complete application received is entitled to be heard first.
- Priority “may” be lost if the applicant breaches the RMA section 21 duty to avoid unreasonable delay.
- Priority is not lost by a section 92 request for information or a section 91 deferral for additional consents unless the applicant breaches section 21 by unreasonably delaying the provision of such.
- In its submission opposing the first application, a later applicant may (1) challenge the merits of the first application, and (2) present “competing concepts”, but may not put up its own competing application and contend that its own application is preferable on the merits (obiter).

**Two themes: process efficiency and substantive policy factors**

In deciding how priority should be determined, the Court discussed two broad themes that it considered pointed in different directions:

1) the efficient application of the statutory timetable, as represented by "s 7(b): the efficient use and deployment of natural and physical resources"; and
2) the substantive consideration of other policy factors as captured by the broad section 5 concept of sustainable management.

The Court indicated that theme 1 remains the dominant consideration in terms of priority decisions. This is because of the need to achieve procedural efficiency rather than having consent authorities “swamped by aspiring to substantive perfection” (paragraph 92).

**First in, first served: an application is “in” when it is filed in a complete form**

Procedural priority is still determined on the first in, first served basis that was developed in *Fleetwing Farms Ltd v Marlborough District Council* [1997] NZRMA 385 (CA). The Court of Appeal in *Central Plains* confirmed that an application is “in” and priority is gained when a complete application is lodged, rather than when it is ready for notification. The Court commented that it is more practical to base priority on the date of receipt of a complete application, than on a judgement call by a consents officer about whether further information or further consent applications are required.

An approach based on the first complete application has the advantage that consent authorities can prioritise the hearing of applications without concerning themselves with the question of when each application was “ready for notification”. This also means that applicants will not risk losing their place in the priority queue based on a consent authority’s views about the need for further information or further applications. However, the new approach has its own issues.

**When is an application complete?**

The “ready for notification” test left priority for a hearing to be determined by potentially arbitrary decisions about what information was required prior to notification and whether further applications were required in order for submitters to understand the principal application. The test for completeness under section 88 is more certain. However, it still requires an element of judgement by officers.

Statutory timelines are now more stringent, and apply from when an application is accepted as lodged. It may be tempting for consent authorities to “buy time” by rejecting applications, rather than seeking
further information under section 92, however such considerations are of course irrelevant to section 88. There is a right of objection and appeal against a decision to reject an application and, where priority may be lost as a result of a section 88(3) decision, challenges are likely.

Section 88(3) provides that:

“If an application does not include an adequate assessment of environmental effects or the information required by regulations, a consent authority may, within 5 working days after the application was first lodged, determine that the application is incomplete and return the application, with written reasons for the determination, to the applicant” (emphasis added)

The requirements for an application and assessment of environmental effects (AEE) are set out in section 88(2), Form 9 of the Resource Management (Forms, Fees and Procedure) Regulations 2003 and Schedule 4 of the RMA. An application must be made in the prescribed form and manner, and include an AEE “in such detail as corresponds with the scale and significance of the effects that the activity may have on the environment” (s88(2)(b)).

Section 88 does not provide as wide a discretion as some councils may believe. An application may only be rejected if information “required” by Regulations is missing, or if the AEE is inadequate in the context of the scale and significance of possible effects on the environment. There is an element of subjectivity in deciding how much detail to include in an AEE (Hubbard v Tasman District Council W001/95 (PT)). It is initially for the applicant to determine what level of information is required in an AEE. The purpose of the AEE is to allow council officers and possible submitters to understand the potential effects of a proposal. It is the further information and the final evidence at any hearing (if there is one) which is then used to determine whether consent is granted.

Section 92 and the ability to “stop the clock” provide a mechanism to ensure that adequate information is available prior to notification and service, and prior to an application being set down for hearing. In our view, the power to reject an application should not be used where an application is complete and where section 92 powers would suffice to fill perceived information gaps. Nor should applications be rejected because officers disagree with the applicant’s approach. That is a matter for the officer’s report.

We suggest that a distinction is required between levels of information needed at each stage of the process. At the stage of acceptance or rejection of an application the question is whether the application contains the information required by regulations and contains an adequate AEE. (For example a “pro forma” AEE will usually be insufficient.) At the next stage officers must decide which persons may be affected and whether service and/or notification is required and, if so, whether there is sufficient information for affected persons to identify potential effects on them and for possible submitters to decide whether and what to submit. If further information is required for this stage it can be sought under section 92.

After a notification decision has been made, the officers need to determine if there is sufficient information to proceed to determine the application, whether by way of an officer decision or at a hearing. Section 92 and, if there is a hearing, the evidence process, can be used to ensure that there is sufficient information to make a decision. There are also powers under section 41C for further information to be requested during the hearing.

At this stage there is no case law about the circumstances in which an application may properly be rejected on the basis that it is incomplete or does not contain an “adequate assessment of environmental effects”. Ultimately, a balance is needed between the rights of applicants to have the clock started and the need for a consent authority to avoid deficient and/or “placeholder” applications. We suggest that in the interim (pending guidance from the Courts) a possible test in applying section 88(c) may be:

In the context of the scale and significance of possible effects, is the AEE sufficient to enable the officers to understand the application and the likely range and scale of potential effects and affected persons, so that they can make an informed decision about whether to request:

- additional applications under section 91; or
- further information under section 92 to enable notification/service decisions?

Priority of hearing v priority of merits

Filing a complete application first only gives a presumption of priority of hearing. It seems implicit in the Court’s decision that later applications should not be heard or at least determined until the first application is determined:

“…assuming there are several applications for the one finite resource, the applicant who satisfies the Ngai Tahu
In our view the reference to a “full hearing” is appropriate, since what is relevant is not so much the timing of the hearing but timing of the decision.

Being “first in” does not provide any presumption that the application is more likely to be granted than any other application. In practice however, priority of hearing and determination is a significant advantage, because the consent authority cannot compare two competing proposals side-by-side and pick a winner. If the first proposal is sustainable and not inefficient, it must be granted even if the later proposal might be more sustainable or more efficient. The difficulty with the first in approach is that complex applications may delay other more simple, “efficient” or urgent applications, which may have more merit.

A later applicant may submit in opposition to the first application, subject to the same rules as other submitters. In _Central Plains_ the Court held that:

“... the applicant who first lodges a complete application is presumptively entitled to the first hearing. The later applicant may not present its full application at that hearing under s 104. What the later applicant may do, like other members of the public alerted to the first application via s 93 notification, is put before the consent authority not only its challenge to the detail of the first application but competing concepts which may justify the authority in:

(a) rejecting the first application altogether; or
(b) allowing it in part only; or
(c) reserving judgment upon it until the later application has been heard; or
(d) exceptionally, ... adjourning it part heard.”
(Par. 89)

It appears that the reference to “competing concepts” means that a later applicant may be entitled to argue that proposals of its general type are a more efficient use of the resource. For example, a submitter who plans to establish a run-of-the-river use such as a hydro dam might argue that non-depleting uses are more consistent with the purpose of the RMA and efficiency of resource use than a surface water take for irrigation purposes. This seems to be a departure from the approach to date, whereby the courts have been reluctant to make any comparison with other potential uses of the resource, provided that the proposed use (first in time) is not “inefficient” (_Fleetwing_ (above)).

**What power is there for consent authorities to delay subsequent lower priority applications?**

Consent authorities have no express power to delay the hearing of a subsequent application to ensure that a higher priority application is heard and determined first. In particular, there is no express power to depart from the statutory timeframes if a later applicant is ready for a hearing but an earlier applicant with priority is not yet ready for a hearing.

In the absence of a power to delay a later application, the approach applied by Canterbury Regional Council commissioners was to hear and determine the later Ngai Tahu application prior to the Central Plains application, but grant it on conditions that protected the priority of the first applicant in the event that it ultimately obtained consent. There would seem to be no necessary barrier to the approach adopted in that instance, given that Central Plains’ eventual priority to the resource was protected. Arguably however, the _Central Plains_ Court of Appeal decision and the focus on priority for a “full hearing” requires councils to put the earlier application on the “backburner” albeit without express statutory authority to do so.

Alternatively, the consent authority may decide to simply press on with a hearing of the earlier application even if it is not ready. Section 92A(3) seems to indicate that the council has no other option, despite the obvious difficulties for all parties in proceeding without all the necessary information and possibly against the applicant’s wishes.

**What amounts to unreasonable delay?**

In _Central Plains_ the Court of Appeal held that priority “may” be lost if an applicant unreasonably delays the provision of further information or otherwise unreasonably delays the hearing of its application. Consent authorities have no express power to determine whether there has been “unreasonable delay”. Accordingly, it would seem that debates about unreasonable delay will need to be determined by the Environment Court by way of declaration. Alternatively, those debates might be determined by the High Court on judicial review of a consent authority’s decision to proceed or not proceed with the hearing of a subsequent application. However, it is debatable whether there is a reviewable statutory power of decision under, say, section 101(1).

The use of section 21 raises various questions, such as:

- How long can a delay be before it is unreasonable?
- Do the individual circumstances influence whether the delay is unreasonable? For example, does the
length of a “reasonable” delay shorten if competing applications in the wings are being held up?

- Is greater delay justified for complex applications?
- Is there unreasonable delay if the applicant and consent authority agree to the delay?

If there is competition for the resource in question, a consent authority’s view that priority has been lost as a result of unreasonable delay may well be challenged. Section 88C(2)(b)(ii) appears to allow an indefinite period for providing further information so long as the applicant confirms within 15 working days that it agrees to provide it. The risk of challenge could be reduced by setting and communicating expectations about timeframes, and obtaining legal advice before letting a later applicant jump the queue based on “unreasonable delay”.

The potential uncertainty around delays could be reduced if, in any situation where the RMA does not expressly impose a time limit on an applicant, the consent authority sets a reasonable time limit and advises the applicant of the potential consequences of not meeting that limit. For example, if the consent authority puts an application on hold under section 91, it could advise the applicant that if the other required applications are not received by a specified date, the applicant’s priority for a hearing may be lost. Or the consent authority could advise the first applicant that the matter will be set down for hearing even if the applicant desires more time.

**Knowledge element**

In *Ngai Tahu* the Court of Appeal stated that if an applicant has knowledge of a prior application for the same resource, it cannot gain priority, at least in a water-take situation. The Court did not comment on this issue in *Central Plains*. With respect, the knowledge component could introduce an impractical extra step with no corresponding benefit for process fairness and efficiency. Consent authorities cannot be expected to make a decision about the level of a third party’s knowledge, nor should they be required to speculate about the competing applicant’s motives as seems implicit in the *Ngai Tahu* decision.

**New Zealand Maori Council declaration application**

Just before the *Central Plains* decision came out, the High Court in *New Zealand Maori Council (Re an Application)* HC Wellington CIV-2009-485-1048, 21 August 2009, struck out an application for a declaratory judgment that sought to argue that priority should be determined at the consent authority’s discretion. The Court commented that the proposition was not capable of serious argument and that there were difficulties in satisfactorily articulating the boundaries of the suggested council discretion, in the form of a declaration. The Court stated that the declaration sought addressed only half the picture, in that it sought to move the law from a rule to a discretion, but did not identify factors governing the discretion.

**Conclusion**

The most recent *Central Plains* decision provides more clarity about consent application priority than the earlier *Ngai Tahu* decision. However, there remain a number of uncertainties and a need for statutory amendment to make Parliament’s intentions clear and provide the necessary tools for consent authorities. The more fundamental issue about whether sustainable management is well served by a “first in, first served” approach is a matter for further debate and one the Government is considering this year.
Biodiversity Offsets — A Suggested Way Forward

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Introduction

In the fourth edition of the UNEP Global Environmental Outlook, produced in 2007, it was reported that the targets set by the international community for biodiversity protection at the Rio Earth Summit in 1992 had not been met, that the relevant international instruments had been ineffective and it would not be possible to achieve the 2010 biodiversity targets agreed in Johannesburg. In the face of an escalating biodiversity crisis, appropriate economic development policies were called for to sustain the diversity of life on the planet and to maintain the goods and services necessary for humanity’s economic activities and well-being.

At the recent Ninth Meeting of the Conference of parties to the Convention on Biological Diversity, held in May 2008 in Bonn Germany, the parties adopted Decision IX/26 concerned with promoting engagement with business. This follows from a decision at the Eighth Conference of the Parties where the Secretariat was requested to compile information on the business case for biodiversity and good biodiversity practice and to make this information available through the secretariats’ clearing-house mechanism. Decision IX/26 noted that while there has been notable progress in mobilising the business community on biodiversity, relatively few companies were aware of the business and biodiversity linkages. The Parties adopted a framework of two priority areas for action on business and biodiversity 2008-2010: building and promoting the business case for biodiversity; and dissemination of planning and assessment tools and best practice. As part of the second priority the secretariat is tasked in collaboration with relevant organisations and initiatives, such as the Business and Biodiversity Offsets Programme (“BBOP”), to compile and make available case studies, methodologies, tools and guidelines on biodiversity offsets, and relevant national and regional policy frameworks.

Biodiversity offsets are conservation actions intended to compensate for the residual, unavoidable harm to biodiversity caused by development projects, so as to ensure no net loss of biodiversity. Before developers contemplate offsets, they should have first sought to avoid and minimise harm to biodiversity.

In New Zealand, there has been debate about whether biodiversity offsets or environmental compensation generally can be considered under the Resource Management Act 1991 (“RMA”). That issue has now been resolved with offsets or compensation either being seen as within the wider definitions of “remedy” or “effects”, or generally within the concept of sustainable management in s 5(2). Moreover, offsets and compensation are matters that can be taken into account under s 104(i)(c).

Despite the acceptance of offsets_compensation as a matter of law, the practice of environmental compensation in New Zealand remains ad hoc and variable and needs to be put on a sounder footing. In 2004 a research monograph on the issue stated: “Our conclusion is that a far more robust regime needs to be developed in New Zealand if environmental compensation is to be used to protect significant biodiversity and landscape values. At present, we appear to be learning as we go rather than learning from the best and worst of international practice. Central government should provide not only more explicit policy direction but should also promote good practice guidelines. This is imperative in order to improve the quality of policies and rules for environmental compensation in second generation planning instruments (including the New Zealand Coastal Policy Statement).”

In this paper I consider selected recent developments in the production of guidelines and methodologies for the use of biodiversity offsets (and environmental compensation generally), both in New Zealand and internationally, and in so doing, suggest a possible way forward for New Zealand.

Benefits, Challenges and Limitations of Biodiversity Offsets

Benefits for biodiversity

Biodiversity offsets offer a key tool for stemming the loss of biodiversity at all spatial scales from local to global by ensuring — through the idea of “no-net-loss” — that development projects explicitly consider and offset their impacts on biodiversity. But perhaps more significantly in a country like New Zealand where government funding appears insufficient to stem the loss of biodiversity, especially under the pervasive impact of invasive species, biodiversity offsets represent a exciting new opportunity to actively engage business in achieving long-term and sustainable biodiversity outcomes.
Benefits for business
Biodiversity offsets can help companies manage their risks more effectively and strengthen their licence to operate by showing regulators that operations can be based on a “no net loss” or “net gain” approach to biodiversity and by securing the support of local communities and civil society. Companies are increasingly seeking to demonstrate good practice on environmental issues to secure their licence to operate and access to capital, to obtain consents in a timely way, to operate cost effectively, and to maintain a competitive advantage. Conversely, bad environmental practice can lead to higher operating costs, costly consenting delays, liabilities, and lost revenues.

Benefits for government
Biodiversity offsets offer regulators a mechanism to encourage companies to compensate fully for losses to biodiversity and make important contributions to conservation in many cases with lower costs than alternative (government funded) policies. Offsets can also help to ensure that project developments intended to meet growing demand for energy, minerals, crops and transport are planned in the context of sustainable development, and are accompanied by counterbalancing measures to secure the conservation of ecosystems and species affected by a project.

Benefits for conservation organisations
Biodiversity offsets can result in more and better conservation and increase the funding available for conservation. Designing and implementing biodiversity offsets in the context of regional development and at the landscape scale allows offsets to contribute to the strategic aims and objectives of conservation planners. Offsets can also help ensure that national or regional conservation priorities are integrated into business planning.

Challenges and limitations
While biodiversity offsets may, in some circumstances, be able to provide the benefits to business, government, communities, conservation organisations and the financial community, there are risks associated with making biodiversity offsets and limits on what they can and should be expected to achieve. The question of their appropriateness and effectiveness as an environmental mitigation mechanism is debated in the conservation and business communities alike. A strong set of principles can help ensure that biodiversity offsets are only used where appropriate and are designed and implemented so as to avoid or manage the risks.

Inappropriate projects get the go-ahead
Perhaps the strongest concern about biodiversity offsets is that they could make it easier for developments to proceed that have a very significant impact on biodiversity that in many cases would be judged unacceptable, on the back of claims that the damage to biodiversity will be offset. There is also a concern that biodiversity offsets could be used as a form of “green washing”.

Lack of additionality
Offset activities should be new or additional and not “business as usual”. That is to say, biodiversity offsets should be activities that would not have been implemented in a “no offset”, or even a “no development”, scenario. Offset planners should address the risk there is no true “conservation additionality” as a result of the biodiversity offset.

Cost-shifting
The fact that companies take responsibility for their footprint on biodiversity and internalise the costs of conservation is an advantage of biodiversity offsets. However, this investment in conservation by developers is not an alternative to public investment in conservation by government, but should supplement it.

Leakage
In designing offsets, developers should seek to avoid displacing the harmful activities that impact biodiversity to another location, an outcome known as “leakage”. Landscape level planning can help address this risk.

Lack of implementation capacity and lack of clarity on liabilities
Offsets are long-term commitments. There is a risk that an offset may be well-designed, but that the organisations responsible for implementing it are not obliged to carry this responsibility forward into the long-term future. They may also lack the human, institutional, legal and financial capacity to take on such a long-term commitment. In addition, offsets represent enduring liabilities for developers, unless the offset (and associated liability) can be transferred to a secure, independent third party that can manage the offset over an appropriate period. There is a risk that these issues will not be adequately addressed during the design of a biodiversity offset.

Challenges of quantification and offset design
Given our incomplete knowledge of biodiversity and ecosystem functions and services, there are considerable challenges to be met in quantifying projects’ impacts on biodiversity and the nature
and amount of conservation actions needed to offset them. Demonstrating no net loss of biodiversity is currently difficult or at least equivocal. The quest for quantification is a long-term undertaking and one shared with the biodiversity and business communities for broader environmental management purposes, not just biodiversity offsets. It is important to note that different groups in society attach different values to biodiversity components. For an offset design process to be credible, it needs to involve the full range of stakeholders, to capture these different values. Consensus building within a broad stakeholder constituency is a sensible approach to minimising risk and facilitating conservation progress while quantification methodologies become more robust.

New Zealand Environment Court Guidelines for the use of Biodiversity Offsets

The most comprehensive discussion of environmental compensation is *JF Investments Limited v Queenstown Lakes District Council*. There, the Environment Court considered an application for a land use consent for a residential platform situated in an outstanding natural landscape in the Queenstown District. In compensation for the proposed location of a house in that landscape, the applicant offered to remove wilding pines from the uphill half of its site, to carry out work up to the value of $100,000 removing pines from elsewhere in the surrounding landscape, and proposed covenants not to further subdivide the allotment, nor to place additional houses on it in the future.

The Court defined environmental compensation as:

> Any action (work, services or restrictive covenants) to avoid, remedy or mitigate adverse effects of activities on a relevant area, landscape or environment as compensation for the unavoidable and unmitigated adverse effects of the activity for which consent is being sought.

While the Court accepted that valuing environmental compensation is very complex it stated that this should not of itself prevent the assessment being attempted:

> The difficulties of obtaining such (e)valuations must not prevent the attempt if sustainable management of resources requires it. The practical answer is usually that if the proposed remedial or mitigatory action is the repair of damage of the same kind as the adverse effects of the activity, it is easier to accept as not only relevant, but reasonably necessary as well. Similarly, if the proposed remedy is also in the same area, landscape, or environment then its benefits, compared with the costs of the proposed activity, are more easily seen. Conversely, if the offered environmental compensation is too far in distance, kind or quality from the adverse effects caused by the proposed activity then it may be no longer reasonably necessary, but merely expedient for the developer to offer.

The question of weight to be placed on the compensation needs to be decided on the facts of each case. In providing guidance on when environmental compensation is appropriate, the Court stated:

> We conclude that off-site work or service or a covenant, if offered as environmental compensation or a biodiversity offset, will often be relevant and reasonably necessary under section 104(1)(i) if it meets most of the following desiderata:

1) it should preferably be of the same kind and scale as work on-site or should remedy effects caused at least in part by activities on-site;

2) it should be as close as possible to the site (with a principle of benefit diminishing with distance) so that it is in the same area, landscape or environment as the proposed activity;

3) it must be effective; usually there should be conditions (a condition precedent or a bond) to ensure that it is completed or supplied;

4) there should have been public consultation or at least the opportunity for public participation in the process by which the environmental compensation is set;

5) it should be transparent in that it is assessed under a standard methodology, preferably one that is specified under a regional or district plan or other public document.

These guidelines were adopted and applied in the Court’s later decision in *Department of Conservation v Wairoa District Council*. There, the Court considered a proposal to clear kanuka forest. Approximately one-third of the 3570 hectare hill country station was in indigenous vegetation, consisting of kanuka and podocarp-broadleaved forest. Much of the forest was being undergrazed by cattle and sheep, which meant the land was neither being protected from damage nor efficiently used as pasture. The proposal was to clear 354 hectares of kanuka to convert that area to pasture, to be offset by protection of 799 hectares of the most significant areas of indigenous vegetation through a QEII National Trust Open Space Covenant; removal of domestic grazing pressure from all protected areas through the establishment of new fencing and the repair of existing fencing;
active control of feral grazing and browsing animals, especially goats and possums; monitoring of biodiversity values; and natural regeneration of pasture areas within the covenanted and fenced area once they were retired from grazing.

DOC had appealed the original Wairoa District Councils resource consent decision on the basis that any indigenous vegetation clearance on the property would be unsustainable because it would lead to the continuing loss of biodiversity, effectively “death by a thousand cuts”. The Department also argued that the proposed protection of the balance might not be effective.

The proposal was considered against the *JF Investments* guidelines: the proposed offset was on the same site, of the same kind of vegetation, on a greater scale, and there was no reason to think the protection would not be effective. While there was not “public consultation in a general sense”, there had “been a public resource consent process in which the spectrum of opinion has been expressed and explored by eminently qualified people”. Against the last factor or “desiderata” that required a standard methodology, the Court recognised the lack of objective measurement against which to assess the offered proposal, but was satisfied its pros and cons had been well worked through.

The Court concluded, “[h]ere, we see the issue as rather more clear cut than was the case in *JF Investments*, and that the biodiversity offsets approach would ensure the protection of the overall significance of the indigenous vegetation on the property”.

**Other Frameworks for Biodiversity Offsets**

**New South Wales**

In December 2006, the Threatened Species Conservation Amendment (Biodiversity Banking) Act 2006 commenced. This Act establishes a biodiversity offset and land banking scheme by which the NSW Government intends to introduce a market-based approach to addressing the impacts of development on biodiversity. The scheme recognises that biodiversity offsets were being negotiated on a case by case basis, which was leading to considerable uncertainty.

The biodiversity offset and land banking scheme offers landowners an opportunity to earn credits for creating sites which maintain or improve biodiversity. Developers can then purchase those credits from a central register and use the credits to offset the negative impact of development on biodiversity.

The scheme is subject to a state-wide two-year trial which commenced in July 2008. The framework for the scheme was established under Part 7A of the Threatened Species Conservation Act 1995 and is supported by the Threatened Species Conservation (Biodiversity Banking) Regulations 2008, the BioBanking Assessment Methodology and the Compliance Assurance Strategy.

Biobanking sites may be established on land by means of biobanking agreements entered into between the Minister for the Environment and a landowner. The agreements will require or authorise the landowner to carry out positive environmental management and/or rehabilitation actions in respect of the land. Management actions carried out under a biobanking agreement are exempt from the requirement for development consent or environmental assessment under the Environmental Planning and Assessment Act 1979.

Biodiversity credits may be created in respect of past, current and future management actions carried out on land in accordance with a biobanking agreement. The biobanking assessment methodology, yet to be established, will set out the management actions for which biodiversity credits may be created and will be used as the basis for calculating the number and class (if any) of the biodiversity credits.

Biobanking agreements are to be registered on title to land and generally will have effect as binding agreements on the owner (and subsequent owners) in perpetuity. Biobanking agreements may be enforced by any person, by action taken in the Land and Environment Court.

Biobank sites are exempt from land tax. For the purposes of land tax assessment, the value of a parcel of land is to be reduced by an amount proportionate to the area that is the subject of a biobanking agreement.

The Biobanking Act establishes a system for trading in biodiversity credits, so that once created and registered (in a register of biodiversity credits to be established by the Director-General of the Department of Environment and Conservation), the credit may be transferred to any person, subject to the regulations.

Transfers of biodiversity credits have effect when registered under the scheme. Part of the funds generated from the sale of the credits are to be held on trust (in a Biobanking Trust Fund and bank account to be established by the Minister)
for the landowner, who receives this as funding for management actions carried out under the biobanking agreement.

Once created, a biodiversity credit remains in force unless it is cancelled or retired under the scheme. A credit cannot be cancelled if it has been transferred to a bona fide purchaser without notice of the circumstances that are grounds for the cancellation of the credit, e.g., if the application for the creation of the credit contained materially false or misleading information. A credit may be retired when it is used as an offset in connection with a development proposal, retired voluntarily or retired for the purpose of complying with a direction given under the Biobanking Act. For example, a biobank site owner (or former owner) may be directed to retire credits if the Minister considers that biodiversity credits were created for a management action that was not carried out, or not completed, in accordance with the relevant biobanking agreement.

Under the Biobanking Act, biobanking statements may be issued for development and activities to which the Environment and Planning Assessment Act applies. An application for a biobanking statement for a development must include an assessment of the impact, or likely impact, of the development on biodiversity values. The Biobanking Act does not specify details as to what form this assessment will be required to take. If the development is likely to impact on biodiversity values, developers can:

- Propose offset works to minimise biodiversity loss or establish their own biobank site to generate credits;
- Purchase or retire biodiversity credits to offset the impact or likely impact; and/or
- Change the project so that no biodiversity loss occurs.

The Biobanking Act recognises that biodiversity loss should be avoided and/or minimised before considering the use of offsets, as the Director-General may refuse to issue a biobanking statement if the developer has not demonstrated that all cost-effective onsite measures to minimise the impact of the development on biodiversity values are being, or will be, carried out.

Ultimately, a biobanking statement may be issued only if the development will improve or maintain biodiversity values. The statement may be issued subject to conditions, including as to the onsite measures to be carried out to minimise biodiversity loss or the retirement of biodiversity credits.

**Victoria**

The Victorian Department of Sustainability and Environment has developed the “habitat hectare” approach. This approach uses observable physical habitat components in an assessment which is standardised for each ecotype, using its “benchmark”. The benchmark represents the average characteristics of mature stands of native vegetation of the same community type in a natural or undisturbed condition. Applying the benchmark to the impact and potential offset sites enables the amount of change in the condition of biodiversity to be compared. The assessment is made in terms of a site’s condition and landscape context. Site condition measures how much the site has changed from a benchmark, by looking at:

- The presence of large old trees (for woodlands and forests);
- The amount of tree canopy cover (for woodlands and forests);
- The amount of logs (for woodland forests);
- The cover and diversity of the understorey;
- The presence of appropriate regeneration;
- How weedy the site is;
- How much leaf litter there is.

Landscape context considers how well the patch of vegetation can cope with natural fluctuations and disturbances, such as old trees dying, bushfires and floods. It is measured by the size of the area of vegetation that the site is within, as well as links to, and the amount of, neighbouring patches of vegetation. Assessments are carried out in accordance with a detailed Vegetation Quality Assessment Manual and an Index of Wetland Condition. BBOP has adopted the Victorian system for use in its **Offset Design Handbook**.

**The Business and Biodiversity Offset Program ("BBOP")**

BBOP is a partnership between companies, governments and conservation experts to explore biodiversity offsets. BBOP’s goals are:

- Demonstrating conservation and livelihood outcomes in a portfolio of biodiversity offset pilot projects;
- Developing, testing, and disseminating best practice on biodiversity offsets; and
- Contributing to policy and corporate developments on biodiversity offsets so they meet conservation and business objectives.

At present, BBOP has released eight documents on topics such as loss/gain quantification methodologies,
site selection/landscape planning, biodiversity offset multipliers and ratios, and a cost-benefit handbook. Once the consultation period has closed in mid-October 2008, work will begin on finalising a practical toolkit which will be made available to industry, policy makers, development agencies, conservation organisations, financial institutions and others. Since biodiversity offsets offer business benefits as a voluntary management tool, companies are keen to ensure that their voluntary efforts are regarded as socially acceptable and scientifically credible. For this reason, private sector representatives have asked for BBOP multi-stakeholder partnership of experts to help design and implement biodiversity offsets to provide credibility, practicality and political support for the approach.

The following draft principles on biodiversity offsets have been developed to guide biodiversity offset projects:

- **No net loss**: A biodiversity offset should achieve measurable conservation outcomes that can reasonably be expected to result in no net loss of biodiversity.

- **Adherence to the mitigation hierarchy**: Biodiversity offsets are a commitment to compensate for significant residual adverse impacts on biodiversity identified after appropriate avoidance; minimisation and rehabilitation measures have been taken according to the mitigation hierarchy. Offsets cannot provide a justification for proceeding with projects for which the residual impacts on biodiversity are unacceptable.

- **Landscape context**: Biodiversity offsets should be designed and implemented in a landscape context to achieve the best measurable conservation outcomes, taking into account available information on the full range of biological, social and cultural values of biodiversity and supporting an ecosystem approach.

- **Stakeholder participation**: In areas affected by the project and by the offset, the full and effective participation of stakeholders should be ensured in all phases of decision-making about biodiversity offsets, including their evaluation, selection, design and implementation. Special consideration should be given to the existing, recognised rights of indigenous and local communities.

- **Equity**: Biodiversity offsets should be designed and implemented in an equitable manner, which means the sharing of the rights and responsibilities, risk and rewards associated with a project in a fair and balanced way among the stakeholders.

- **Long-term success**: The design and implementation of biodiversity offsets should have as their objective sustained outcomes in terms of:
  - The viability of key biodiversity components;
  - The reliability and accountability of governance and financing; and
  - Social equity.

- **Transparency**: The design and implementation of biodiversity offsets, and communication of their results to the public, should be undertaken in a transparent manner.

**A New Zealand Suggestion**

Recently, an assessment framework for biodiversity offsets has been proposed based on experience with two New Zealand biodiversity offsets. The paper proposes and discusses six principles as follows:

a) Biodiversity offsets should only be used as part of a hierarchy of actions in which a development project must first seek to avoid impacts and then minimize the impacts that do occur. Biodiversity offsets should not be used to justify adverse impacts; rather they are the final step in a process that focuses first on avoidance and minimisation.

b) Some form of guarantee must be provided that the offset proposed will occur. One of the major criticisms of offsets, especially in North America, is that most approved offsets fail to meet their objectives or never actually occur.

c) Biodiversity offsets are inappropriate for certain ecosystem (or habitat) types because their rarity or the presence of particular species within them makes the clearance of these ecosystems inappropriate under any circumstances. Notwithstanding the hierarchy in principle one, it seems clear that there are some ecosystems or habitat types for which offsets are never going to be possible. These may be ecosystems that have already been diminished to such an extent that any further loss is unacceptable, or habitats of species whose loss would most likely lead to the extinction of the species as well.

d) Biodiversity offsets can involve protection of existing habitat but most often involve the creation of new habitat, especially when existing habitat already enjoys a degree of protection.

e) A clear currency is required that allows transparent quantification of values to be lost and values to be gained in order to ensure ecological equivalency between cleared and offset areas. Any biodiversity offset proposal must be founded on very good knowledge of the biodiversity values of both the site that is to be impacted and the offset site,
including composition, structure and pattern, function, as well as dynamics and resilience of the system. The development of a clear currency to quantify the values at different sites being considered as part of biodiversity offsets is essential to ensure that clearance of high quality habitat or a rare ecosystem is not offset using an area of low quality habitat or common ecosystem and thus that biodiversity offsets have credibility.

f) Determination of what is an appropriate offset must take into account both the uncertainty involved in obtaining the desired outcome for the offset area and the time-lag that is often involved in reaching this point. Uncertainty relates primarily to the inability of ecologists to accurately predict what a system will be like at some point in the future as a result of management actions implemented as part of the offset (e.g. restoration).

Biodiversity Offsets in New Zealand — A Possible Way Forward

There is some real confusion surrounding the use of the concept of a biodiversity offset in New Zealand. This confusion was noted by the Court in *JF Investments*. Whereas the Environment Court has generally considered the issue as one of “environmental compensation” (with some exceptions such as the *Wairoa* case), much of the international literature (including the IUCN paper which assisted the Court in developing its desiderata), is concerned with “biodiversity offsets”. Perhaps this inconsistency has arisen because the Court in many of the cases (e.g. *Memon, Stapylton-Smith, JF Investments*) has been dealing with issues of landscape impacts and amenity effects, which are not specifically biodiversity related.

Much of the discussion in other jurisdictions is about how biodiversity values can be assessed and measured. The objective is then to offset the effects of a development on biodiversity by securing an equivalent (or better) biodiversity or conservation gain. Such a gain is most readily achieved where ‘on-site in kind’ values are identified — that is, like for like, on or close to the site in question. Conceivably, it can also be achieved in other ways as well. For example, by “off-site out of kind” offsets (e.g., the protection of a “higher value” lowland podocarp forest in a separate ecological district to “compensate” for the removal of an area of “lower value” beech forest). Another approach in New Zealand (and the one adopted in the *Department of Conservation v Wairoa District Council case*), involves the enhancement of values within a degraded area (usually as a result of domestic grazing animals and/or invasive species) on-site or off-site to offset the clearance of indigenous vegetation. The challenge with biodiversity offsets (of whatever nature) is to establish a transparent and coherent means of identifying the overall objectives of adopting such an approach, as well as how the relevant values are measured and protected.

Biodiversity Offsets Versus Environmental Compensation

The wider concept of “environmental compensation” on the other hand has to take account of the fact that a whole range of conservation and amenity values are not susceptible to “valuation” in a manner similar to biodiversity values. Adverse effects on landscape and amenity values for example, cannot be “offset” by an equivalent positive effect. It is not possible to recreate an outstanding landscape for one which has been adversely affected by development. In this context, it is, however, possible to consider whether positive effects from the development in question can be offered which result in an overall “gain” such that a proposal overall is acceptable.

The Court in *JF Investments* has articulated what is in effect a hybrid set of considerations taken primarily from papers dealing with biodiversity offsets and has adapted them in the context of landscape and amenity considerations. The question is whether this is the preferable approach, or whether there should be policy or regulatory direction that deals with biodiversity offsets as a specific subset of environmental compensation.

In terms of environmental compensation generally, one of the fundamental questions is whether it is appropriate to consider that effects on landscape and amenity values can ever be “compensated for” in real terms. While one may accept that one or more positive effects outweigh one or more adverse effects of a particular proposal, the danger is to try to see one as a substitute for another in the sense of an “offset”, when the positive and adverse effects cannot be assessed or valued with the same currency. For example, the provision of walking tracks and waterways restoration cannot “compensate for” a perceived
failure to meet the objectives and policies of a district plan about limiting urban growth. That is because there is no currency against which to assess the adequacy of such “compensation”. It is, however, appropriate to consider, in the round or as a balancing exercise, whether the proposal is worthy of consent as promoting sustainable management. The “desiderata” are helpful in this context as well — the more closely related the “compensation” is to the “effect” (both are spatial and subject terms) the easier it might be to make that overall assessment. But it would be a mistake (with respect) to try to require some sort of standard methodology for comparing apples and oranges. Was $100,000 of wilding pine control the appropriate compensation, or should it have been another figure — say $60,000 or $200,000? Such an exercise cannot be measured.

It may be that in this wider context, the UK concept of "planning obligations" may be of some assistance.

Planning obligations (or "Section 106 agreements" under the Town and Country Planning Act 1990) are private agreements negotiated, usually in the context of planning applications, between local planning authorities and developers, and intended to make acceptable development which would otherwise be unacceptable in planning terms. Planning obligations might be used to prescribe the nature of a development (e.g. by requiring that a given proportion of housing is affordable); or to secure a contribution from a developer to compensate for loss or damage created by a development (e.g. loss of open space); or to mitigate a development’s impact (e.g. through increased public transport provision). The outcome of all three of these uses of planning obligations should be that the proposed development concerned is made to accord with published local, regional or national planning policies.

The Secretary of State’s policy requires, amongst other factors, that planning obligations are only sought where they meet all of the following tests. A planning obligation must be:

a) Relevant to planning;
b) Necessary to make the proposed development acceptable in planning terms;
c) Directly related to the proposed development;
d) Fairly and reasonably related in scale and kind to the proposed development; and
e) Reasonable in all other respects.

The use of planning obligations must be governed by the fundamental principle that planning permission may not be bought or sold. It is therefore not legitimate for unacceptable development to be permitted because of benefits or inducements offered by a developer which are not necessary to make the development acceptable in planning terms.

It may well be that this concept has some application in a more formal sense in New Zealand.

A Proposal for a National Environmental Standard

Currently, the debate over biodiversity offsets is being fought out before Council hearing panels and the Environment Court. This is an expensive, time consuming and ultimately uncertain process with regard to the outcome obtained. I suggest that a practical way forward is to remove the heat of this debate from the adversarial process. This will require the introduction of a standard methodology and a means by which the design of an offset can be certified as achieving no net loss. This will enable developers to have certainty about what is acceptable or not and how much a necessary offset will cost. That will mean that there can be appropriate planning by developers. Then there need not be a debate at a hearing about whether an offset is adequate. If a consent has been granted conditional on certification of an offset, then if that certification is not obtained the consent cannot be implemented. It may be that in certain circumstances the debate in a hearing is only about whether, from a sustainable management perspective, the consent should be declined: notwithstanding that it might be possible to design an offset (the "go, no-go decision"). The system could operate as follows:

a) A National Policy Statement ("NPS") is established which provides that for those projects identified in a national environmental standard, the objective to be achieved in a consenting process is no net loss of biodiversity (or possibly, even a net gain of biodiversity). The NPS would set the general principles similar to the BBOP principles and provide that consents can be granted conditionally subject to later certification that a proposed offset will achieve no net loss.
b) A National Environmental Standard which sets out:

i. The types of activities which are required to implement offsets to achieve no net loss of biodiversity (perhaps those affecting threatened biodiversity);

ii. An appropriate methodology that must be applied in assessing the effect and the proposed offset. This methodology needs to be transparent and able to be used without unreasonable cost (perhaps based on Victoria’s Habitat/Hectares approach);

iii. How certification that a particular offset proposed will achieve no net loss can be done, and who can provide that certification;

iv. The basis upon which bonds are to be calculated and held to guarantee the certified outcome.

The challenge is to develop a system for New Zealand without “one side” dominating the discussion and obtaining a legislated framework that favours one interest group over others. The framework developed needs to be based on sound ecological principals, but be developed within a pragmatic legal, economic and social framework.
The Dirt on Contaminated Land

Helen Atkins, Partner; and Vicki Morrison, Senior Associate; Atkins Holm Joseph Majurey

Introduction

There has been increasing recognition over recent years of the need to find ways to identify and manage contaminated land more effectively. This has led to a number of discussion papers and guidelines being issued by the Ministry for the Environment and the development of the proposed National Environmental Standard for Soil Contamination (proposed NES) which is currently open for submissions.

This article discusses the issues associated with the identification and remediation of contaminated land under the current regulatory regime; outlines the comparative contaminated land regime in Australia; and the proposed changes to New Zealand’s contaminated land regime with the introduction of the proposed NES. This article then comments on the likely effectiveness of the change and concludes by suggesting some additional amendments to the proposed regulatory regime.

The current regulatory regime

Contaminated land is defined in section 2 of the Resource Management Act 1991 (RMA) as:

“land that has a hazardous substance in or on it that—

a) has significant adverse effects on the environment; or

b) is reasonably likely to have significant adverse effects on the environment.”

Regional councils are tasked, under section 30(1)(ca) of the RMA, with “the investigation of land for the purposes of identifying and monitoring contaminated land”; and territorial councils, under section 31(1)(ilia) with the “prevention or mitigation of any adverse effects of the development, subdivision or use of contaminated land”.

Councils are generally empowered to promulgate rules in their respective regional and district plans to give effect to their functions (including those in relation to contaminated land), and under sections 68(11) and 76(5) respectively, regional and territorial councils are expressly allowed to exempt a rule from applying to an area or class of contaminated land if the rule:

a) provides how the significant adverse effects on the environment that the hazardous substance has are to be remedied or mitigated; or

b) provides how the significant adverse effects on the environment that the hazardous substance is reasonably likely to have are to be avoided; or
c) treats the land as not contaminated for purposes stated in the rule.

There is however no specific directive as to how the regional and territorial councils should achieve their respective functions and no indication of how these functions fit with functions under other legislation.

Problems with the Current Regime

There are a number of problems with the current regime. These relate to the splitting of functions between the councils; the differences in approach between councils; the difficulties councils face in carrying out their functions; the way in which contaminated land functions are impacted by other legislative responsibilities; and the difficulties in sheeting home responsibility for any environmental consequences arising from the use or otherwise of contaminated land.

Splitting of Functions

With regional councils taking on the investigatory and monitoring function, and territorial councils being responsible for avoiding/mitigating adverse effects from the use, there is a potential disconnect in the way contaminated land is managed. In particular, the extent to which territorial councils can carry out their contaminated land functions will depend at least in part on how well the regional councils carry out their investigation and monitoring functions. This is because territorial councils will only be in a position to control the adverse effects of using or developing contaminated land if the council is in fact aware that the land is contaminated. Communication and cooperation between regional and territorial councils is therefore very important and unfortunately in this and other areas has sometimes been difficult to achieve (refer proposed NES discussion document Part 1, Section 2).

Differences in Approach

The way in which the contaminated land functions have been approached has differed between councils. Some councils such as the Auckland Regional Council (ARC), have sought to establish a relatively detailed regulatory framework for the investigation, monitoring and remediation of contaminated land.
(refer Part 5 of the proposed Air Land and Water Plan). Other councils, such as Environment Waikato, have created plans to deal with a certain type of contaminant (e.g. dairy effluent) but have not sought to establish a comprehensive contaminated land regulatory framework. This makes it more difficult for people (and for territorial councils) with land interests in more than one region to understand and meet their obligations in respect of contaminated land.

Further, the differences in approach also mean that it is difficult to determine what the best and most effective approach is. Comparisons between the approaches are of limited usefulness, particularly given the differences in relation to objectives and policies of the councils’ respective plans. While it may be possible to determine how well a policy or rule gives effect to an objective, determining which is the better objective may not be so easy.

**Difficulties in Fulfilling Functions**

Councils rely to a large extent on information from the public and information which comes forward as a result of resource consent applications to identify contaminated or potentially contaminated sites, the extent of the contamination, and the likely risks and effects arising from the contamination. The difficulty with such an approach is that because there is no statutory obligation on the public to provide such information, and because resource consent applications are (generally) at the discretion of the site user, the information obtained tends to be sporadic. While some councils, such as the ARC, have attempted to impose notification requirements in their plans for certain activities (refer Permitted Activity Rules 5.5.40(a) and 5.5.42A(3) of the proposed Air Land and Water Plan), such Rules do not impose a general obligation to impart information about contaminated land and rely on compliance with the Rules by the public.

**Impact of Other Legislation**

In the course of carrying out its investigatory and monitoring functions, regional councils will obtain information about the land in question which may range from mere knowledge that the land is contaminated or potentially contaminated, to detailed reports about the extent and effects of the contamination. This information, once held by the council, is potentially then subject to obligations under other legislation such as the Local Government Official Information and Meetings Act1987 (LGOIMA). This is because the RMA does not specifically exempt contaminated land information from being subject to these other obligations. Given the potential impact the release of such information may have on the price and use of the land, it is worth considering this issue in a little more detail.

**LGOIMA**

LGOIMA requires that official information — which is essentially information “held” by the council (refer section 2) — be disclosed, unless there is good reason to withhold it. Reasons for withholding information are set out in sections 6 (prejudice maintenance law, detection of offences etc) and 7 (confidentiality, legal privilege etc). In most cases it is unlikely that there would be good reason to withhold contaminated land information. Indeed, under section 44(A)(2) (a) of LGOIMA, territorial authorities are specifically required to disclose the “likely presence of hazardous contaminants” on a site, in any land information memorandum that they issue for that site.

The question of whether there is an obligation to release contaminated land information was recently considered by the Ombudsman and Privacy Commissioner in relation to the highly publicised request for hazardous land information about potentially contaminated sites in Hawkes Bay. Hawkes Bay Regional Council was at first reluctant to disclose its list of potentially affected sites (3099 in total) given the information was unverified; that not all of the property owners were aware of the information; and given the potential effect the release of information would have on property prices. The Council’s stance was reviewed by both the Privacy Commissioner and the Ombudsman. The Privacy Commissioner took the view that the information was personal information of the property owner and could not therefore be released without the consent of the property owner. The Ombudsman disagreed, citing case law (Commissioner of Police v Ombudsman [1988] 1 NZLR 385 (HC)), which indicated that personal information was information “held about an identifiable individual”, and as the information was about the state of the land, it was not personal information. The Ombudsman directed that unless there was good reason to withhold it (which there was not), the Council was required to release the information. While the outcome of this case was undoubtedly the correct outcome under both the LGOIMA and the Privacy Acts, one of the possible RMA implications of this decision, is that the public may now be even more reluctant to disclose contaminated land information to the council, knowing that it could end up being released to the public.

**Sheeting Home Responsibility**

In addition to the above issues, finding someone to take responsibility for the contamination and in
particular to pay for the remediation required is often difficult. While the “polluter pays” principle may be accepted by many as being perhaps the most appropriate, it can be difficult to enforce. This is particularly so when the cause of the contamination is historical and the land has subsequently changed hands. Indeed, even where the contamination is continuing, there may be difficulties in locating the source of the contamination, (where seepage and discharges are occurring) and who is responsible for the contamination. The recent Government-funded clean-up cases at Mapua and the Tui mine are excellent examples of how our current legislation does not deal well with what are known as “orphan sites”.

Also even if the polluter or owner can be found, it can be difficult to force them to take action. While some council plans require notification and remediation of contaminated land, not all do, and even those that do can generally only impose notification and remediation responsibilities where there is a new activity, change in land use or subdivision proposed. This means that the land can still be on-sold in its existing state and the obligations in relation to notification and remediation (if any) would then fall on the new owner (unless the sale agreement specifically indicated otherwise).

How Does Australia Do It?
As can be seen from the above, there are a number of issues with the current regulatory regime for contaminated land, not all of which are capable of an easy fix. However, as these are issues which are increasingly faced by all countries it is perhaps worth taking a look briefly at how another country deals with contaminated land issues. Australia, being our closest neighbour in terms of location and also in terms of legislative/policy frameworks is worth considering.

In Australia, each state has specific legislation which deals with contaminated land; for example the Contaminated Land Management Act 1997 (NSW) and the Environmental Protection Act (QLD). While the form and content of the legislation is different from state to state, some common themes are that the legislation seeks to: control activities which may lead to contamination; require the establishment and maintenance of contaminated land registers; require the remediation of contaminated land if it is likely to adversely affect human health; and sheets home responsibility to the polluter in the first instance or the owner/occupier if the polluter cannot be found or proceeded against. By having particular contaminated land provisions enshrined in legislation, (rather than subsidiary standards or plans), the rights, obligations and responsibilities of all parties are clear; and while there are no doubt issues associated with each of these legislative regimes (such as no public requirement to notify), they illustrate an alternative option which is worth investigating.

Proposed Regulatory Regime
The proposed NES, which was open for submissions until 19 April 2010, while not an Act, is a national standard that will provide some much needed national guidance on the way that contaminated sites should be dealt with. It will also make recommendations as to how contaminated land information should be managed, and will hopefully ensure a more consistent approach is adopted throughout New Zealand.

The NES sets out contamination thresholds at which the land is safe for people and requires that contaminated land be appropriately identified and assessed at the time that it is developed. In general, where the risk to human health from an activity is acceptable it will be a permitted activity and where it is not acceptable or there is not sufficient information to determine if it is acceptable, it will be a restricted discretionary activity and require resource consent. All territorial authorities will be required to give effect to and enforce the NES.

Challenges of Proposed Regime
The proposed NES, while providing national guidance, is not the silver bullet or panacea that will cure all of the difficulties (noted above) associated with the current contaminated land regime. While it will provide some clear guidance to territorial councils and help to ensure a consistent approach is taken by those councils, the assistance it provides is limited. In particular, the proposed NES only applies to territorial council responsibilities (not regional); only relates to soil contamination (not water); does not sheet home responsibility to the polluter (owner/developer is responsible); and it still relies on “development” of the land to trigger the contaminated land provisions.

While it is certainly a step in the right direction, there is still more work to be done and the Government has indicated in its proposed work programme for contaminated land that it is continuing to look at ways of improving contaminated land management (refer www.mfe.govt.nz/issues/hazardous/contaminated).

Alternatives?
One perhaps controversial idea is to amend the RMA to impose a requirement on the public to notify councils
when they become aware that land is or is likely to be contaminated. Such a requirement could function in the same way that the existing requirement to apply for resource consents does in relation to use of land. It could also have similar (although probably lesser) penalties able to be imposed in the form of fines for non compliance. Although this requirement would raise difficulties (such as proof of knowledge etc), it may assist in identifying contaminated land that might otherwise go unnoticed.

Similarly, another potential amendment would be to identify a hierarchy of those responsible for remediating contaminated land. In Australian states this begins with the polluter, and moves down to the owner, occupier etc, making these persons subject to penalties if any remediation is not carried out. Such provisions would make it very clear who is responsible for remediating contamination and also indicate the importance of ensuring that land is in fact remediated.

Conclusion

The problems in identifying and remediating contaminated land are ones which are faced by councils throughout New Zealand and indeed the developed world. While not all problems are capable of an easy-fix, the more legislative guidance that is provided, the easier it will be to identify and appropriately manage contaminated land. While the proposed NES is a good start, that is all it is. Further changes may be required (including legislative changes) to sheet home responsibilities for identifying and remediating contaminated land.
Making Good Decisions: Catching a Fair Wind

Bal Matheson / Kate McDonald *

Introduction
The first port of call for most participants in the epic voyage to secure resource consents is a hearing in front of a local authority. While the decisions made at the local authority level do not always attract the same level of interest as Environment Court hearings, the manner in which local authority hearings are held and the way in which the decisions are reached in that forum are fundamental to the fair and efficient functioning of the Resource Management Act 1991 (RMA). And, to continue the nautical analogy, we are not talking small fry. The capital value of projects decided by local authority hearing panels can often be in the tens of millions, up to the hundreds of millions of dollars for large infrastructure projects; and the local, regional and national benefits of such projects can be substantial. The importance of such projects, and, almost inevitably the scale of the potential environmental effects, means that all parties involved in the resource consent process (ie both applicants and submitters) expect a fair hearing.

Having been involved in local authority hearings from Kerikeri to Invercargill, we have seen our fair share of the good, the bad, and the ugly in terms of the hearing process. While the RMA confers a great deal of discretion on local authorities to adopt their own hearing procedures, given the importance of the decisions being made and their quasi-judicial nature, it is vital that the decisions are made in a way that promotes confidence in the integrity of the decision-making process. This article comments on two procedural aspects of local authority hearing processes and recommends some changes to further enhance the robustness of these processes.

Balancing of competing expert opinion at a local authority level
Competing expert opinion is a common feature of local authority and Environment Court hearings as experts can often reach different conclusions about the effects of a project. Which expert’s evidence is preferred can often have a very influential effect on whether the proposal is approved, and if so what conditions are imposed. The Environment Court in Scurr v Queenstown Lakes District Council C060/2005 (at para 48) stated:

It is to be noted that expertise may be limited to a particular “subject” within a particular “field”. The essential issue is always whether the witness is sufficiently qualified, either by a special course of study and/or by experience, to assist the Court on the subject matter in issue. This is to be is [sic] decided on a case-by-case basis and is a question of fact.

The Court went on to state (at para 59) that while there is no formal objection to expert opinion evidence being given by a witness lacking formal qualification in the discipline concerned, the weight to be attached to such evidence is for the Court to decide.

While Scurr outlines that expert witnesses will not always need to have formal qualifications, there is a difficulty in weighing competing evidence where the expertise or experience of an expert witness is never established in the proceedings. This is often the case where a Council officer appears effectively as an expert witness yet the applicants have insufficient knowledge regarding that council officer’s experience, ability, or qualifications to appear in that capacity. (And of course at a council hearing there is no opportunity to test this evidence through cross examination.) In our view, the lack of information about an expert’s expertise inhibits the decision-maker’s ability to exercise discretion as to the weight that is attached to such evidence. In addition, in our experience, whether because of time pressure or otherwise, often what is prepared and attached to the prehearing report as an “expert report” is simply an email summary of conclusions. In those circumstances there is usually no information about the identity of the person who undertook the analysis, what his/her qualifications and expertise were, what assessment was undertaken, and how the conclusions were arrived at.

We recommend that, if an opinion given by a council officer is likely to be contentious, the officer includes a brief statement which details relevant qualifications and expertise. Furthermore, and particularly if the disputed opinion could result in a significant cost to the applicant (or could result in the application being declined), the relevant council officer’s report should comprise a full description of the assessment undertaken; the information they have considered; and the conclusions. Unless this information is provided, it is very difficult (if not impossible) for local authority decision-makers to appropriately weigh the competing expert opinion with which it is often faced.
Avoiding any perception of bias

Whether you are appearing in support of or opposition to a proposal being decided at a local authority level, it is fundamental that:

Justice must not only be done; it must be seen to be done.

(Lord Hewart CJ, R v Sussex Justices, ex parte McCarthy [1924] EW HC 1 (KB))

Apparent bias can arise where there is a reasonable suspicion that the decision-maker is not bringing an impartial mind to the resolution of the case. This can occur where the decision maker has a financial interest in the proceedings, a relationship to a party or a witness, or a personal interest that may influence the outcome of the case. We wish to comment on one particular example of apparent bias that can arise in the context of local authority hearings of applications made under the RMA.

Despite an applicant’s best endeavours, it is often the case that council officers remain opposed to a project at the conclusion of a hearing, or, more commonly, will remain firm in recommending that certain conditions be imposed if consent is granted. That, in itself, is not of concern as applicants understand that it is the hearing commissioners who will make the final decision. However, what can give rise to significant concerns from applicants is where those same council officers are perceived to be involved in the actual deliberations of the hearing commissioners.

At the close of hearing, following the applicant’s right of reply, the Chair will usually pass a motion excluding the public. In terms of the further involvement of council officers in the deliberation process, we have witnessed three different approaches by the Chairs of various hearing committees: the Chair will say nothing about whether council officers will be involved in further deliberations; the Chair will make it clear that the council officers will be involved in further deliberations given their knowledge of the application and their expertise; or the Chair will make it clear that no council officers (or any other third parties) will be further involved and that the decision will be made by the members of the committee on the information then before the committee.

In our opinion, it is a fundamental principle of a fair hearing that council officers are not involved in any deliberations made after the close of a hearing and this should be made explicit by the Chair. That applies whether or not the council officers are strongly in support of or opposition to a project. If hearing commissioners wish to seek any guidance from council staff then that should be done in an open hearing, and prior to the applicant’s right of reply. Only in this way will justice not only be done, but will it be seen to be done.

Conclusion

There has been a significant improvement over the last five years in terms of the decision making process of local authorities and in our opinion the confidence in that process has grown significantly. Hearing committees have benefited from Chairs who take an active and firm role in proceedings, and the Ministry for the Environment’s accreditation of hearing commissioners through its Making Good Decisions course has greatly assisted in the quality of local authority decision-making.

There will always be a tension between the desire for a fair and transparent hearing process on the one hand, and a wish to avoid unnecessary procedural formality and cost on the other. We consider that the recommendations made above are straightforward, relatively low-cost procedural amendments that will only further enhance the chances of there being a fair wind for all those sailing on the sometimes turbulent waters of the RMA.

* Bal Matheson is one of four partners in Russell McVeagh’s Environmental and Resource Management team. Bal’s practice focuses on obtaining environmental approvals for large scale commercial, industrial and infrastructure projects. Kate McDonald has recently joined the team as a graduate.
Second Time Around — Section 290A and Having Regard to Council Decisions

Daniel Minhinnick, Senior Solicitor, Russell McVeagh

Introduction
Section 290A of the Resource Management Act 1991 requires the Environment Court to have regard to the original decision subject to appeal. Recent caselaw suggests that section 290A obliges the Court to do nothing more than give genuine consideration to the council decision. The Environment Court has also expressed a concern at the “excessive reliance” placed by witnesses on council decisions when giving evidence in the Environment Court.

This article examines observations made by the Environment Court in two recent decisions regarding the weight to be given to council-level decisions, and looks at some of the practical implications of the Environment Court’s comments for practitioners.

Background
The Resource Management Amendment Act 2005 introduced section 290A, which requires the Environment Court to “have regard to” the council decision subject to appeal. This amendment represented a major departure from the more significant limitations on the Environment Court’s appeal powers originally proposed in the Resource Management and Electricity Amendment Bill. The Government was concerned by the costs and delays associated with going through applications twice — once at the council hearing and again at the Environment Court on de novo appeal. There were also concerns that de novo appeal powers allowed the Environment Court to completely ignore council decisions. The original Bill therefore proposed to limit appeals to rehearings based on the evidence presented before the council decision-maker. In particular, limits were proposed on the introduction of new evidence, and the Court’s de novo hearing powers were proposed to be severely restricted to certain defined situations.

The Government, following the recommendations of the Local Government and Environment Select Committee, ultimately abandoned the original proposed amendments. It considered that the proposed amendments would actually increase the formality and costs associated with council hearings. It also recognised that applications naturally evolve over time and new issues often arise between the council hearing and appeal. The Government remained concerned, however, that council decisions were not being given appropriate status by the Environment Court. Councils, not the Court, are democratically empowered to make decisions for their local people and their decisions should not be overruled unless there is a good reason to do so.

Parliament therefore directed the Environment Court to “have regard to” the council decision on appeal. The intent was to ensure the council’s decision had some status, while not unnecessarily restricting the Environment Court’s appeal powers. This new requirement formed part of a series of amendments seeking to increase the robustness of council-level decision-making.

Duty to “have regard to”
Section 290A requires the Environment Court to “have regard to” the council decision subject to appeal. The phrase “have regard to” was discussed in Unison Networks Ltd v Hastings District Council (High Court, Wellington, CIV 2007-485-896, 11 December 2007). Justice Potter held that to “have regard to” was not synonymous with “shall take into account” or “to give effect to”. Rather, to “have regard to” required that (at para 70):

“...the matters must be given genuine attention and thought, and such weight as is considered to be appropriate.”

The section 290A duty to “have regard to” the council’s decision does not, therefore, require that decision to be “taken into account” or “given effect to” by the Environment Court on appeal. Further, while the successful party at council-level might hope that the council decision forms the starting point for the Court’s consideration, it cannot be the case that the council-level decision changes either the burden or standard of proof.

Two cases from the last year add further dimensions to this position. These are further discussed below, along with some of the practical implications of the Environment Court’s observations in each.

Duty to give reasons?
In HB Land Protection Society v Hastings District Council (W57/09, Environment Court Wellington, 28 July 2009), the Environment Court made clear that section 290A does not give rise to a presumption that the council’s decision is correct. Rather, the provision simply requires genuine consideration be given to the council decision under appeal. The Court stated (at para 7):
“Section 290A requires the Court to \ldots have regard \ldots to the Council's decision in question. The Court has interpreted that not as creating a presumption that the Council’s decision is correct, but as requiring genuine consideration of it and, impliedly at least, as requiring an explanation if we should come to a different view. We also have the view that if we find that the decision is a finely balanced one, the Council’s decision can be given weight as an expression of informed local opinion. That might particularly be so in a Plan appeal, where questions of policy are prominent.”

The Court's explanation of the weight to be given to the council decision when the decision is finely balanced demonstrates how "having regard to" a council decision might play out in practice. However, it must be the case that the council’s decision is to be had regard to in every case, not simply when it is a “finely balanced” one.

Of more interest is the Environment Court’s suggestion that section 290A places a duty on the Court, impliedly at least, to give an “explanation” where a different view from the original council decision is reached on appeal (at para 7). This suggests that section 290A extends the duty on the Environment Court to give reasons for its decisions, by requiring specific reasons to be given where the Environment Court reaches a different conclusion than the council below.

There is a long chain of authority establishing why the courts should provide reasons for their decisions. In *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546, Chief Justice Elias outlined the rationale as to why the provision of reasons by Judges is desirable. In particular, the giving of reasons forms an important part of “openness in the administration of justice” (at para 76). A failure to give reasons also means that the lawfulness of a decision is difficult for a higher court to assess (at para 80).

The duty to give reasons has been applied in relation to decisions of the Environment Court. Justice Williams in *Biomarine Ltd v Auckland Regional Council* (2007) 13 ELRNZ 1 noted that the rationale for providing reasons, as established in Lewis, applied equally to decisions of the Environment Court (at para 27). Justice Gendall in *Heaney v Rodney District Council* (HC, Auckland CIV-2003-404-003480) similarly noted that “it must always be good judicial practice to provide a reasoned decision (at para 27). In *Progressive Enterprises v North Shore City Council*, Justice Venning stated that (at para 55):

"The Environment Court is under a duty to give reasons for its decision, but the reasons may be succinct and in some cases will be evident without express reference."

So, while there is a general duty to provide reasons, there is nothing in those cases which suggests that express reasons must be given as to why a different decision is reached from the decision-maker below. Although in practice the reasons given in an Environment Court decision are likely to make it clear why a different conclusion has been reached, the Environment Court’s comments in *HB Land Protection Society v Hastings District Council* suggest that section 290A expands the Court’s obligations to include a requirement to provide express reasons for a departure from the council's decision below. However, as mentioned above, any expanded obligation to provide reasons cannot elevate the status of the council-level decision beyond a matter to be considered by the Environment Court, and cannot alter the burden or standard of proof for parties at Environment Court level.

**Excessive reliance**

In *Upper Clutha Environmental Society v Queenstown Lakes District Council* (C113/09, Environment Court, Auckland, 13 November 2009), the Environment Court expressed concern at the “excessive reliance” placed by witnesses on council decisions when giving evidence in the Environment Court. On the issue of section 290A, the Environment Court stated (at paras 61-63):

"[61] As required by s 290A of the Act, we must have regard to the Commissioners’ decision under appeal. It is a careful decision and, given the eminence of one of its authors, entitled to considerable respect. As will be seen, we agree with its conclusion. However we were concerned that the briefs of evidence of some witnesses for the applicants expressed an excessive reliance on the Commissioners’ views, as if we should adopt their evidence because it was also the view of the Commissioners.

[62] During the hearing we therefore raised with counsel several reasons why any Council’s decision should not be gone into at length or in detail by witnesses on appeal. These were:

i. The Court hears different evidence to that heard by the Council. In this case we heard six additional witnesses, and perhaps more importantly nearly all witnesses were cross-examined before us, whereas this does not occur at the Council level.

ii. There can be different legal representation at the two hearings. Before us, but not before the Commissioners, the Society and the Council were legally represented. (These first two reasons together explain why our hearing took considerably longer than the Commissioners’ hearing.)

iii. There is a different composition of the decision-making body. In this case the Council’s Commissioners both
had legal qualifications, whereas this Court comprised one Judge and two Commissioners with qualifications and experience in other areas (resource management planning and environment management). Indeed the Court is usually structured to bring a mixture of relevant knowledge and experience to bear, as is envisaged by s 253 of the Act.

iv. An appeal hearing proceeds de novo, which requires that the Court has an open mind and reaches its own decision on the matter. In so doing it must “have regard to” the decision of the Council. We give this phrase the meaning accepted by Potter J in Unison Networks Ltd v Hastings District Council — to give genuine attention and thought to the matter, and give such weight to it as the case suggests is suitable. It does not go further than that.

v. Any decision on assessment matters is a matter of judgment, which can in some cases be finely balanced — as the Commissioners indicated in this case — and can go either way. The Court on appeal can easily form a different judgment for all sorts of reasons. It may come to the same conclusion, or it may not, but it must make up its own mind on the material before it.

vi. Additionally, and as a matter not raised with counsel, subject to matters of jurisdiction a proposal before the Council can be different to that considered by the Council, so that the evidence may be different for that reason.

[63] As a result, to repeatedly remind the Court of the views of the first decision-maker is not only to needlessly prolong the evidence but also to misunderstand the role of the Court. Mr Todd thought we were “exactly right” on this point, and Mr Whata did not take issue with it. We accept that there has been little guidance to date on s 290A and trust that by setting out these concerns we can help avoid this problem in the future.

Some of the reasons given by the Court mirror those given by the Local Government and Environment Select Committee in 2005 when it recommended changes be made to the Resource Management and Electricity Amendment Bill, including the natural evolution of applications, and new issues being raised at Environment Court level.

Section 39(1) of the RMA provides local authorities with the discretion to establish a procedure that is “appropriate and fair in the circumstances”.

There are many examples of robust and thorough council hearing processes, often before highly experienced independent commissioners, including retired Environment Court or High Court Judges. In those circumstances, where the council process could be said to more closely resemble an Environment Court process (for example involving prior evidence exchange, questioning of the applicant by submitters via the committee, an experienced decision-making body and extensive expert evidence), a more powerful case might be made for the council decision to be given greater weight. This is also foreshadowed in the reference at para 61 of Upper Clutha Environmental Society v Queenstown Lakes District Council to the respect to be shown the council decision in that case, due to the eminence of one of the authors.

Given the Court’s comments in Upper Clutha Environmental Society v Queenstown Lakes District Council, witnesses and legal counsel appearing in the Environment Court may refer to the council decision to the extent that it assists the Court in discharging its obligation to give the decision attention and thought. However, “excessive reliance” is unhelpful; potentially prolongs hearings; and misunderstands the Environment Court’s role to consider a matter with an open mind and reach its own decision.

Avoiding council hearings

Given the Environment Court’s clear direction that first-instance decisions are of limited weight and the new option of seeking direct referral, applicants are increasingly likely to use the direct referral process to avoid a council hearing process for controversial projects. The 2009 RMA amendments recognised the substantial costs and delays associated with consenting processes, and introduced the process of direct referral of resource consent applications to the Environment Court (sections 87C to 87I) as one potential mechanism to address those issues.

While streamlining the consenting process (either through direct referral or call-in) has efficiency benefits, applicants should be aware of the changes to section 285 which now provides that the Court must apply a presumption that the Court’s costs and expenses are to be ordered against the applicant. The recent call-in of the Waitakí “cow cubicle” dairy effluent consent applications demonstrates that the potential exposure for applicants can be significant. There, the Ministry for the Environment estimated that the processing costs of those applications would be in the order of $2.6 million, which serves to demonstrate the potential costs associated with calling in resource consent applications.
2010 is the International Year of Biodiversity and NELA will be holding its National Conference in Australia’s Capital.

The NELA National Conference is Australia’s pre-eminent environmental law conference bringing together Judges, academics, legal practitioners, planners, scientists, government officials and policy analysts.

The 2010 Conference will be held at the historic University House, the ceremonial heart of the Australian National University. Opened in 1954 by His Royal Highness the Duke of Edinburgh as the first building on the campus of the newly-formed Australian National University, University House was home to the research students and professors of the University at the time. Set in tranquil gardens with heritage-listed architecture and décor, University House has a history rich in academic prestige and ceremony.

An exciting program is being developed featuring eminent speakers and further details will be released as they become available.

To receive regular email updates on topics and presenters register your interest for the 2010 National Conference at nelaaust@ozemail.com.au

Delegates planning on attending the conference are encouraged to book their accommodation requirements early as Canberra hotels will be busy at that time of the year, with Federal Parliament likely to be in session.

A limited number of rooms have been booked at University House at a special conference rate. To secure your booking and to access the conference rate, please contact reservations at University House on 02 6125 5211 or accommodation@anu.edu.au and quote ‘NELA Conference’
Recent Cases

James Gardner-Hopkins, Partner and Christian Brown, Solicitor, Russell McVeagh

Cutting out the middle man — requirements for direct referral of resource consents to the Environment Court


Progressive Enterprises Limited (“Progressive”) applied for resource consent to construct a new supermarket at Warkworth. The consent application was publicly notified and Progressive sought direct referral of the consent application to the Environment Court under the new provisions in ss 87C-87I of the RMA. Progressive also sought that the matter be heard at the same time as existing appeals on a district plan change and plan change variation.

This was one of the first applications made under the new direct referral provisions and the Court’s observations will be of interest to planners and practitioners generally.

Direct referral provisions

By way of summary, the new direct referral provisions provide the following:

- **87C** — The direct referral provisions only apply when an application for consent or to vary a consent condition has been notified (this includes limited notification).
- **87D** — The applicant must request the relevant consent authority to allow the application to be determined by the Environment Court either on the day the application is lodged, or 5 working days after submissions close.
- **87E** — No submitter has a right to be heard on the request and the Council must issue its decision, including reasons, within 15 working days.
- **87F** — If the consent authority grants the applicant’s request, it must continue to process the consent application and prepare a report within the longer of 20 working days after submissions close or 20 working days after the authority grants the request.
- **87G** — An applicant who receives a section 87F report and continues to want the application to be determined by the Environment Court must, within 10 working days, lodge a motion in the prescribed form specifying the orders sought, grounds on which the application is made and a supporting affidavit as to the matters giving rise to the application. Section 274 of the Act applies to the notice of motion.

Notice of motion

In Progressive v Rodney District Council, the Court considered that the notice of motion required under s 87G(2)(a) does not need to establish grounds or a substantive reason for the Court to accept the direct referral — as the Court has no discretion to refuse a direct referral. Rather, the Court considered the intention of the notice of motion to be to set out the terms of the resource consent sought, compliance with the statutory requirements (e.g. that the Council had agreed to the direct referral) and a supporting affidavit setting out the background matters which need to be addressed under ss 87C-87G. Without this information, the Court is not in a position to know whether the Act’s prerequisites have been undertaken.

Role of the consent authority

The consent authority is required to prepare a report on the application (s 87F(3) and (4)) and forward the consent application, all submissions and other information and reports supplied on the application to the Court on receiving a notice of motion (s 87G(3)).

By reference to these provisions, Judge Smith concluded that the intent of direct referral is that the consent authority is a party and must be represented at the hearing. He went on to say:

> It cannot be the intention of Parliament that officers of council would be expected to appear and support their reports, including provisions of detailed evidence as required by direction of the court without District Council support.

Section 274 of the Act

Section 87G(4) explicitly states that s 274 of the Act applies to notices of motion. Accordingly, under s 274(1) of the Act, persons who meet the requirements can apply to become parties to the proceedings.
and have 15 working days to do so from the date of commencement of the proceeding. This follows from the express provisions of s 274(2) as the proceeding is not an appeal or inquiry, but falls within s 274(2) (c) as “any other case”.

Conclusion
In this case, the affidavit in support lodged by Progressive did not address whether the steps required under sections 87C-G had been complied with. As a result, the Court directed that a further affidavit be lodged addressing these matters.

The Court’s comments regarding the direct referral process provide useful clarity around this new procedure. The Court’s comments will also be helpful for applicants seeking to make use of the new provisions, as well as for consent authorities who may have thought the process relieved them of the need to be a party to a direct referral proceeding.

Russell McVeagh acted for Progressive in this proceeding.

Consent applications that raise matters of national importance: new tests?
In October 2009 the Environment Court issued its decision on Meridian Energy Limited’s (“Meridian”) application for consent to construct and operate a wind farm on the Lammermore range in Central Otago (“Project Hayes”). The Court’s decision, by a majority of 3-1, overturned the decisions of the Central Otago District and Otago Regional Councils to grant consent.

The extensive 350 page decision raised a number of legal issues including introducing “new tests” under the RMA when assessing applications where matters of national importance are raised.

Background
Meridian applied for resource consent to establish and operate a wind farm of up to 176 wind turbines (up to 630mw total) on the Lammermore Range in Central Otago. Consent was granted at council level, subject to conditions. Meridian appealed this decision to council level, subject to conditions. Meridian appealed this decision to the High Court (the appeal is yet to be heard).

The Project Hayes site covers the upland areas of five high country stations, all of which have licence agreements with Meridian. The subject site envelope covers an area of 135km² and was found to be an outstanding natural landscape (“ONL”).

Among the submitters on the application were the Ministry for the Environment, which lodged the first ever “whole of government submission” on an energy project. The Director General of Conservation (“DoC”) also lodged a separate submission in opposition, however as a result of a negotiated agreement, DoC neither supported nor opposed the application at the Environment Court hearing.

Efficient use of resources and cost — benefit analysis
One of the main issues discussed in the decision was the test to be applied under s 7(b) of the RMA which relates to the efficient use and development of natural and physical resources. The Environment Court was wary of what it described as a “cherry-picking” approach to the assessment of efficiency and wished to ensure that all specific costs and benefits of a proposal were examined, and if possible, quantified.

The Environment Court held that there are two questions to answer when determining the efficiency of the use of resources:

1) Is the value to be achieved from the resources utilised the greatest benefit that could be achieved from the resources?
2) Could the same benefit be produced utilising resources of lower value if they were organised differently, or if a different set of resources was used?

The Court cited passages from Lower Waitaki River Management Society Incorporated v Canterbury Regional Council (C80/2009) to the end that it is helpful if the costs and benefits can be quantified, otherwise the section 7(b) analysis merely repeats the qualitative analysis carried out elsewhere in Part II of the RMA.

The Court went on to hold that where market valuations are not available, non-market techniques may be used.

The Court was particularly critical that, in a case involving a development of this scale and value, there was little or no evidence quantifying the costs in terms of intrinsic values such as landscape and heritage, on a subject site that is an ONL.

Meridian has appealed the legality of the “new test” that the value of the resource is the greatest benefit that could be achieved from the resource, on the basis that it invalidly displaces the overall assessment required under Part 2 of the Act. Clarification is also sought as to whether the RMA requires an applicant to undertake a comprehensive cost-benefit analysis that quantifies all costs of a proposal, including assessment of alternative sites, hypothetical or
potential proposals or other methods for achieving intended output, in this case energy.

**Consideration of Alternatives**
The Court concluded that realistic alternatives to Project Hayes exist and should have been considered by Meridian. It also found that there were more wind generation projects under consideration than will be required to be built. Therefore, to achieve the purpose of the Act, proposed projects on sites that are not ONLs should be investigated more fully before developing the Project Hayes site.

The Court referred to consents granted for the Kaiwera Downs and Mahinerangi wind farms, which were lodged and notified after Project Hayes. These projects were considered to be relevant as:

- Part of the relevant environment or as potential accumulative effects, if likely to proceed (or at least not fanciful); or
- Alternatives sites, if they are not likely to proceed.

Meridian has appealed these aspects of the decision to the High Court on the grounds that the Environment Court erred by requiring a consent applicant to assess other proposals (consented and non-consented) at other sites. There was no evidence before the Environment Court as to the characteristics or effects of the “alternatives”, the cost-benefit analysis for such projects or even evidence that they would be built. This departs from the generally accepted position that a consent authority or the Court is required to determine the application before it without consideration of potential alternatives (although the fourth schedule requirements for an assessment of effects include a discussion of alternative locations or methods if effects are significant). However, the Environment Court’s approach in this case confirms that where there are adverse effects on a matter of national importance, alternatives must be considered. This is especially so when the project seeking consent is of such a large scale; is accompanied by a very detailed assessment of effects; and the cost and value of the project is significant.

**Procedural issues — priority**
Following on from the inter-related issues of cost-benefit analysis and the assessment of alternatives, cumulative effects and the existing environment, Meridian also appealed on procedural grounds on the basis that Project Hayes had priority over the Mahinerangi and Kaiwera Downs wind farms which were later in time.

The Court had found that this was not a case where the priority decision in *Fleetwing* applied, as from a procedural point of view, the case involved different resources within different districts (Mahinerangi is in the Clutha District, Kaiwera in Gore). In any event, the Court considered that the Mahinerangi and Kaiwera Downs projects were relevant either to accumulative effects as part of the existing environment or as alternatives.

**Public interest**
The complex and inter-related issues raised in the decision and Meridian’s appeal have generated considerable public interest. Opposition to Project Hayes has been vocal and included high profile individuals and considerable media coverage. The conduct of some of the appellants and supporters was such that it warranted its own section in the decision. The Court was concerned that some appellants, especially members of the Maniototo Environmental Protection Society, were making remarks in the media that appeared to be attempts to sway public opinion against the proposal.

The Court reminded opponents during an adjournment in 2008 that the “proceedings were still being heard and therefore sub judice” and stated “comments on the merits of the proposal in the media should stop”. The comments did not stop and while the Court was careful not to be influenced by such remarks, it warned parties to future proceedings that care must be taken during a hearing or before a decision is released when making public comments as the Court may invoke its powers to deal with contempt on its own volition (i.e. without waiting for a complaint).

Federated Farmers has sought to join Meridian’s High Court appeal as it is concerned that the new tests in the decision could be applied to farming activities such as “possible future major irrigation projects” and “farming activities which require a resource consent”.

**To film or not to film — when is it appropriate to film Environment Court proceedings?**
It is not often that RMA practitioners get the opportunity to appear on television. The recent procedural decision of Judge Borthwick in *J W Groome v West Coast Regional Council* [2010] NZEnvC 61 may have cost several RMA practitioners their 15 minutes of fame.

A joint hearing panel (West Coast Regional Council and Grey District Council) had granted Trustpower consent for a proposed hydro-electric power scheme on the Arnold River, on the West Coast of the South Island. The grant of consent was appealed to the Environment Court by Mr J W Groome.
Television New Zealand ("TVNZ") made an application to film the Environment Court proceedings as it considered that the story was "of great interest to the people on the West Coast" and wished to film parts of the hearing as well as the Court’s site visit.

The parties to the appeal in the Environment Court had no objection to in-court media coverage; however, Trustpower did not consider it was appropriate that TVNZ accompany the Court on its site visit.

The Court applied the principles set out in the Environment Court's In-Court Media Coverage Guidelines 2005 and noted that "in-court media coverage is consistent with desirability for open justice" and "the media have an important role in the reporting of hearings as the eyes and ears of the public".

However, the Court ultimately declined TVNZ’s application in its entirety for the following reasons:

- Given the majority of the hearing would involve cross-examination of witnesses without the context provided by their evidence-in-chief (which was largely to be taken as pre-read) and it was doubtful that “the filming would result in a fair and balanced reporting of the hearing.”
- Any discussion between members of the Court during a site visit could well be evaluative in nature, and the broadcasting of that discussion would therefore “never be appropriate”.

The Court did note that it may be possible to put measures in place to address fairness and balance issues, but that there was not sufficient time to traverse these matters with the parties (the application to film had been made out of time). As a minimum, additional copies of the evidence would need to be provided and this was considered unreasonable given the evidence ran to four Eastlight folders; would involve additional costs to parties (two of whom were private individuals); and could potentially impact on their preparation for the hearing.

It appears that the Court is willing to allow in-court filming when the appropriate application is made in time and measures are put in place to ensure fairness and balance in reporting. However, filming of site visits is clearly off-limits.

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**Sustainable fresh water management — Are we there yet?**

*Taking a “hard look” at the issues impacting on sustainable management of our fresh water resource*

Fresh water is the great integrator, connecting sky to sea and flowing through our lands, lakes and rivers. It crosses territorial boundaries and defies traditional zoning techniques. Though principally managed by Regional Councils, water can be critically impacted by change in land use authorised by district and city councils. Water also sits at the centre of competing demands for its cultural, recreational, aesthetic and economic values.

The strong linkage between water abstraction for agricultural use, electricity generation and economic growth has led to unprecedented demand for water in Canterbury and elsewhere in New Zealand. This has caused a raft of issues including water quality and quantity, priority, allocation and ownership, cultural values and governance structures to come sharply into focus. In response to widespread concern about management of our water resource, the Canterbury Mayoral Forum has released the Canterbury Water Management Strategy and the Government has established the Land and Water Forum. Ideas resulting from these initiatives may lead to significant re-shaping of governance structures relating to fresh water management at a regional and national level.

Against this context, the 2010 RMLA Annual Conference will explore these issues and consider possible responses to better achieve integrated and sustainable management of our fresh water resource.
Call for Contributions
Resource Management Journal

The Resource Management Journal’s mission is to facilitate communication between RMLA members on all matters relating to resource management. It provides members with a public forum for their views, as articles are largely written by Association members who are experts in their particular field.

Written contributions to the Resource Management Journal are welcome. If you would like to raise your profile and contribute to the Journal, a short synopsis should be forwarded by email to the Executive Officer (contact details below) who will pass that synopsis to the Editorial Committee for their review. Accordingly, synopsis and copy deadlines are as follows:

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The word limits for articles are now max/min limits; ie 2,400 words means 2,400 words, not more nor less. Articles should be:
- Single page article = 825 words
- Four page article = 3,300 words
- Six page article = 4,950 words (to be by invitation from the Editorial Committee)

Style guidelines should be in accordance with the New Zealand Law Style Guide by Geoff McLay, Christopher Murray and Jonathan Orpin, the Law Foundation New Zealand.

Letters to the Editor are also welcomed. Acceptance of written work in the Resource Management Journal does not in any way indicate an adoption by RMLA of the opinions expressed by authors. Authors remain responsible for their opinions, and any defamatory or litigious material and the Editor accepts no responsibility for such material.
# RMLA Membership Form

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When sending in your cheque please retain a copy of this tax invoice for your records.

Post to: The Executive Officer, RMLA, C/- 4 Shaw Way, Hillsborough, Auckland 1041

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<td><strong>Suburb/Area</strong></td>
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**Occupation Category** — Please tick one of the following:

- Architect
- Engineer
- Environmental Manager
- Judge
- Planner
- Scientist
- Solicitor/Barrister
- Surveyor
- Other (please specify)

**Employment Category** — Please tick one of the following:

- Government
- Industry
- Private Practice/Consultancy
- Local Body
- Other (please specify)

**Special Interest Groups** — To allow the Association to keep members up to date via email please indicate which **Special Interest Groups** you would like to participate in:

- All
- Air Quality
- Biodiversity/Nature Conservation
- Climate Change
- Coastal Land and Marine
- Contaminated Sites
- Freshwater (incl Drinking Water)
- Local Body
- RMA Policy and Review
- Urban Design/Sustainability
- Utilities & Infrastructure
- Independent Commissioners

In order to facilitate discussion, we need your consent to distributing your email to the whole interest group. If you do not consent to distribution of your email address to other members of your group, please tick the following box:

- I do NOT consent to my email address being distributed to other SIG Groups

**Annual Subscription** (GST Inclusive) = $150.00 ($70.00 for fulltime students) for a 12 month membership from 1 October (This reduces to $70.00 from 1 April and to $35.00 for fulltime students for a 6 month membership). Please make cheques payable to the Resource Management Law Association of NZ Inc.

**Resource Management Theory & Practice** is published annually. The aim of the journal is to provide a vehicle for in-depth analysis of resource management issues relevant to the New Zealand scene. Subscription to the journal for RMLA members resident in New Zealand is $35 per year. Back volumes are also available. If you would like to subscribe to this annual Journal, or order a back issue, please tick the relevant box. An invoice will be sent to you together with the relevant Journal:

- RMT&P Annual Subscription
- Vol 1 (2005)
- Vol 3 (2007)
- Vol 5 (2009)
- Vol 6 (2010)

**Privacy Act 1993:**

You are free to access and correct any information we hold about you. The RMLA holds a members’ list with contact details which is available to RMLA members and (on request) to selected other organisations which are involved in resource management issues. If you do not wish your name to be included in the list, please tick the following box:

- I do NOT consent to my name being included in the RMLA Member’s List