When it comes to activities having potential adverse effects on our environment, it is better to be safe than sorry. To look before we leap. To take things slowly. These deceptively simple phrases capture the essence of what has become known at law as the precautionary principle. Yet the concept has not only been lauded but also maligned, with opposing schools of thought seeing it as an unjustifiable handbrake on valuable innovation and social and economic enhancement, or as an essential reminder that some risks are simply not worth taking.

New Zealand’s environmental law has a relatively short — yet rich — history of precautionary thinking. From its origins in European (and, in particular, German) municipal law and its translation into various international instruments, the idea of precaution found formal expression in New Zealand’s resource
management legislation from the mid-1990s. This article traces in brief the development of precaution as a legal concept in New Zealand environmental law, from its inclusion in the fisheries context to its most recent conceptualisation in legislation pertaining to the exclusive economic zone. The latter, the article argues, has drawn on the relatively weak and vague requirements of previous formulations, but has re-packaged and strengthened them to produce a strong and directive approach to dealing with risk and uncertainty. It could mark a potential turning of the tide for precautionary thinking in this country. Recent decisions concerning seabed mining have suggested this may be the case.

The first express example of a precautionary “principle” in New Zealand legislation appeared in the Fisheries Act 1996 (although several policy documents embraced the concept earlier). In ss 10(c) and (d) of the Act there is a direction that “decision makers should be cautious when information is uncertain, unreliable, or inadequate” and that “the absence of, or any uncertainty in, any information should not be used as a reason for postponing or failing to take any measure to achieve the purpose of this Act”. The requirements were positive steps for the marine environment (even if they were driven by a concern that long-term utilisation should be maximised). Yet it is concerning that these provisions have proved relatively weak and conservative. The term “should” is neither specific nor directive. In particular, it is arguable that precautionary decisions by the Minister responsible for fisheries have in practice been undermined by the principle mandating the use of best available information (see C Iorns Magallanes “The Precautionary Principle in the New Zealand Fisheries Act: Challenges in the New Zealand Court of Appeal” (2006) Australasian Law Teachers Association Published Conference Papers).

Yet the precautionary concerns that underlay the Fisheries Act also led to the inclusion of an express principle in the Hazardous Substances and New Organisms Act (HSNO Act), which was enacted in the same year. Under s 7 of the HSNO Act a decision-maker is obliged to take into account the need for caution in managing adverse effects where there is uncertainty about those effects. But, again, a direction to take caution “into account” is relatively weak, and does not mandate any particular outcome where uncertainty exists. Andrew Hayward, for one, is of the view that the language of “managing” effects “seems to place it in the realm of preventative or reactionary measures rather than precautionary measures” and that true precaution “does not simply mandate that one conducts a risk assessment, but rather mandates a specific response to uncertainty” (see A Hayward “The Hazardous Substances and New Organisms Act, precaution, and the regulation of GMOs in New Zealand” (2005) 9 NZJEL 123 at 146, 153). The HSNO Act simply ensures that a decision-maker turn its mind to the need for caution. Similarly, key regulations in setting the approach of the EPA to risk and uncertainty are characterised by non-mandatory language (such as cls 29-35 of the Schedule to the Hazardous Substances and New Organisms (Methodology) Order 1998).

Alongside the formal principles built into the Fisheries and HSNO Acts, jurisprudence under the Resource Management Act during the 1990s became increasingly focused on the issue of precaution. The RMA did not, when first enacted, refer to the idea, and in that sense was less progressive than the Fisheries and HSNO Acts. But the lack of express reference in the Act may simply be because precaution was in its infancy when the Act was conceived. Indeed, the regime as a whole was clearly designed to be protective and pre-emptive, with a precautionary flavour. The courts have certainly been eager to read in an element of precaution — if only in the language of an “approach” rather than a formal “principle”. This has been done in three key ways within the consenting context. (For a detailed discussion and critique, see G Severinsen “To Prove or not to Prove? Precaution, the Burden of Proof and Discretionary Judgment under the Resource Management Act” (2014) 13 Otago L Rev 351, G Severinsen “Bearing the Weight of the World: Precaution and the Burden of Proof under the Resource Management Act” (2014) 26 NZULR 375 and G Severinsen “Letting our Standards Slip? Precaution and the Standard of Proof under the Resource Management Act 1991” (2014) 18 NZJEL 173).

Firstly, the courts have considered that, when proving or disproving the existence of future effects, the ordinary civil standard of proof is not sufficiently precautionary. It is therefore untenable. The RMA expressly requires the consideration and weighing not only of those effects that are more likely than not to occur, but also those that may be very unlikely but of potentially high magnitude. Case law resolving this point has followed two divergent paths; the tradition expressed in McIntyre v Christchurch City Council (1996) 2 ELRNZ 84 (PT) has seen greater value in recognising a flexible standard of proof varying according to the severity of the potential impact, while the line of cases beginning with Shirley Primary School v Christchurch City Council [1999]
NZRMA 66 (EnvC) has dispensed with the idea of “proof” entirely in favour of an expert exercise of discretion when identifying potential effects. Academic scholarship has not reconciled the two traditions. Yet the key point is that precaution has been seen as central in establishing the existence of future effects.

Secondly, the courts have in some cases recognised the existence of a precautionary burden of proof. Notably, the Environment Court in Shirley upheld the idea that there is an overall burden on an applicant to show that a proposal is consistent with the purpose of the Act (although the exact nature of this burden in legal terms was left vague). Ultimately, there has been a degree of reluctance to recognise a formal burden of proof on an applicant to disprove the existence of potential effects, but a greater inclination to recognise an evidential or tactical burden on every party to make the existence of potential effects a live issue. Because it applies not only to an applicant, this approach is not overly precautionary.

Thirdly, the courts have in some cases accepted that the international law principle of precaution is a valid matter than can be considered under s 104(1)(c) of the RMA. Other cases have rejected this view, but have nevertheless accepted that greater weight can be accorded to potential effects according to their likelihood and magnitude, particularly if subordinate policy instruments (such as the NZCPS) reference the need for precaution specifically. It has recently been confirmed in Sustain Our Sounds v New Zealand King Salmon Company Ltd [2014] NZSC 40, [2014] 1 NZLR 673 that the precautionary obligation can, in some circumstances, be discharged through the imposition of adaptive management conditions.

Later amendment to the RMA has also formalised the need for careful risk management in the planning context, in that s 32 requires planning authorities to assess the risk of acting or not acting if there is uncertain or insufficient information. Yet even this obligation is relatively conservative, in that (as with the HSNO Act equivalent) it does not mandate any particular outcome. While precautionary jurisprudence under the RMA has been well-developed, and is capable of producing highly precautionous outcomes, it is characterised by inconsistency and has raised as many questions as it has answered.

It is alongside these three “pillars” of the precautionary approach developed in the 1990s — Fisheries Act, HSNO Act and RMA — that the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act) was enacted. It brought with it, in ss 34(2) and 61(2), the most recent example of the precautionary principle in New Zealand’s environmental law. The sections (which deal with the development of regulations and consent decisions respectively) provide that “if, in relation to making a decision under this Act, the information available is uncertain or inadequate, the [decision-maker] must favour caution and environmental protection”. Both sections are followed up by a statement that “if favouring caution and environmental protection means that an activity is likely to be refused, the [decision-maker] must first consider whether taking an adaptive management approach would allow the activity to be undertaken”.

While some (such as the Parliamentary Commissioner for the Environment in her submission on the EEZ Bill) may have lamented the novel choice of wording, in that the sections do not mirror familiar international conceptions of the precautionary principle (such as in the Rio Declaration), on closer inspection the requirement is potentially much more liberal than its predecessors under the Fisheries and HSNO Acts. This is despite the fact that aspects of its wording appear to have drawn from these sources. It is also potentially stronger than the approach that has been constructed under the RMA.

Under the EEZ Act, decision-makers must favour caution and protection rather than take into account the principle that they should be cautious. The requirement is strong and directive. While the principle in the Fisheries Act exhorts the Minister to be cautious, and to ensure uncertainty is not used as a reason to fail to achieve the purpose of the Act (which includes both utilisation and sustainability), s 61(2) requires both caution and environmental protection (not simply the achievement of sustainable management). The favouring of environmental protection where there is uncertainty in information is itself deemed to be an integral part of achieving sustainable management. This clear link between precaution and the overall purpose of the EEZ Act is an important step forward.

Furthermore, it is suggestive that the EEZ Act possesses a specific precautionary principle on top of other precautionary measures possible under the Act. The regime is sufficiently similar to the RMA to enable the same measures to be taken that have been developed in cases like Shirley and McIntyre, without the need to refer to s 61(2) at all. One could read in a precautionary standard and burden of
proof, the need for additional weight where an overall broad judgment involves considerations of uncertain effects, and a role for the international precautionary principle. The existence of s 61(2), which reflects none of these measures specifically, may suggest an additional precautionary obligation on decision-makers. It is not persuasive to see the principle as purely procedural in nature or relating to the proof of future effects. Nor is it simply another matter to which consideration must be given in a decision-maker's discretionary judgment.

A sensible interpretation of s 61(2) is that it requires some concrete action, in the event of scientific uncertainty, to address that uncertainty. It does not simply require caution to be weighed, and possibly outweighed, in a balancing exercise. In this sense, precaution cannot be "lost" amongst economic or social considerations, and the section can be interpreted as a relatively liberal approach to precaution. Concrete action could be taken in the consenting context by declining consent, or by imposing conditions (such as adaptive management conditions) proportionate to the probabilities and magnitudes of effects in question, as well as the potential irreversibility of effects. A concrete response in the regulatory context may be the imposition of a protective activity status and/or standards.

Although only two decisions under the consenting provisions of the EEZ Act have so far been decided that have turned on the application of the precautionary principle, both support a strong and liberal interpretation of s 61(2). The Decision Making Committees (DMC) appointed by the EPA to decide the Trans-Tasman Resources (TTR) and Chatham Rock Phosphate (CRP) applications, both concerned deep seabed mining (the first for iron sands off the Taranaki Coast and the second for phosphorite nodules on the Chatham Rise). In each case consent was declined, in large measure because of substantial uncertainties in information concerning potential effects. For example, the DMC in TTR considered at [138] that "... there is considerable uncertainty in the information provided as to both the nature of the environment and the way the mining operation might affect it" while in CRP it was found at [823] that "it is incontestably the case that there remained significant gaps in the data and information provided about the consent area's marine environment as well as uncertainty about the impact of the proposal on existing interests and the environment."

The references made in these cases to s 61(2) were relatively general, and focused primarily on the appraisal of evidence in the discretionary judgment of the DMC rather than the statutory test itself. However, some valuable interpretive findings were made. It was held, for example, that the language used in s 61(2) is directive and absolute (TTR at [116]), that the information principle concerning caution is a "lens" through which [the decision-maker] must view the proposal to determine if it meets the purpose of the Act" (TTR at [775]) and that "the taking of risks in this environment is not encouraged" (TTR at [139]). It was also made clear that the principle has substantive value as a firm guide to expert discretion, not just procedural value in setting a standard or burden of proof when finding the existence of potential effects. In the context of deep seabed strip mining, a lack of experience and reliable information may be more likely to fall foul of the requirements of s 61(2). It will be interesting to see how the section will be applied in contexts where unknowns are less prominent.

Section 61(2) of the EEZ Act builds upon the language used in previous iterations of the precautionary principle in New Zealand's environmental law. Yet it goes further than its predecessors. It can be seen as strongly liberal and directive, and the TTR and CRP decisions made under it have been punctuated by language that reflects this view, particularly in the context of strip mining in the deep seabed. Substantial uncertainties remain concerning the interpretation of s 61(2), as must be true with all provisions seeking to capture a complex idea within a snappy, sub-sectioned, sound-bite. But in addition to the question marks characterising the RMA, Fisheries Act and HSNO Act, the EEZ Act has also stamped a precautionary exclamation mark. And in a world facing increasingly rapacious resource consumption and environmental degradation, we may hope it is not the end of the precautionary sentence. Rather let us consider it a brave step in a new direction — a turning of the tide towards a greater respect for our natural world.

For a more detailed discussion of the points raised in this article, see Catherine Iorns Magallanes and Greg Severinsen “Diving in the Deep End? Precaution and Seabed Mining in New Zealand’s Exclusive Economic Zone” (2015) 13 NZJPIIL forthcoming.
Kia ora koutou

Welcome to our themed Resource Management Journal issue: Mining. Aotearoa New Zealand has a long history of mining. Maori began quarrying rock when they first arrived, and Europeans arriving in this country fast followed suit broadening resource extraction to a wide range of minerals onshore and offshore. Mid this year, the West Coast celebrated its 150th year of mining. To mark this occasion, on 23 July 2015, Hon Simon Bridges, Minister of Energy and Resources, highlighted that the minerals sector:

plays an important and long-standing role in our national economy, contributing more than $1 billion to our GDP. You work in an industry that is highly productive, provides highly skilled and well paid jobs for New Zealanders, produces vital materials and products for industry, and adds significantly to our exports.

According to the Minister:

There are currently more than 900 (922) mineral prospecting, exploration and mining permits across the country with a further 163 permit applications being processed by NZP&M. More than 400 (408) mineral permits or permit changes were granted last year.

The Minister regards New Zealand’s minerals industry as resilient, adaptive and ready to seize opportunities. This is an industry that the Government strongly supports especially in seeking to attract more investment in exploration. This is why, as Mr Bridges explained, the Government is investing in providing comprehensive information to potential investors to help New Zealand compete on the international stage for resources development. Apparently, the Government invested more than $4 million in aeromagnetic surveys of Northland and the West Coast in 2011 and 2012, and it is currently spending a further $6 million on regional aeromagnetic surveys in Nelson, Marlborough, parts of Otago and Southland. See Simon Bridges “Minerals West Coast Forum 2015” (press release, 23 July 2015).

New Zealand Petroleum & Minerals (NZP&M), as a branch of the Ministry of Business, Innovation and Employment, leads this government work. It has been at the forefront of a major review of mining laws and policies in Aotearoa New Zealand in recent years.

The Crown Minerals Act 1991, Resource Management Act 1991 and the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 are the three key mineral law statutes. The Crown Minerals Act defines Crown-owned minerals — petroleum, gold, silver and uranium — and endorses these as nationalised minerals. This Act supports the minerals programmes that establish the policies, procedures and provisions for mining Crown-owned minerals including information on how to seek mining permits. In May 2013, two new mineral programmes were introduced replacing all previous programmes (see Minerals Programme for Petroleum 2013 and the Minerals Programme for Minerals (Excluding Petroleum) 2013). If a permit is issued, then rights of access to the land where the mineral is or might be found needs to be pursued.

According to the Minister:

Pursuant to the Resource Management Act, if persons and companies wish to extract minerals from land including seabed land out to the 12 nautical mile boundary that is not already permitted by a local authority, then resource consents must be sought from the appropriate local authority.

The Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act) is relevant in the context of mineral exploration and exploitation in the seabed. The purpose of this Act is to promote the sustainable management of natural and physical resources in the exclusive economic zone and the continental shelf. The general rule is that no person can do any activity in the exclusive economic zone or in or on the continental shelf unless the activity is a permitted activity authorised by a marine consent. The Environmental Protection Authority issues marine consents.

Today, there are more than 20 statutes and regulations relevant to mining including, in chronological order, the:

- Continental Shelf Act 1964;
- Marine Mammals Protect Act 1978;
- Conservation Act 1987;
- Resource Management Act 1991;
• Crown Minerals Act 1991;
• Health and Safety in Employment Act 1992;
• Biosecurity Act 1993;
• Maritime Transport Act 1994;
• Hazardous Substances and New Organisms Act 1996;
• Ngai Tahu (Pounamu Vesting) Act 1997;
• Health and Safety in Employment (Petroleum Exploration and Extraction) Regulations 1999;
• Health and Safety in Employment (Pipelines) Regulations 1999;
• Climate Change Response Act 2002;
• Crown Minerals (Minerals Fees) Regulations 2006;
• Crown Minerals (Petroleum Fees) Regulations 2006;
• Crown Minerals (Minerals and Coal) Regulations 2007;
• Crown Minerals (Minerals Other than Petroleum) Regulations 2007;
• Crown Minerals (Petroleum) Regulations 2007;
• Marine and Coastal Area (Takutai Moana) Act 2011;
• Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012;
• Crown Minerals (Royalties for Petroleum) Regulations 2013;
• Crown Minerals (Royalties for Minerals Other than Petroleum) Regulations 2013;
• Minerals Programme for Petroleum 2013;
• Minerals Programme for Minerals (Excluding Petroleum) 2013.

In recent years, there have been many high profile and significant decisions and legislative reform concerning mining in Aotearoa New Zealand. Of course past issues of the Resource Management Journal have captured some of these notable events. For example, our April 2014 front cover article was by Catherine Somerville and Kylie Paine entitled “Non-notified exploratory drilling in the EEZ: Shutting out the public or a reasonable response?”. In that same issue Robert Makgill has an article entitled “Oil and Gas in the Exclusive Economic Zone”. And in our April 2015 issue there is an article by Bronwyn Carruthers and Ezekiel Hudspith entitled “Decision on Marine Consent Application by Chatham Rock Phosphate Ltd”. I urge you to go back and reread this work and other pieces in previous issues.

Our seven mining articles in this Resource Management Journal issue builds on that work by providing a further glimpse into some of these matters. In our opening article, Catherine Iorns Magallanes and Greg Severinsen provide an excellent historical and contemporary insight into the precautionary approach to better understand its operation within the EEZ Act. The article by James Gardner-Hopkins provides further understanding of the EEZ Act by discussing the two significant Environmental Protection Authority decisions that declined marine consents: the Trans-Tasman Resources decision (declined in June 2014) and the Chatham Rock Phosphate decision (declined February 2015). Nicola Wheen’s article reminds us of those national protests in 2010 against the Government’s plans to open up some significant conservation areas to mining by removing them from sch 4 of the Crown Minerals Act 1991. Government reacted by initially promising and then legislatively reforming in 2013 to add 12,400 hectares of reserves and parks to sch 4. Wheen queries the success of these reforms. Barry Barton’s article provides an opportunity to step back and consider Aotearoa New Zealand’s law in a broader global context. Coming back to the North Island of Aotearoa New Zealand, Sarah Down and Sarah Hoffman provide a discussion of the 2014 High Court decision New Zealand Steel Mining Ltd v Butcher and bring to the fore some of the more unique components of mining in this country: the challenges Maori have in protecting their interests in mining developments. Continuing with this Maori dimension, Bernie Napp captures some of the discussion that occurred at the Maori Engagement in New Zealand’s Extractive Industry: Innovative Legal Solutions Symposium held in Auckland in June that I was involved in organizing (see here for some of the recorded speeches: Nga Pae o te Maramatanga New Zealand’s Maori Centre of Research Excellence Media Centre at http://mediacentre.maramatanga.ac.nz/content/2015-extractive-industry-symposium). Napp provides an
excellent overview of many of the keynote speakers and provides concluding remarks that enable a broader understanding of Aotearoa New Zealand’s positions and interests. The final mining related article is by Andrew Erueti who provides a fitting big picture comment to this themed issue. His article continues the Maori focus on mining by taking us beyond our shores to consider the context and relevance of international human rights and then back again to local decisions including the Trans-Tasman Resources decision. To all of these contributors, thank you for making this a special Resource Management Journal issue, for sharing with us your knowledge and for providing rich commentary for us to consider and ponder.

The last parts of this journal issue congratulate Nicola Hulley as our RMLA scholarship winner 2014 by providing a short synopsis of her thesis work. We then have four great summaries of recent cases led by Bronwyn Carruthers.

I trust that you enjoy reading this special themed journal issue. We are working on a new theme idea for one of the Resource Management Journal issues in 2016, to be announced in the Resource Management Journal November issue. In the meantime, if you have not done so already, remember to register for the RMLA annual conference in Tauranga. The theme this year is Matauranga Maori. And, as always, please do consider publishing in this journal, the copy deadline is 16th October.

Nga mihi

Jacinta

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**Testing the waters: Trans-Tasman Resources and Chatham Rock Phosphate decisions**

- **James Gardner-Hopkins**, Partner, Russell McVeagh

The Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act) was promoted as an integral part of the Government’s Bluegreen Agenda. The original Bill was intended to recognise opportunities and responsibilities, while overall strengthening New Zealand’s environmental and resource management systems.

Any legislation addressing New Zealand’s 400 million hectares in the exclusive economic zone, and 170 million hectares in the extended continental shelf, was going to be controversial. It was introduced on 24 August 2011, and had its first reading on 13 September 2011. But it didn’t have its third reading until nearly a year later on 28 August 2012. A number of significant changes were made through the legislative process, including to the purpose clause, the “information principles” and to how “economic benefit to New Zealand” is to be considered.

The EEZ Act received royal assent on 3 September 2012, and came into force on 28 June 2013.

A number of decisions on marine consents have now been made by the Decision Making Committees of the Environmental Protection Authority (EPA) under the EEZ Act. While marine consents have been granted for Oil & Gas activities (OMV New Zealand Ltd and Shell Todd Oil Services, for activities in existing oil and gas fields in the EEZ) the applications for seabed mining by Trans-Tasman Resources (TTR) and Chatham Rock Phosphate (CRP) were both declined. TTR proposed to excavate up to 50 million tonnes per year of seabed material containing ironsands for processing and exporting. TTR’s application area was 65.76 km$^2$, located between 22 and 36 kilometres offshore in the South Taranaki Bight. CRP sought marine consent to carry out seabed mining for phosphate bearing material within an area of 10,192 km$^2$ (later reduced to 5,207 km$^2$) located on the Chatham Rise more than 400 km east of Christchurch.

The TTR application was declined on 17 June 2014, and, although initially appealed to the High Court, that appeal was discontinued on 12 December 2014. The CRP application was declined on 10 February 2015. No appeal was filed.

The industry, led by Straterra, has labelled the EEZ Act as being flawed and failing to be “enabling” of responsible seabed mining. Soon after the TTR and CRP decisions, there was some hope expressed for legislative reform, potentially alongside the next
phase of the RMA reforms. It is unclear whether that
will now eventuate.

However, both TTR and CRP have signalled an
intention to pursue new applications — presumably
even if the EEZ Act is not amended. They may well
lament the fact that they did not pursue appeals
to clarify the legal tests to be applied to their
applications. Certainly, other applicants and
potential participants would have been assisted
by guidance from the High Court about some of the
tests that have received most scrutiny and criticism,
being:

(a) The approach to “uncertainty” (and the
precautionary approach).

(b) The approach to “adaptive management”.

(c) The role of economic analysis in the
decision-making process.

Informing all of these matters is, of course, the
purpose of the EEZ Act in s 10 which is to “promote
the sustainable management of the natural resources
of the exclusive economic zone and the continental
shelf”. While it now bears close similarity to the
purpose under the RMA, it changed considerably
from the purpose originally contained in the Bill
as introduced — which was to “achieve a balance
between the protection of the environment and
economic development” (cl 10). That echoed the
Bill’s original requirement that allowed a marine
consent to be granted “if the activity’s contribution to
New Zealand’s economic development outweighs the
activity’s adverse effects on the environment” (cl 61(2)
(a)). This has now become a simple requirement under
s 59(2)(f) to “take into account the economic benefit
to New Zealand”. The reasons for the change to the
purpose clause focused on using a known concept (of
sustainable management), rather than risk litigation
over a newly worded purpose (including the difficult
term “balance”), and recognising the potential for
cross-boundary applications (ie for activities within
and beyond the 12-mile limit).

Uncertainty and adaptive management

Clearly, there are significant uncertainties involved
in the development of EEZ resources, particularly
seabed mining. Seabed mining projects are by their
nature complex. They are capital intensive and have
many unknowns given the potential depths involved
and distance from the shore.

The EEZ Act sets out some novel “information
principles” in s 61. These require the EPA to:

(a) make full use of its powers to request
information from the applicant, obtain advice,
and commission a review or a report; and

(b) base decisions on the best available information;
and

(c) take into account any uncertainty or inadequacy
in the information available.

Further, if information is “uncertain or
inadequate”, then the EPA must “favour caution and
environmental protection”. That all weighs heavily
against an applicant. (Catherine Iorns Magallanes
and Greg Severinsen address this expression of the
precautionary principle in A Turning of the Tide?
Tracking Precaution in New Zealand’s Environmental
Legislation.)

However, there is something of a lifeline in s 61(3) of
the EEZ. This requires that, if favouring caution and
environmental protection means that an activity is
“likely” to be refused, the EPA must first consider
whether an adaptive management approach would
allow the activity to be undertaken. This would
appear to be a strong directive for the EPA to explore
adaptive management and try to make it work for an
applicant.

The principles of adaptive management are well
known. It is a precautionary technique that has been
described as “structural learning by doing” (Crest
Energy Kaipara Ltd v Northland Regional Council
EnvC Auckland A132/2009, 22 December 2009 at
[98] (interim decision), quoting the New Zealand
Bio-diversity Strategy). In Sustain Our Sounds v
New Zealand King Salmon Company Ltd [2014] NZSC 40,
[2014] 1 NZLR 673 the Supreme Court has found that:

(a) as a preliminary threshold before adaptive
management can be considered, there must
be an adequate evidential foundation to
have reasonable assurance that the adaptive
management approach would achieve its goals of
sufficiently reducing uncertainty and adequately
managing any remaining risk;

(b) secondly, it is necessary to consider whether
any adaptive management regime could be
considered consistent with a precautionary
approach. That will depend on a combination of
factors, being:

i. the extent of environmental risk;
ii. the importance of the activity;

iii. the degree of uncertainty; and

iv. the extent to which an adaptive management approach will sufficiently diminish the risk and the uncertainty.

In terms of whether the adaptive management regime would sufficiently diminish risk and the uncertainty, the Supreme Court adopted the factors identified by the Board of Inquiry, being:

(a) there will be good baseline information about the receiving environment;

(b) the conditions provide for effective monitoring of adverse effects using appropriate indicators;

(c) thresholds are set to trigger remedial action before the effects become overly damaging; and

(d) effects that might arise can be remedied before they become irreversible.

Applying this approach was sufficient in New Zealand King Salmon for the Board to approve four out of the nine farms that had been sought, and in face of significant opposition and allegations of uncertainty.

Neither TTR nor CRP managed to get past first base in respect of adaptive management. For TTR it may have been a case of too little too late, in respect of its proposed adaptive management conditions (Trans-Tasman Resources Ltd Marine Consent Decision, June 2014 at [12] of the executive summary):

On 8 May 2014, the last day of actual hearings, the applicant proposed a detailed suite of conditions that included a “risk-based tiered adaptive management approach”. As we set out in some detail in this decision, the conditions proposed by the applicant, while extensive, are not sufficient to give us the degree of confidence we needed to be able to grant consent to the proposal.

The EPA again struggled with adaptive management in the CRP application (Decision on Marine Consent Application by Chatham Rock Phosphate Limited, February 2015 at [852]):

The DMC finds that an adaptive management approach would not resolve the primary question of the adverse effect on the benthic environment without considerable pre-mining research and model validation in situ, which the applicant informed the DMC was not a viable option.

Straterra described this as a “Catch 22” in the March 2015 position paper Enabling Responsible Seabed Mining which stated: “lack of certainty mean that consent was declined, because trial mining (adaptive management) was considered unacceptable because of uncertainty — a circular argument, or ‘Catch 22’.”

In both cases, the EPA was clearly influenced by the overlays of the explicit statutory focus on uncertainty and adequacy of information. Could it be a case of precaution on precaution, tending the EPA to decline, when Parliament may have actually intended in s 61(3) to instead have had the EPA searching for a way to approve the application (through adaptive management)?

The role of economic analysis

The EPA has also downplayed the benefits of the mining applications before it. While the economic analysis is significant in respect of the s 59(2)(f) duty to take into account the economic benefit to New Zealand of the application, it is also significant to the role of adaptive management, which requires consideration of the “importance of the activity”. That must include the economic benefits arising from it.

In the case of both the TTR and CRP applications, the EPA seemed comfortable accepting the forecasts about taxes and royalties payable to the government ($50M per annum for TTR, $34M for CRP). However, the EPA in both cases refused to go much further, finding other economic benefits accruing from the project would be “less certain” (TTR), that employment gains would be “modest” (CRP), and that the applications would be unlikely to generate more than a modest economic benefit to New Zealand.

This reflects the difficulty, if not reluctance, the Environment Court and Boards of Inquiry have also had in quantifying economic benefits. For example, the Board in New Zealand King Salmon, while stating that each of the farms, both individually and collectively, would be of economic benefit — ultimately refused to make a finding, stating that “it is not possible to put a figure on it”. This is something the Environment Court grappled with in the Bathurst case (West Coast Environmental Network Inc v West Coast Regional Council and Buller District Council [2013] NZEnvC 47 at [101]-[127]).
There may be a number of reasons why decision-makers struggle in making clear and confident findings in respect of the likely economic benefits of applications before them. It could be that members of the relevant decision-making bodies do not have the expertise or experience in that field (many being lawyers, planners, and scientists rather than economists). No doubt the vastly differing methodologies of the witnesses before them does not assist. There may need to be a concerted focus on the greater use of expert conferencing to better identify the key differences in assumptions and methodologies. Or perhaps the decision-makers and economic experts need to develop better frameworks for analysis, just as they did for landscape and natural character?

Concluding thoughts

Most of the issues facing seabed miners are not particularly new. There is an increasing desire for greater science in decision-making, and in reducing uncertainty. However, the way the current statutory framework is being applied is weighed heavily against an applicant, without good baseline data and validated models (which can be very expensive to obtain and develop). When that is coupled with a distrust of evidence in respect of economic benefit, then even an intended lifeline of “adaptive management” may be insufficient to get an application over the line.

We will watch the progress of the fresh applications by TTR and CRP, should they be made, with interest.

Undermining conservation? The 2013 changes to the Crown Minerals Act 1991, s 61 and Schedule 4

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Introduction

In 2010, New Zealanders took up their pens and placards to protest the Government’s plan to open up some significant conservation areas to mining by removing them from Schedule 4 of the Crown Minerals Act 1991. On 1 May, “an estimated 50,000 marchers joined one of the biggest protests in Auckland for decades” ("Huge Protest says no to Mining on Conservation Land" The New Zealand Herald (online ed, Auckland, 1 May 2010)). Submissions totalling 37,500 were lodged in response to the Government’s discussion paper on the proposal, most of which opposed it. This reaction was hardly surprising, given that mining and conservation have a controversial history, and that the areas had been listed in Schedule 4 in the first place because of their significant conservation values. Claiming to have heard the message “loud and clear”, the Government said it would leave Schedule 4 intact and “allay the fears of some submitters that the government may consider allowing mining in national parks in the future by taking this possibility off the table [giving an] added layer of protection for New Zealand’s most highly valued conservation land” (Hon Gerry Brownlee and Hon Kate Wilkinson “No Land to be removed from Schedule 4” (media statement, 20 July 2010 <www.beehive.govt.nz>). The Government promised to add the 12,400 hectares of reserves and parks waiting to be added to Schedule 4, to its protective list. It also promised to propose an amendment to the Schedule, so that any area in the future classified in an equivalent category to existing Schedule 4 areas would automatically be included in it, and there would no longer be any on-going need for Orders in Council to be made to include new areas by amending the Schedule.

These promises were implemented in reforms to the Crown Minerals Act, Conservation Act 1987 and Reserves Act 1977 made in 2013. But do they really give an added layer of protection to New Zealand’s most important conservation areas? From a conservation perspective, it is hard to argue against the addition of 12,400 ha to Schedule 4, except to say that this was already going to happen before the reform process even began. But what of the reforms that took the option of mining in national parks “off the table”, and provided for automatic inclusions of appropriately classified areas in Schedule 4’s list of areas where mining is banned?

Schedule 4

The relevant part of the 2013 reforms changed how land is added to, and removed from, Schedule 4. This Schedule lists conservation areas in respect of which s 61(1A) of the Crown Minerals Act bars the Crown from entering into access
arrangements for mining purposes. In 1997, the Schedule was added, and included:

- all land within national parks;
- reserves classified as nature or scientific reserves;
- sanctuary areas under the Conservation Act 1987;
- wilderness areas under the Reserves Act 1977 or the Conservation Act;
- any wetland that New Zealand had notified under the *Convention on Wetlands of International Importance especially as Waterfowl Habitat* (signed 2 February 1971, entered into force 21 December 1975) (“Ramsar wetland”);
- wildlife sanctuaries, marine reserves;
- the Otahu and Parakowhai ecological areas on the West Coast of the South Island;
- all Department of Conservation (DoC) administered land on the Coromandel Peninsula or on any island in a defined area offshore to the east of the Coromandel Peninsula; and the internal waters of the Coromandel Peninsula, “where those lands or areas were so held, managed, administered, classified, declared, notified, or gazetted at the date of commencement of this Act”.


**Taking mining in national parks “off the table”**

Before 2013, there was nothing in the Crown Minerals Act to stop Orders in Council under s 61(4) from being made to remove land in national parks or other conservation areas from Schedule 4. In 2013, the Crown Minerals Amendment Act added, inter alia, two new subsections to s 61:

9) No Order in Council may be made under subsection (4) that results in land within a category of land described in clauses 1 to 8 of Schedule 4 of this Act being excluded from that schedule.

10) To avoid doubt, subsection (9) does not limit or affect—

(a) any provision of any other enactment that has the effect of excluding land from clauses 1 to 8 of Schedule 4; or

(b) any action taken under a provision of any other enactment that has the effect of excluding land from clauses 1 to 8 of Schedule 4.

Subsection (9) was made to implement the promise to ensure that Governments cannot open up existing national parks to mining. Before this subsection was enacted, the Government could open up land in national parks to mining by making an order under subsection (4) to remove the relevant land from the Schedule. Now that route is blocked and only Parliament can exclude land in a national park from the Schedule (s 11(1) of the National Parks Act 1980). If Parliament were to do this, then also new subsection (10)(a) confirms that the effect would be to exclude that land from Schedule 4. (This would, of course, have been the result anyway because of the operation of the doctrine of implied repeal.) This change is potentially significant: as at 2012, national parks comprised about 11.5 per cent of New Zealand’s land area, or a bit more than one fifth of all protected areas.

The same applies to any nature or scientific reserves that have been declared to be national reserves under the Reserves Act and, apparently, to marine reserves. Only Parliament can revoke their status and thereby remove them from Schedule 4 via s 61(10)(a) (s 13(2) of the Reserves Act and the Marine Reserves Act 1971, which does not address revocation, presumably leaving this to Parliament). Of course there are only four national reserves, of which only one — the Subantarctic Islands — comprises nature reserves and is therefore included in Schedule 4. Out of a total of more than 4.4 million square kilometres of territorial sea and exclusive economic zone, just over 500 square kilometres are protected by law (and not all of these are in marine reserves).

However, the classifications of nature reserve, scientific reserve, wilderness area in a reserve, wilderness or sanctuary area under the Conservation Act, and wildlife sanctuary can all be revoked by Order in Council (ss 24(8) and (9) and 47(1) of the Reserves Act, as inserted by ss 8(2) and 9(1) of the Reserves Amendment Act 2013 respectively;
s 18AA(5) of the Conservation Act as inserted by s 6 of the Conservation Amendment Act 2013; and s 9(1) of the Wildlife Act as amended by s 4(1) of the Wildlife Amendment Act 2013. So the Government can effectively still remove these areas from Schedule 4 by exploiting s 61(10)(b). The position of these areas, in respect of being opened up for mining, is little different from what it was before the 2013 reforms. The only difference is that the route a government must take, should it wish to allow access for mining to a particular area, will have to be the Reserves, Conservation or Wildlife Act, rather than s 61(4) of the Crown Minerals Act.

Thus, the Government kept its promise to take the possibility that national parks could be opened up to mining by the Government off the table. This change also covers national reserves and marine reserves. However s 61(10)(a) preserves the Government’s position in respect of other Schedule 4 protected areas, which can still be opened up to mining by Government action. That said, no government has actually removed any land from Schedule 4 since it was created in 1997.

**Automatic inclusions in Schedule 4**

While no land has been removed from Schedule 4, land has been added to it. Prior to the 2013 reforms this happened twice, in 2008 and 2011. In both cases, the land had to be added by amending the Schedule by Order in Council under s 61(4). This is because the limiting phrase “where those lands or areas were so held, managed, administered, classified, declared, notified, or gazetted at the date of commencement of this Act” appeared at the foot of the Schedule. The new Schedule 4 inserted by the Crown Minerals Amendment Act 2013 does not include this phrase, thus allowing for the automatic inclusion of any new or extended national park, nature or scientific reserve, sanctuary area or wilderness area, wildlife sanctuary, marine reserve or Ramsar wetland.

Had no other changes been made, this reform would have been significant from a conservation perspective. Until 2013, the Minister of Conservation could classify nature and scientific reserves, set aside wilderness areas in reserves, and declare wilderness or sanctuary areas under the Conservation Act by way of a notice in the *Gazette* (ss 16(1) and 47(1) of the Reserves Act and s 18(1) of the Conservation Act). Had this still been the case when automatic inclusion in Schedule 4 was introduced in 2013, the effect would have been that some conservation areas could make it onto Schedule 4 by virtue of a decision of the Minister of Conservation. This decision would have to be based principally, even exclusively, on conservation values because the Minister’s primary function is to manage land and other natural resources for conservation (that is, preservation and protection) purposes (s 6 of the Conservation Act).

But, of course, other changes were made. The amendments affecting Schedule 4 were just one part of a series of joint initiatives launched by DoC and the Ministry of Economic Development. These initiatives aimed to facilitate access to mining located in DoC-administered land and were expressly about “maximising” New Zealand’s mineral potential, given the Government’s estimate that 70 per cent of New Zealand’s mineral resources lie in DoC land, and its objective of closing the income gap between New Zealand and Australia (Ministry of Economic Development “Maximising our Mineral Potential: Stocktake of Schedule 4 of the Crown Minerals Act and Beyond” (March 2010)). A second part of the joint initiatives focused on improving access for mining to DoC-administered land not protected by Schedule 4. This part resulted in amendments to s 61(1)-(2) of the Crown Minerals Act 1991 that introduced a two-tier system for decisions on access for mining to Crown conservation land, whereby the Minister of Conservation continues to make decisions on less significant proposals, but decisions on Tier 1 (gold, silver, coal, ironsand, other metallic mineral or platinum) or significant exploration or mining activities must be made by the Minister and the Minister of Energy and Resources (s 61(1) and (1AA), as replaced and inserted by s 41(1) of the Crown Minerals Amendment Act). “Significan[ce]” is determined by a prior decision of the Minister of Conservation, having regard to the likely effects of the proposed mining activities on both conservation values for, and other activities on, the affected land; the “net impact” of the activities on the land; and any other matters he or she considers relevant to achieving the purpose of the Act (s 61(1AAB), as inserted by s 41(1) of the Crown Minerals Amendment Act). The Act’s purpose — as laid out in s 1A and also a product of the 2013 reforms — is to promote mining.

If these reforms make mining on non-Schedule 4 conservation land easier, they may ironically serve to emphasise the importance of the Schedule. Before the changes, Michelle van Kampen argued that because existing law (being the Crown Minerals Act and the Resource Management Act 1991) provided sufficient environmental protection, Schedule 4 was superfluous (Michelle van Kampen “The adequacy of legislation regulating the environmental effects...
The shift to joint decision-making for significant mining proposals deserves comment. Joint decision-making is not new in this field (for example, s 71 of the Wildlife Act prohibits any person from doing any act in respect of wildlife under any of the Acts listed in its ninth Schedule “except with the prior consent of the Minister of Conservation and the Minister charged with the administration of the Act under which the act ... is performed”) and this change may well simply have “formalised” existing practice (Michelle van Kampen and Bal Matheson “Minerals and Petroleum” in D Nolan (ed) Environmental and Resource Management Law (5th ed, LexisNexis, Wellington, 2015) at 545). Nevertheless, joint decision-making is bad for accountability and the rule of law. In the leading case on joint decision-making under s 71 of the Wildlife Act, France J found that, while the two ministers in a joint decision must ultimately “form an independent judgment”, joint decision-making also involves the two ministers “com[ing] together [to] agree on what is to happen” (Save Happy Valley Coalition Inc v Minister of Conservation CIV-2006-485-1634, 8 December 2006 at [10]-[16]).

Applicants challenging joint ministerial decisions face additional barriers on judicial review, compared to those challenging decisions of a single minister. The major barrier is that the courts are likely to adopt a [strict standard to test the reasonableness of decisions] because the involvement of additional ministers appears to be a signal from Parliament that such decisions involve weighing and balancing of competing policies. ...

Another hurdle for applicants is that ministers may prefer not to give reasons, in order to conceal areas of disagreement and negotiation. Ministers might rely on [Talley's Fisheries Ltd v Cullen HC Wellington CP287/00, 31 January 2002 (HC)] to argue that there is no duty to provide reasons [and] it seems likely that ministers will [be able to] rely on s 9 of the [Official Information Act 1992, which authorises the withholding of official information where this is necessary to protect the free and frank expression of opinions between ministers], so applicants cannot rely on that route as an alternative ...

Identifying reviewable decisions may [also] be problematic. ... Although this problem is not unique to joint ministerial decisions, it seems more likely to occur in that context, because of the drawn-out discussions and negotiations leading up to joint decisions (Heidi Baillie “Joint Ministerial Decision-Making and Legal Accountability” LLB(Hons) Dissertation, University of Otago, 2011 at 32 and 33).

In order also to facilitate mining, the 2013 reforms aimed to secure a formal role for the Minister of Energy and Natural Resources in decisions about land classifications that could impact on access arrangements for mining. Clearly, it would be inconsistent with this aim for the Minister of Conservation, acting alone, to continue to be able to classify or set aside conservation areas that would then be automatically included in Schedule 4. As the Cabinet paper that introduced this aspect of the reforms explained:

We consider that greater upfront consideration should be given to the other potential values of the land by requiring an Order in Council (subject to Cabinet consideration) to be made to implement classification decisions for those conservation classes listed in Schedule 4. These decisions are currently the sole responsibility of the Minister of Conservation. ...

we consider the automatic addition of areas is only appropriate if statutory processes exist to ensure that mineral values are properly considered in conservation classification decisions that have this effect. (New Zealand Cabinet “Stocktake of Schedule 4 Crown Minerals Act — Outcomes” (20 July 2010) paras 33 and 35 <www.mbie.govt.nz>).

Revisions to the classification and special protection provisions in the Conservation and Reserves Acts were therefore made. From 2013, nature and scientific reserves, and wilderness and sanctuary areas have had to be classified or made by Order in Council under ss 16A(2) and (3) and 47(1) of the Reserves Act (inserted by ss 7 and 9(i) of the Reserves Amendment Act 2013) or s 18AA of the Conservation Act (inserted by s 6 of the Conservation Amendment Act 2013). The Minister of Conservation can no longer make these areas by way of a Gazette notice. Since Orders must go to Cabinet before being signed off by the Executive Council, all the Ministers in Cabinet will have to agree that the land should be classified or made into a conservation area of a type entitling it to a
place in Schedule 4. Once the land is appropriately classified, it will be automatically protected from mining.

In so far as additions of land to Schedule 4 are concerned, the 2013 reforms changed little. Orders under s 61(4) of the Crown Minerals Act used to be needed, and now Orders under one or other of the National Parks, Marine Reserves, Wildlife, Reserves or Conservation Acts are needed. The extra step of a Gazette notice has gone for some areas, simplifying the process. Although it is impossible to tell yet what actual impact this will have on classifications of nature and scientific reserves and the making of sanctuary and wilderness areas, it seems inevitable that fewer of these areas will be made. For Cabinet, conservation is not the paramount consideration. Further, the prospect of needing to obtain Cabinet approval could conceivably deter the Minister and Department of Conservation from even pursuing the creation of nature and scenic reserves or wilderness and sanctuary areas. It may seem more efficient to pursue “lesser” — or no — classifications. This matters because these classifications and special protections exist within a comprehensive conservation scheme to help protect and preserve important indigenous plants and animals and their communities. Classification has effects beyond mining, on how conservation areas are managed, and what other activities can occur there.

The Parliamentary Commissioner for the Environment recognised in 2013 (“Investigating the future of conservation: The case of stewardship land” (August 2013)) that classification takes too long, and that too much conservation land remains unclassified and without special protection nearly 30 years after DoC was created, even though some of it has very high conservation values. If the 2013 reforms cause further delays in classification and special protection processes (because it takes longer to get an Order than a notice, or because DoC is forced to make a wider case because it has to persuade Cabinet, not just the Minister of Conservation), and this means that more stewardship land remains unclassified for longer, or that land which deserves protection as a nature or scientific reserve, or a wilderness or sanctuary area, is afforded some “lesser” protection to avoid Cabinet, then the reforms will have had a negative impact for conservation beyond the impact of the hoped for increase in mining.

Conclusion

When the Government set out to promote mining in conservation areas, it bought a fight over Schedule 4. Its response was to make apparent concessions on Schedule 4, while at the same time continuing on with its greater plan of making mining easier. It said that it would not take any land out of Schedule 4, that it would make sure no government could in the future take national parks out of Schedule 4, and that it would ensure that in the future, land of equivalent conservation status to that already protected in Schedule 4 would be automatically included on the Schedule upon attaining this status. In the result, the Government stuck to most of its promises, but created flow-on problems for conservation that may be significant. Of particular concern are those parts of the reform package that may negatively impact on the already difficult and drawn out processes of classification and special protection.

The global context of New Zealand’s mining legislation

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The issues that mining and oil and gas raise are not unique to New Zealand, and the extractive industries are very international in character; so it can be illuminating to put New Zealand issues and law into a broader global context.

Mining and petroleum are a huge part of successful economies in countries such as Australia, Canada, and Norway, and, if one looks back further, the United States and the United Kingdom. On the other hand, many countries have a history of poor outcomes from mining and petroleum extraction. The “resource curse” has afflicted many developing countries, because resource rents can be harmful to democracy (P Collier The Bottom Billion: Why the Poorest Countries Are Failing and What Can Be Done About It (Oxford University Press, New York, 2007)). Mining has sometimes led to poor results in countries not far from us, such as Papua New Guinea and the Solomon Islands. In contrast, New Zealand has strong rule of law, little corruption, and many restraints on power in the political system, so it is relatively secure from such harms. This paper considers New Zealand’s mining, oil and gas legislation in a broader global context.
context to see what lessons can be learnt from other jurisdictions.

The state has a complex role in mining, oil and gas, in many countries being the legislator, resource owner, environmental manager, regional economic developer, and industry participant all at once. In Petrocorp Exploration Ltd v Ministry of Energy [1991] 1 NZLR 641 (PC) the courts struggled to agree whether the case was in private law, between co-venturers, or in public law, concerning the exercise of statutory powers. The New Zealand government no longer plays a commercial role in mining or oil and gas, but complexity remains in its different legislative, regulatory, promotional, and royalty-extracting roles. Internationally, minerals are often declared to be the patrimony of the nation, subject purely to the permanent sovereignty of the state. There is a long history of tension between such economic nationalism or state control, with the free play of market forces, international capital flows, and laissez-faire approaches in mining legislation, embodied in the “Washington Consensus”. Mexico has recently opened up its oil sector; long under the state monopoly of Pemex. Other countries like Venezuela and Bolivia remain opposed to foreign involvement.

As well as a tension between state control and the market, there is a tension between national and local levels within a country (J Williams “Global Trends and Tribulations in Mining Regulation” (2012) 30 JERL 391). Resources industries are highly transnational, but they are fundamentally local as well. In some countries, local communities complain that they receive only the adverse effects of mineral operations in their district, and none of the positive benefits which are instead reaped in the capital city or overseas. These complaints are especially prevalent in countries such as the Democratic Republic of Congo, where state institutions are ineffectual, and where central government has a long record of doing nothing positive for its people. However, claims for regional or community benefits from resources projects are spreading and are no longer found only in the developing world or in isolated hinterland regions. One example is Local Government New Zealand’s proposal in the 2014 general election that mineral royalties be shared with local communities. Such new emphasis on localism and sharing benefits with communities has become widespread. It is associated with ideas of social licence to mine and corporate social responsibility. A leading example of the determination to make mining an instrument for positive social change is South Africa’s Mineral and Petroleum Resources Development Act 2002. A broad-based socio-economic empowerment Charter was promulgated under it in order to promote the entry of historically-disadvantaged South Africans into the mining industry.

Aboriginal interests are bringing about changes to mining legislation in some countries. In Canada one important challenge has been to the free entry system where a miner can stake a claim on land open to staking, and obtain mineral title, without first seeking government permission. This legacy of the gold rushes of the 19th century was held in 2012 to be incompatible with the duty of the Crown to consult and accommodate (Ross River Dena Council v Government of Yukon 2012 YKCA 14). In Ontario, substantial changes to the Mining Act RSO 1990 c M14 were made in 2009 to give greater recognition to Aboriginal interests, and the new Far North Act SO 2010 c 18 put Aboriginal communities in a leading position in land use in the province’s north. However, an overall pattern of legal change is only gradually emerging.

Much of the detail of mining legislation anywhere is directed at the balance between security of tenure and regulatory flexibility. Security of tenure is important to mining and petroleum companies, who make large capital investments that will pay off over a long period, and that cannot be moved from one place to another. They face considerable geological and market risk, and are uneasy about political and regulatory risk. Internationally, there is an ample history of horror stories of expropriation or corrupt changes to the rules once a company has committed itself to a host jurisdiction. New Zealand offers few such worries; changes to taxes or environmental requirements — the sort of changes that a company may expect to encounter here — are scarcely expropriation. But we see the concern with security of tenure displayed in the Crown Minerals Act 1991 (CMA), in s 32, which effectively guarantees that if the holder of an exploration permit makes a discovery, then it will able to obtain a production permit for it. In some countries, stabilisation clauses and bilateral investment treaties are important means of increasing security of tenure. In New Zealand, the much-awaited Trans-Pacific Partnership Agreement is likely to be important for investment disputes.

At the same time, regulatory flexibility is evidenced in the CMA. The methods of allocation of exploration and production permits are essentially discretionary ones, even though the minerals programmes made under the Act go a considerable way to restrict and explain how various specific discretionary powers
will be exercised. Discretionary modes of allocation of permits, including competitive bidding rounds for oil and gas, are good practice internationally. The free entry system is now effectively confined to the United States and Canada. In some countries, including parts of Australia, state agreements are specially negotiated for each project and ratified by the legislature if necessary. However the procedure is one that is vulnerable to special interests, opaque in its balancing of different values and is therefore not a good example for New Zealand. The “use it or lose it” principle that is embodied in the CMA’s requirements for work programmes and forfeiture is common elsewhere, and acts to prevent speculation in mineral rights by parties who do not carry out actual exploration and development work. Restrictions on transfer, such as those contained in s 41 of the CMA, are also common. They are often accompanied by restrictions on foreign ownership, although none of them are to be found in the New Zealand Act.

The 2013 amendments to the CMA introduced a number of interesting mechanisms but few of them stand out from an international or comparative point of view. The division of permits into Tier 1 and Tier 2 permits depending on their complexity is unusual. Some countries have separate legislation for quarries, which disposes of some of the simpler projects, and enact separate petroleum legislation, which deals with many of the more complex ones. The annual meetings and coordination with health and safety and environmental regulators, which the 2013 amendments introduced, are also unusual, but they are likely to be regarded internationally as good practice.

New Zealand has more privately-owned minerals than many other countries (gold, silver, and petroleum, of course, are always vested in the Crown). The global trend over time is to move towards state ownership or control of all minerals. This is because complicated patterns of ownership tend to discourage mineral activity, especially in the early stages of the exploration sequence where a company has a small budget and a large area of land to appraise. It is not worthwhile to invest in negotiations with multiple mineral owners when the chances of finding anything on their land is slim. Some countries have addressed this problem by simply vesting minerals in the state; others (including some Australian states) have made private minerals subject to the statutory regime as if they were Crown minerals; and some Canadian provinces have imposed mineral land taxes to encourage inactive mineral owners to transfer their rights to the Crown. There may be a case for such measures in New Zealand.

It is common internationally for environmental management to be carried out separately from the mining or petroleum legislation, but it is more common for it to be in the hands of national or provincial level agencies rather than agencies like New Zealand’s regional and local councils. There is work to do for regional councils to address the after-effects of mining and petroleum operations. Petroleum needs effective environmental regulation to ensure the proper plugging and abandonment of wells, and mining needs more attention to be given to the cost of rehabilitation of mine sites. Anecdotal evidence suggests that the bonds or other financial assurance taken for rehabilitation are rarely set at a level that will really supply the full sum required to rehabilitate a site in the event of financial incapacity on the part of the operator. Good legislation and practices elsewhere could offer paths forward: for example, M Hawkins “Rest Assured? A Critical Assessment of Ontario’s Mine Closure Financial Assurance Scheme” (2008) 26 JERL 499.

Some of the concerns that arise in mining and petroleum law globally are therefore apparent in New Zealand’s law, while other problems are thankfully distant. It is useful to put our law in the wider context and to identify opportunities for learning from comparative analysis.
New Zealand Steel Mining Ltd v Butcher

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The High Court decision of *New Zealand Steel Mining Ltd v Butcher* [2014] NZHC 1552 (NZ Steel) illustrates some of the challenges that Māori have in protecting their interests in mining developments.

**Background**

In this case, New Zealand Steel was granted a 100-year permit in 1966 under the Iron and Steel Industry Act 1959 (ISIA) over an area known as Maioro, located on the Awhitu peninsula at the Waikato river mouth. At the time the permit was granted NZ Steel was a Crown-owned company. The land subject to the mining permit included several important wāhi tapu (sacred areas) for Ngāti Te Ata, including burial grounds of important ancestors, which made up about 20 per cent of the total mining permit area (NZ Steel at [3]). The land had previously been acquired from Ngāti Te Ata by the Crown through takings in 1939 and 1959 by proclamation under the Public Works Act 1928 (PWA). The stated purpose of the 1939 taking was “sand-dune reclamation purposes” and, for the 1959 takings, “state forest purposes” (NZ Steel at [6]). In 1959 the ISIA was enacted for the purpose of bringing about the birth of an iron and steel industry in New Zealand (NZ Steel at [7]).

Importantly, at the time the wāhi tapu were taken, ironsand mining was not a permitted purpose for acquisitions under the PWA. Furthermore, s 19 of the PWA provided that where any land was taken under that Act, the government would “not thereby be deemed to have acquired or to acquire any right to any mines … or other minerals whatsoever under any land so taken”. That is, ownership of any minerals on the land remained vested in the landowner who had been dispossessed, unless the taking instrument clearly expressed an intention to take minerals as well as the surface title. Although the ISIA gave the Crown the exclusive right to mine iron sands, the language in that Act seems to vest mining rights rather than ownership rights in the Crown, (compare s 3 of the ISIA with s 10 of the Crown Minerals Act 1991) and provides for a system of royalties for mining undertaken on private land. That is, the Crown could not expropriate private mineral rights unless it followed the process under the ISIA. This did not occur here, as the Crown presumably considered the takings under the PWA were sufficient. This meant that at no point were Ngāti Te Ata paid compensation for the value of minerals on their land, or offered royalties in respect of the mining activity.

This raises doubts about the legality of the initial taking of the wāhi tapu, and whether the Crown ever effectively acquired ownership of the iron sands on the land. However, the entire area of Maioro, including the wāhi tapu, was gazetted for iron sand mining purposes under the ISIA, with the mining licence granted to NZ Steel shortly after, which at the time was a Crown-owned company.

Since the acquisition of these lands Ngāti te Ata sought the return of their wāhi tapu, which became part of Ngāti Te Ata’s Treaty claim. The Waitangi Tribunal raised several concerns about the takings of the wāhi tapu under the PWA:

1. Although the officers of the Forest Service may have been unaware of the interest in iron sand mining at the time the wāhi tapu were taken, other officers of the Crown in other branches “were very much aware of it” (Waitangi Tribunal Manukau Report (WAI 8, 1985) at [5.4]). This meant the Crown “must be taken to have been aware of the intention to mine iron sands” when the wāhi tapu were taken (Waitangi Tribunal Manukau Report (WAI 8, 1985) at [5.4]).

2. No compensation was paid in 1959 (albeit the law at the time did not impose an obligation to ensure compensation was paid), and when an ex gratia payment was made in 1972, it did not take into account any past use or occupation of the wāhi tapu by the Crown, or the value of timber or minerals on the land.

3. At the time of the takings, there was a provision in the Maori Affairs Act 1953 which would have allowed the land to be taken for forestry purposes without dispossessing Maori title. This was not used, however.

4. Many of the iwi did not know the wāhi tapu had been taken until the hearing before the Waitangi Tribunal. There had been “no notice, no advice and no money”. Ultimately, the iwi did not want money; rather, they wanted their land back (Waitangi Tribunal Manukau Report (WAI 8, 1985) at [5.4]).
Overall, the Waitangi Tribunal considered the iwi had “good cause to brood over the manner in which they were dispossessed of their last lands and over the use to which those lands [were] now being put” (Waitangi Tribunal Manukau Report (WAI 8, 1985) at [5.4]). In its recommendations, the Tribunal suggested, inter alia, that the Crown should renegotiate the terms of the mining licence with Ngāti Te Ata (Waitangi Tribunal Manukau Report (WAI 8, 1985) at [9.3.6]). The Government and Ngāti Te Ata began negotiation about the ownership of the land at Maioro as well as potential royalty payments.

In April 1990 the matter became critical when the operator of a bucket dredge saw a bonelike object thrown up. It was a human bone. After protests by Ngāti Te Ata, the Minister of Justice advised by press release on the 16th of May that discussions between the Crown and Ngāti Te Ata over the lands had commenced (NZ Steel at [9]). A month later on 16 June, the Minister of Justice issued a media statement stating the Government had set in motion the process to return the four blocks at Maioro to Ngāti Te Ata and take them out of the area covered by the mining licence (NZ Steel at [10]).

However, negotiations were made more difficult at this stage as NZ Steel, which had previously been Crown owned, was sold to a private company in 1987 (along with its mining rights). Consequently, NZ Steel made a judicial review application seeking to prevent the Crown from re-vesting the wāhi tapu in Ngāti Te Ata. The Crown opposed the application and Ngāti Te Ata became involved in the case as well. The case was never heard, as the proceedings were stayed following an exchange of undertakings whereby the Crown would not remove the wāhi tapu from the mining area, but NZ Steel would not mine the wāhi tapu. The purpose of this was to leave the wāhi tapu undisturbed while the parties worked out a settlement. A final agreement was never reached, and the undertakings stayed in place until 2013.

In 2013, shortly after Ngāti Te Ata lodged a substantive claim against the Crown in respect of Maioro, NZ Steel applied to the High Court to be released from its 1990 undertaking so that it could mine the wāhi tapu. Ngāti Te Ata strongly opposed this, in part on the basis that the Crown’s acquisition of the wāhi tapu was unlawful, which undermined the validity of any licence it purported to grant over the wāhi tapu.

However, the Crown reversed its position of support from 1990 and in 2014 Fogarty J granted NZ Steel’s application on the basis that it was an imminent impediment to the applicants’ enjoyment of their entitlement to mine ironsands.

**Findings of the Court**

Here it is important to note four key aspects of the judgment:

1. The Judge accepted that when the undertakings of the Crown and NZ Steel were given, it was contemplated that the parties would either negotiate a three-way settlement or a hearing would take place (NZ Steel at [35]). This meant the Crown and NZ Steel could not simply agree to release each other from the undertakings.

2. It was acknowledged that there had been no formal taking of the wāhi tapu under the ISIA, or compensation or royalties paid under that Act, and that compensation for a PWA taking (usually representing the market value of the land) could “easily result in underpayment where land is being taken for mineral extraction” (NZ Steel at [61]). However, the Court did not consider that any dispute about the legality of the takings, or the payment of compensation or royalties, affected the NZ Steel licence.

3. Regardless, of whether the undertakings continued to be binding, it was argued by counsel for Ngāti Te Ata that under s 44 of the Heritage New Zealand Pouhere Taonga Act 2014 (formerly the Historic Places Act 1993), NZ Steel was unable to mine the burial sites. Unfortunately the judgment failed to mention this line of reasoning at all.

4. Ultimately, the High Court considered that after nearly 25 years of impasse there was no reason for NZ Steel to be prevented from exercising its rights under the mining permit, and that all parties should be able to reach a settlement.

Ngāti te Ata have filed an appeal in the Court of Appeal. However, the case may not progress as shortly after the High Court’s ruling NZ Steel made an undertaking not to mine the wāhi tapu in the next 12 months. It remains to be seen whether a long term agreement can be reached.

Nonetheless, these negotiations and the costly and time-consuming court battle have stalled the progression of the entirety of Ngāti Te Ata’s Treaty claims. As Fogarty J noted in the case, the Crown acknowledged that Cabinet withdrew from a possible settlement regarding the wāhi tapu “in
part because it appeared desirable that the return of the wāhi tapu area should be considered as part of a comprehensive Treaty settlement, rather than on an ad hoc basis and because procedures in the Resource Management Act 1991 and Historic Places Act 1993 appear to provide adequate protection for archaeology and other sacred sites” (NZ Steel at [18]).

Where former Crown interests have been alienated, difficulties may arise. Here, although Maioro is still vested in the Crown, and subject to a mining licence issued by the Crown, the involvement of a third party has been a major issue for the iwi. This is because they have found that they have to negotiate not only with the Crown for their Treaty settlement and the protection of their sacred areas, but NZ Steel, who have been assertive in protecting their interests in mining over the area. A leading spokesman for Ngāti Te Ata stated that the cultural and commercial redress to which every iwi is entitled is gone because it has been put in the hands of a private business, as opposed to negotiating directly with the Crown. In other words, by issuing a mining licence and then alienating the shares in the company holding the licence, the Crown has impaired its ability to offer redress through the return of unencumbered tribal land, or even by providing for iwi involvement in setting the conditions under which mining may occur.

The Crown’s contention that the Resource Management Act 1991 (RMA) provides adequate protection is also questionable, particularly where historic rights and licences are concerned. This is because there is High Court authority from an earlier case taken by Ngāti Te Ata that, where a licence pre-dates the RMA, it cannot necessarily be brought within the regulations of that Act (New Zealand Steel Ltd v Attorney-General [2013] NZHC 3524). In that case, NZ Steel sought judicial review regarding the issue of whether resource consent was needed to fell trees on the wāhi tapu. However, the Crown took a neutral position in response to NZ Steel’s application, and the High Court found that the mining licence was an “existing privilege” for the purposes of the transitional provisions of the Crown Minerals Act 1991. This meant that, because the mining licence imported a right to fell trees in the licence area, it was not necessary for the Crown or NZ Steel to seek consent under the RMA to undertake such removal of trees or any necessary incidental works (compare the Environment Court’s earlier findings in Chief Executive of the Ministry of Agriculture and Forestry v Waikato Regional Council EnvC Auckland A133/06, 17 October 2006). The effect of this decision is that NZ Steel, in undertaking rights associated with the mining licence, is not subject to the RMA and Ngāti Te Ata cannot exercise its rights under that Act.

Comment

This case illustrates that if a third party has been given rights in respect of land (hereby way of a mining permit and the sale of NZ Steel to a private company) it impedes the Crown’s ability to offer redress for Treaty Settlements. Rather than the Crown and iwi being able to reach an agreement between them, any settlement affecting the third party’s rights also has to be negotiated with that party as well. In the case of an iwi that is opposed to mining, or at least wants to be involved in defining the parameters for mining, and a company that pursues its mining interests assertively, reaching such an agreement is clearly difficult. This being noted, there is a wide spectrum of company engagement with iwi interests in New Zealand, with varying results.

In the Ngāti Te Ata example, which involves wāhi tapu of significant worth, it is obvious that there is much at stake. The case also illustrates that while there are protections to protect iwi interests over wāhi tapu (such as burial sites), once mining permits are granted, such as under the RMA and the Heritage New Zealand Pouhere Taonga Act 2014, iwi can have significant difficulties in enforcing their rights under legislation.

The issue that the grant of mining permits may negatively affect the ongoing Treaty negotiations of iwi has been raised by iwi in a number of recent Competitive Tenders. Under the Competitive Tender process, the Crown offers up a large tender area for companies to bid on. Companies will then place bids to explore in particular areas of mineral prospectivity, with the Minister in turn issuing permits for exploration to companies for a period of five years.

In the Northland Competitive Tender 2012 for example, the Ngāti Hau Trust Board noted in their submission:

“As claimants to the Waitangi Tribunal, our claims have yet to be heard and any further issuing of permits, current and/or future, for exploration in Northland would further prejudice the prosecution of our claims before the Waitangi Tribunal…

We respectfully request that the Ministry of Economic Development refrain from pursuing the proposed competitive tenders process for mining exploration in Northland until the completion of the Te Paparahi
In a similar vein, the Nga Hapu Whanau o Whangaroa submission recommended a “moratorium on all new assessment, prospecting and exploration in the ‘Nga Puhui nui tono’ until the Ngapuhi settlement hearings stage two have been settled in full.” Concerns of the effect of mining developments on Treaty negotiations have also been raised by iwi leaders in the media. For example, Te Runanga A Iwi O Ngapuhi chairman Raniera “Sonny” Tau criticised plans for mineral exploration in the Far North saying the Government is trying to “empty its cupboards” before Treaty settlements can be considered (“Ngapuhi hits out at Crown mining move” *New Zealand Herald* (online ed, Northland, 23 July 2010)). He stated that, “This is Ngapuhi whenua, and the Government needs to settle our grievances before it creates new ones by creating a mining carte blanche” (“Ngapuhi hits out at Crown mining move” *New Zealand Herald* (online ed, Northland, 23 July 2010)).

The Government response to the concern that the issuance of permits may negatively affect Treaty Settlement was that:

“The government is committed to settling historical Treaty claims in Northland. We believe there are no grounds for restricting the Crown's ability to manage its mineral assets in the period until any settlement is reached. Although some Maori may perceive mineral permits as having some proprietary effect, the granting of a permit does not constitute the creation of an interest in land and accordingly, the holding of a permit under the Crown Minerals Act 1991 does not impact on and should not be prejudicial to the resolution of historical Treaty claims” (New Zealand Petroleum & Minerals, 13 June 2012).

While this is just one example, it is argued that the Crown must consider and give significant weight to Treaty settlements before granting exploration and mining permits in all situations. This is because while a permit does not create a proprietary interest in the land itself, the award of a permit does create an interest in land for a third party and can affect Treaty negotiations. Consequently, as occurred in the Ngāti Te Ata case, third parties may oppose the terms of any Treaty settlement that impinges their rights.

On the other hand, it could be countered that an exploration permit by no means ensures that a development will lead to mining, as a relatively small number of explorations permits do progress to the next stage and the actual area that is mined is a much smaller site. Furthermore, key pieces of legislation do exist which have protections for Maori, such as the RMA and the Heritage New Zealand Pouhere Taonga Act 2014. However, due to the high stakes that can be involved in mining developments and the deficiencies of the surrounding legislative framework (such as the RMA) in protecting the rights of Maori in practice (see Waitangi Tribunal *Report on the Management of the Petroleum Resource* (WAI 796, 2003)) it is argued that the Crown must seriously consider any impacts on Treaty settlements at the earliest stages of mining developments. Indeed, the importance of Treaty Settlements to consultation is provided for under the Minerals Programme as an express matter to be taken into consideration by the Minister in consultation, including over exploration permits (see Minerals Programme for Minerals (Excluding Petroleum) 2013, sections 2.7(1)(e) and 2.3(1)(e)(i)).

Furthermore, it should be noted that iwi claims to minerals is yet to be resolved (see Waitangi Tribunal *Report on the Management of the Petroleum Resource* (WAI 796, 2003)) an issue which as Mai Chen has noted is likely to increase grievances (Mai Chen “Stopping the grievance cycle” *New Zealand Herald* (online ed, New Zealand, 13 September 2012)). It is argued that the Crown must begin to engage more receptively with Maori about mining developments and claims to ownership, as to do otherwise is to delay resolving crucial treaty issues and risk creating new grievances against the Crown.

Crucially, the substantive grievances between Ngāti Te Ata and the Crown were not fully explored in *NZ Steel*, given the High Court’s position that such issues did not impact on the validity of NZ Steel’s licence. The legality of the Crown’s acquisition of Maioro and the wāhi tapu, and the effect of granting a licence over interests the Crown may not have rightfully acquired, are issues that remain to be addressed another day.
In defence of existing structures for engagement between the minerals/mining industry and Maori

Bernie Napp, Policy Manager, Straterra*

Abstract

The minerals sector in Aotearoa New Zealand needs to be aware that Maori groups (iwi, hapu) consider or believe they have rights and interests over their ancestral lands (rohe), even where that falls short of private property rights. They may also claim such interests over land formally held by others by way of private property right. The legal basis for such interests is generally claimed to be art 2 of the Treaty of Waitangi (and that is also consistent with the Principles of the Treaty). These considerations are material issues for companies when engaging with Maori prior to undertaking activities. The legislative context in our country has deliberately provided for that engagement to be voluntary, noting that most relevant legislative regimes and consent decision-making processes require evidence of engagement with Maori, and outcomes from that process. All of the foregoing is essential to avoid iwi/hapu acquiring the role of consent authority, which would create conflict with the system for local government.

In New Zealand’s endorsement of the Declaration in April 2010 ((20 April 2010) 662 NZPD 10229), the then Minister of Justice, Hon Simon Power, provided a number of qualifications for that support, in particular:

"In moving to support the Declaration, New Zealand both affirms those rights [set out in the Declaration] and reaffirms the legal and constitutional frameworks that underpin New Zealand’s legal system. Those existing frameworks, while they will continue to evolve in accordance with New Zealand’s domestic circumstances, define the bounds of New Zealand’s engagement with the aspirational elements of the Declaration."

In particular, where the Declaration sets out aspirations for rights to and restitution of traditionally held land and resources, New Zealand has, through its well-established processes for resolving Treaty claims, developed its own distinct approach.

That approach respects the important relationship that Maori, as tangata whenua, have with their lands...
and resources both currently and historically, and
the complementary principles of rangatiratanga and
kaitiakitanga that underpin that relationship. It also
maintains, and will continue to maintain, the existing
legal regimes for the ownership and management of
land and natural resources. ...

... where the Declaration sets out principles for
indigenous involvement in decision-making,
New Zealand has developed, and will continue to rely
upon its own distinct processes and institutions that
afford opportunities to Māori for such involvement.
These range from broad guarantees of participation
and consultation to particular instances in which a
requirement of consent is appropriate” [emphasis
added].

That is to say that New Zealand has developed
particular legislative frameworks, institutions
and practices — reflecting New Zealand’s distinct
historical context and path taken — and that
these will remain intact, while acknowledging that
New Zealand’s system is continuing to evolve. To
quote from Survival International: “New Zealand’s
support for the declaration is not unconditional. The
Prime Minister made it clear in a statement that the
declaration is an ‘aspirational’ document, and will
be implemented only ‘within the current legal and
constitutional frameworks of New Zealand’” (<http://

This article upholds the Government’s position on,
and rationale for its approach to the rights of Maori
as indigenous peoples of New Zealand.

International context

The scene-setter at the symposium was former
UN Special Rapporteur James Anaya’s report on
indigenous people’s rights as regards the extractives
industry (Report to the Human Rights Council
A/HRC/24/41, 2013). The report concluded that
indigenous peoples must have the right to grant
or withhold consent to mining on their land, and
have the ability to participate materially in mining
projects if they wish. In his report, “their land”
refers to land over which indigenous peoples have
some level of ownership and control, be it private
ownership or “native land title”.

Professor Ciaran O’Faircheallaigh, of Griffith
University, Queensland, Australia, argued that the
best outcomes for indigenous peoples — as regards
mining projects — are where the legal protections
are strongest (see www.griffith.edu.au/business-
government> for listed articles and publications).

That is because legislative tools provide the real and
tangible ability for indigenous peoples to exercise
management control over resources on “their land”.
This leads to the concept of “benefit sharing”, which
may be divided into: financial; employment and
training; environmental management; and cultural
heritage protection, drawing on examples from
Canada and Australia. If the legal protections are
not strong, Professor O’Faircheallaigh's advice to
indigenous peoples is to mobilise politically and
litigate, and such would also help address a “power
imbalance” between indigenous peoples and the
mining company and any government support of
that company.

In this article, I caution against applying these ideas
too literally in New Zealand because the context in
our country is very different to elsewhere. To this I
now turn.

New Zealand context

Land owner permission

Over privately-owned land, any company wishing
to explore or mine must first obtain land owner
permission (s 47 of the Crown Minerals Act 1991
[CMA]), as well as permission from the owner of the
minerals, if that person is different from the land
owner. That may be the Crown, or some other person.

Over Crown-owned land, for example, public
conservation lands and waters, or a riverbed
managed by Land Information New Zealand, access
from the relevant land-holding Minister, and in
some cases, also from the Minister of Energy and
Resources, must be sought under ss 61 and 62 of the
CMA.

In the case of Maori land, access must be sought
under s 80 of the CMA.

The legal exception in some cases is for “minimum
impact activities”, for example, prospecting (s 49,
and for Maori land, s 51). Theoretically, a prospector
could enter private land or Crown land as of right to
collect, say, hand samples from a riverbed or rock
outcrop. In practice, land owner permission would
be sought. In the case of Maori land, the land owners
would be required to be consulted.

Maori rights and interests over land not owned by
Maori

In New Zealand, the context for Maori rights and
interests under art 2 of the Treaty of Waitangi
continues to evolve. The key phrase is that Maori were to have “the unqualified exercise of their chieftainship over their lands, villages, and all their property and treasures”; this is encapsulated in the term te tino rangatiratanga (see www.nzhistory.net.nz for commentary on the differences between the English and te reo Maori versions).

The following developments are highlighted, as providing additional context:

• The Treaty settlement process continues to unfold, in which economic, cultural and other grievances are redressed, at least in part, over historical and contemporary breaches of the Treaty committed by the Crown against claimants;

• Settlement legislation increasingly provides for statutory influence for Maori over natural resource management and planning, for example, the co-management of the Waikato River by the Waikato River Authority, as a form of redress;

• Provision is made increasingly in legislation for Maori statutory input, for example, advice to the Environmental Protection Authority from the Maori Advisory Committee, Nga Kaihautu Tikanga Taiao;

• RMA reform proposals include statutory roles for Maori to provide advice, as well as having an appointed representative on hearings panels, while retaining the ability to advocate separately for Maori interests in planning processes (Ministry for the Environment Improving our resource management system: A discussion document (February 2013));

• Joint planning committees (for example, the Hawke’s Bay Regional Council, Regional Planning Committee) are being established by some councils around New Zealand, with 50/50 council/Maori membership, for example, on freshwater management planning, noting that Maori may also participate as New Zealanders in local government elections;

• The EPA’s practice under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 regime, has been to include one Maori representative on each five-member decision-making committee in respect of marine consent applications.

Taken together, the evolving custom in New Zealand is a recognition that iwi/hapu rights and interests over their rohe extend further than the rights and interests that any other person might hold or claim over land they do not own privately. At issue is how much further, and more than one interpretation has been advanced:

• The general Crown view is that those rights and interests fall short of private property rights, and short of rights of management or control over resources such as freshwater (“Maori in freshwater bid” (12 April 2015) <www.stuff.co.nz>), or minerals and petroleum; whilst

• The Waitangi Tribunal has taken views that speak to the concerns of claimants, namely that Maori rights and interests over resources meant that tangata whenua had to be able to “count on being involved at key points in decision-making processes that affected their interests; make a well-informed contribution to decisions; afford to have that level of involvement; and be confident that their contribution would be understood and valued” (“Report on the Management of the Petroleum Resource” Te Mantukutuku (May 2012)).

To elaborate on the above, consider the concept of kaitiakitanga or guardianship of resources. The Waitangi Tribunal has provided one definition, that kaitiakitanga “gives rise to an obligation and a corresponding right to: protect, preserve, control, regulate, use, develop, and/or transmit those taonga” (Waitangi Tribunal The flora and fauna and cultural intellectual property claim (WAI 262, 2006) at 5). The concept of taonga includes the environment, and natural resources, and could be extended or refined to include minerals, particularly those used by Maori historically (for example, pounamu).

An analogous definition is provided in a University of Otago publication (K Ruckstuhl and others Maori and Mining (Te Poutama Maori, University of Otago, 2013)), in which kaitiakitanga “is defined as an ancestral obligation to collectively sustain, guard, maintain, protect and enhance mauri”, mauri being the “essence or life force”, for example, of nature, which could also be expressed as ecological integrity, in relation to biodiversity.

Comment

There is a “grey area” around the extent to which New Zealand’s existing natural resource management system provides for, or places boundaries around the meeting of kaitiakitanga aspirations, as Maori may see them. Ultimately, that is for the Crown and Maori as Treaty partners to resolve. That lack of
clarity or resolution, however, is not necessarily an impediment to defining a framework for appropriate engagement between industry and Maori.

As to the call for “innovative legal solutions”, any proposals developed will need to include consideration of the existing system of local and central government, and, more broadly, natural resource management, which provides for participation by all New Zealanders (including Maori), as well as Maori in their own right.

Engagement in New Zealand

Engagement by companies

The evolving rights and interests framework in New Zealand provides a very strong rationale for exploration and mining companies to engage with Maori, and Government recognises this.

In 2013 the Environmental Protection Authority initiated the development of policy and guidelines on industry engagement with iwi/hapu, under the legislation for which the EPA has responsibilities (“Engaging with Maori” <www.epa.govt.nz>). That includes the RMA, the EEZ Act, and the Hazardous Substances and New Organisms Act 1996 (HSNO Act). In this work, Straterra was consulted amongst a wide range of stakeholders. A crucial outcome of the consultation is that engagement is characterised as voluntary.

The following year New Zealand Petroleum & Minerals — the branch of the Ministry of Business, Innovation and Employment responsible for administering rights to Crown-owned minerals under the CMA — commissioned work on this topic from Ngati Ruanui, a Taranaki-based iwi with extensive experience with the oil and gas industry in the region. Once more Straterra was consulted, among other interests. The result was a “Best practice guidelines for engagement with Maori” (Ngati Ruanui, 2014). The purpose of the guidelines is "voluntary principles to assist industry to effectively engage with iwi in the ongoing development of petroleum and minerals within New Zealand”.

These and other documents (for example Maori and Mining above) are supported by industry, and reflect the legislative context, as set out in, for example:

- CMA, s 33C(1): “Every holder of a Tier 1 permit must provide to the Minister an annual report of the holder's engagement with iwi or hapu whose rohe includes some or all of the permit area or who otherwise may be directly affected by the permit.”
- RMA, s 36A(1): “The following apply to an applicant for a resource consent and the local authority: (a) neither has a duty under this Act to consult any person about the application; and (b) each must comply with a duty under any other enactment to consult any person about the application; and (c) each may consult any person about the application.”

Engagement by the Crown

Under section 2.2(1) of the Minerals Programme for Minerals (Excluding Petroleum) 2013, New Zealand Petroleum & Minerals is required to consult with Maori on a range of circumstances, including on any application for a minerals permit, and on any proposal to hold a tender inviting such applications. The evidence is, however, that this occurs too late in the process to satisfy Maori, whether on permit applications (for example J Richards “New prospecting permit at Tai Tapu reignites mining issues” Golden Bay Weekly (Takaka, 17 July 2015)) or on tenders (for example M Dinsdale “Anti-mining group plan further action” Northern Advocate (Whangarei, 29 November 2013)). I understand New Zealand Petroleum & Minerals is taking steps to address this issue.

Industry view on what good engagement looks like

General

The experience of the NZ minerals and mining industry as reported to Straterra (Bernie Napp “Improving the rules of engagement” Mining NZ (2015 issue 1)) is that engagement with Maori tends to work well as a voluntary process, and when it ensures:

- respect for tangata whenua (the iwi/hapu with ancestral ties to relevant land);
- an acknowledgement of rights and responsibilities over their rohe;
- two-way sharing of information;
- discussion and resolution of any issues; and, potentially
- an exploration of how Maori could be involved in the project or the company's activities, including from an economic perspective.
Respect

Industry shows respect for tangata whenua by working in a manner that recognises the importance of whanaungatanga (relationships) and kanohi kíteata (the seen face). This is done by seeking face-to-face meetings (kanohi ki te kanohi), at a senior level, as appropriate (compare Ngati Ruanui guidelines at 9, mana ki te mana), and placing priority on genuine dialogue (manaakitanga — “mutual respect, work together with fairness and integrity” (Ngati Ruanui guidelines)), and the building over time of a rapport or a relationship.

Acknowledgement of rights and responsibilities

While tangata whenua may lack property or management rights over the environment or resources on land they do not own, it is appropriate to recognise kaitiakitanga responsibilities or aspirations held by iwi/hapu on behalf of their people within their rohe. A willingness to engage substantively on Maori interests and concerns goes a long way towards providing such acknowledgment.

Two-way sharing of information

Dialogue entails the sharing of information from both sides. In the case of industry, there is an incentive to be as free and frank as possible with projects, and for dialogue to be substantive, while taking into account likely commercial sensitivities. There is a natural tension here, and efforts made by a company to resolve those will be appreciated by Maori.

For their part, the tangata whenua may have matauranga or knowledge of their own to impart or be considered, and this may take various forms. Mataruanga Maori refers to traditional knowledge systems or perspectives held by tangata whenua within their rohe, expressed by Maori in a Maori cultural context — and may be translated roughly as local knowledge, or knowledge in relation to their ancestral land and practices (see “cultural impact assessments” <www.qualityplanning.org.nz>).

As the name suggests, a cultural impact assessment is a mechanism for identifying and assessing the potential or actual effects of a project on cultural matters, which may be very broad in scope. Normally, these would be prepared by potentially-affected iwi/hapu.

Discussion and resolution of any issues

Armed with the foregoing, the dialogue partners are in a position to identify and discuss concerns. This is not a substitute for the applicable regulatory processes, for example an RMA consenting process; this is in the context of appropriate engagement between the company and tangata whenua. It is accepted that not all Maori issues and concerns may be able to be resolved; however, a process of continuing dialogue in a culturally sensitive manner makes for a good start.

Exploration of further involvement by Maori

Beyond the material issues raised above, engagement between a company and iwi/hapu can extend to the development of a relationship group at a working level, entailing regular meetings and project updates. At a greater level of intensity, that could include participation by tangata whenua in monitoring or evaluating compliance with resource consent conditions and the like. There may be an opportunity for more direct involvement by Maori in the project, for example employment, commercial arrangements such as leasing of land, even equity investment.

Additional considerations and comment

A question that commonly arises among explorers and miners is: why engage with Maori, if they are not the land owner. To that question, the Ngati Ruanui guidelines provide specific and useful responses, for example: “Iwi can often recognise pitfalls or gaps in thinking and put forward otherwise unforeseen issues or opportunities … Engaging with iwi will often lead to an improved reputation for a company in the eyes of the overall community.”

If a company does not engage with tangata whenua, it can expect consequences. For example, it could find itself in the High Court over its project; it could become the subject of a claim to the Waitangi Tribunal. If Maori are opposed to the project — and if the mining company still wishes to proceed — there is access to the RMA process, by way of submission, with appeal rights on decisions, and those rights are extensive.

In addition, regional policy statements and plans often provide extensive consideration of Maori interests and concerns, and values and principles in relation to sustainable management, and are a relevant consideration for decision-makers on consent applications.

Maori views on engagement

This section is a partial snapshot, as context.
Speakers at the Waipapa marae symposium included Professor Margaret Mutu, of Far North iwi Ngati Kahu; Maui Solomon, representing Moriori from the Chatham Islands; and Maria Bartlett, on behalf of Te Runanga o Ngai Tahu. Their general message, broadly summarised, was: if you want to mine in our rohe, we expect you to be serious about dialogue with us on our interests and concerns, and on what you want to do. Maybe we will come to a mutual arrangement — under our values and principles — and maybe not.

In *Maori and Mining* (above), it is concluded that: "[a] high proportion of iwi consider exploitation to be permissible only if: it is ‘sustainable’; the adverse effects are not detrimental to the stability of the environment; the adverse effects are avoided or are mitigated; there are benefits for hapu/iwi."

It is noted that the extraction of minerals *per se* has been excluded from the definition of sustainable management under the RMA and the EEZ Act.

**Discussion**

The international experience referred to by Professor Anaya and others has limited relevance in New Zealand. Here, it is rarely a case of Maori living in an area where no one else lives or having interests or being affected directly, in which a mining company may seek to operate.

New Zealand’s natural resource management legislation has caught up with society’s expectations, thanks to widespread legislative reforms from the late 1980s. While there is an historical legacy of environmental pollution from mining in New Zealand, as elsewhere in the world, today the environmental management of mining is increasingly standardised best-practice (see for example, Centre for Minerals Environmental Research <www.crl.co.nz>).

That said, the expectations by Maori on industry, and the Crown, for engagement are growing, and that is appropriate — provided this is managed carefully in the context of New Zealand’s existing system of local government.

There is always room for improvement in industry engagement with Maori, and the body of knowledge and experience in this area continues to grow.

Professor O’Faircheallaigh offered this advice for miners and Maori when engaging: have clear objectives and “unity of purpose”; try to understand each other; engage early; be resourced to engage; have the community [iwi/hapu] not the company assess the cultural impacts; and engage at the appropriate level. Those are messages that would resonate with mining companies operating or seeking to operate in New Zealand (*Indigenous Peoples and Mining Good Practice Guide* International Council on Mining & Metals <www.icmm.com>).

Unaddressed in this article is an issue of capacity among some iwi/hapu to engage with miners. That is arguably a public good issue and the Crown has the responsibility as Treaty partner to consider this issue.

On the obligation on the Crown to engage with Maori in relation to minerals activities: this has been inadequate to date. As a general principle, the more engagement that the Crown carries out with iwi/hapu in advance of tenders or permit applications, the more straightforward it will be for companies when they seek to engage with Maori. There is a balance to be struck between Crown and company engagement, and the onus has been tilted unfairly on companies to date. As stated, New Zealand Petroleum and Mining is taking steps to address this situation (see “Working with communities and local authorities” <www.nzpam.govt.nz>).

As to any concerns over a power imbalance between mining companies and Maori, it is noted that New Zealand ranks as having the fourth lowest power imbalance on Hofstede’s “power-distance index”, of a list of 66 indicative countries (see <www.clearlycultural.com>). The PDI measures “the extent to which the less powerful members of organizations and institutions (like the family) accept and expect that power is distributed unequally”. (Austria has the lowest PDI, followed by Israel and Denmark).

In Straterra’s view, a delicate balance has been achieved in New Zealand as regards indigenous people’s rights and private property rights, despite an *ad hoc* and piecemeal approach to natural resource management policy over many years. This reflects or is connected with New Zealand’s highly-consultative political culture.

**Concluding remarks**

Minerals prospecting, exploration and mining companies seeking to do business in Aotearoa New Zealand are strongly encouraged to engage with iwi/hapu in whose rohe their activities are located. Tools and advice for engagement have been developed, and best-practice in this area continues to evolve. New Zealand's natural resource management
system in legislation and practice enables ample public participation, including by Maori. The opportunities for Maori statutory input into our system continue to grow, and their nature and reach continue to evolve. We have a modus operandi in New Zealand of which New Zealanders may be justifiably proud. It must be borne in mind that this was not always the case, and the leadership and efforts of many individuals and groups in achieving the current balance are greatly appreciated. While that may fall short of the aspirations of some or many Maori, our practice could be regarded as world-leading. We have forged our own path to date whilst at the same time adhering to the broad principles of the Declaration on the Rights of Indigenous Peoples. Let us — miners and Maori — continue to move forward together in an enduring manner to provide for us and the generations to come.

*Straterra is the industry organisation representing the NZ minerals and mining industry. Its membership includes minerals producers, explorers, research providers, geotechnical and engineering firms, equipment suppliers and providers of ancillary services, eg, legal, financial, environmental (<www.straterra.co.nz>).

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New Zealand’s international human rights obligations to iwi affected by extractive industry

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In this article, I set out some of the aims of our extractive industry project funded in 2015 by Nga Pae o te Maramatanga New Zealand’s Maori Centre of Research Excellence (led by myself, Associate Professor Jacinta Ruru, Professor Barry Barton and Sarah Down). Called “Maori Engagement in NZ’s Extractive Industry: Innovative Legal Solutions”, the project hopes to use developments in international law and best practice and policy in other countries to identify gaps in New Zealand regulation of extractive industry and suggest possible reforms. We will also be investigating company policy and practice in New Zealand. Although comment on that is planned for a later issue of this journal.

Generally, international human rights have not played a central role in indigenous claims making in New Zealand. Indigenous rights law and policy has primarily been focused on Treaty of Waitangi rights, customary rights and environmental law. What are the reasons for this? Human rights did not fit well with the core concerns of Indigenous Peoples. The Universal Declaration of Human Rights (1948) (UDHR) drafted by Western states with an emphasis on individual rights held universally, irrespective of the person’s cultural, religious or political connections, failed to address those matters that were of most importance to Indigenous Peoples — political sovereignty and territory. The same could be said for the two treaties that gave effect to the UDHR, the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR). Indeed, Samuel Moyn has controversially argued that human rights were part of the state building project. Rights established the boundaries of citizenship as a means of solidifying the power of the nation state (Samuel Moyn The Last Utopia: Human Rights in History (Belknap Press of Harvard University Press, Cambridge, 2010)).

At the same time, the protection of fundamental human rights has always been critical to indigenous peoples — their communities occupied the margins of social life in their home states. But human rights did not seem to reach them, largely due to the very fact of their marginalization and the inability of the state to ensure Indigenous Peoples had access to them (José Martínez Cobo Study of the Problem of Discrimination Against Indigenous Populations (United Nations, 1987)).

It was not until the rise of identity movements in the 1960s and ‘70s — no doubt buoyed by the decolonization movements of the 1950s and ‘60s — that greater attention was directed at Indigenous Peoples and denial of basic human rights. In New Zealand, the initial focus was racial discrimination (Kenneth Keith (ed) Essays on Human Rights (Sweet and Maxwell, Wellington, 1968)). Race relations was fast becoming a concern with the world’s condemnation of apartheid in South Africa.
and the legacy of the West’s colonization project. In New Zealand, protests at Bastion point and the Land March kept the issue in sharp focus. The Race Relations Act was passed in 1971, a Race Relations Conciliator appointed, and the International Convention on the Elimination of All Forms of Racial Discrimination ratified by New Zealand in 1972.

While discrimination was key to the experience of Indigenous Peoples worldwide, in New Zealand, Maori activists continued to demand political rights (sovereignty, or tino rangatiratanga, mana motuhake) and the return of land. This call led to important local reforms, in particular, the innovation of the contemporary treaty settlement process which provided compensation to iwi for the loss of tribal lands in the late 19th and early 20th centuries. These reforms quite rightly have been lauded about the world as progressive and innovative. But they did not deliver far-reaching political rights, only procedural rights of consultation with local and central government.

However, unbeknownst to many in New Zealand, a parallel process was in motion at the UN. This was the negotiation of what was to become the UN Declaration on the Rights of Indigenous Peoples (the Declaration) drafted from 1982 to 2007 in two-week annual meetings in the UN offices of Geneva. Many of the Indigenous advocates participating in the negotiations were from New Zealand, Canada, Australia and the United States. And in negotiations they focused on Indigenous Peoples’ political power, or in the language of international law, self-determination (Karen Engle The Elusive Promise of Indigenous Development (Duke University Press, Durham NC, 2006)). The New Zealand government played an important role in this process. It attended virtually every annual meeting over the course of the 20 plus years of negotiation of the text. In the Declaration negotiations, New Zealand called for a Declaration that set out the basic human rights in the UDHR, ICCPR and ICESCR, though adapted to the indigenous situation. On occasion it also noted the importance of historical redress. In other words, New Zealand preferred a reference to standards in the Declaration that reflected the regime New Zealand had already instigated. These standards were inserted into the Declaration and as a result the Declaration protects a broad range of human rights — including right to life, equality, education without discrimination, right to lands and culture — and right to redress.

But Indigenous advocates (including those from New Zealand) insisted on self-determination and protection of treaty rights. Self-determination is controversial because it is seen as the core principle underpinning the decolonisation process and the creation of new states. New Zealand was opposed to the calls for a reference to self-determination. It was also opposed to Indigenous Peoples call for a right to free, prior, and informed consent (FPIC). Indigenous Peoples argued that mere consultation — or the human right to effective participation in decisions affecting them — was not sufficient and that when their interests are affected the state should seek their informed consent.

But despite New Zealand’s resistance to these three measures, they were all included in the final version of the Declaration adopted by the United Nations General Assembly (UNGA) in 2007. Thus art 3 of the Declaration provides:

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 32 of the Declaration provides:

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

Indigenous Peoples also have the “right to the recognition, observance and enforcement of treaties” (art 37).

New Zealand voted against the Declaration when it came before the UNGA, noting its objection in particular to FPIC, claiming that it granted a right of veto (New Zealand explanation of vote, 13 September 2007). New Zealand of course changed its mind in 2010 — after prompting by its junior coalition partner, the Maori party. New Zealand’s endorsement of the Declaration was heavily qualified. It emphasised that the Declaration was not binding. While true — the Declaration is technically a non-binding resolution of the UNGA — the fact that it was drafted over the course of more than 20 years with active participation of Indigenous Peoples and states means that it is vested with significant normative weight (Claire Charters and Rodolfo Stavenhagen (eds) Making the Declaration Work (International Work Group for Indigenous Affairs,
And many of the rights in the Declaration elaborate on rights that New Zealand has committed to in other binding treaties including the ICCPR, and ICESCR. And then, there is the sheer number of states that have endorsed the Declaration — now 148 states (close to 80 per cent of the UNGA).

Indeed much of what New Zealand has said is contrary to widely-held views about the meaning of the Declaration. And this is an important point. Declaration-making, like Treaty-making, is a collective project. No one state has a monopoly on meaning. Instead, it is the “interpretative community” that gives proper meaning to the text of an international instrument like the Declaration (Ian Johnstone Treaty Interpretation: the Power of Interpretative Communities (1991) 12 Mich JIL 371) — ie, those states, inter-governmental organisation, experts, civil society and Indigenous advocates closely associated with the drafting of the text and its implementation. That includes New Zealand, but no one member of the community can simply offer its view and say that is only the answer for all time. It is the broader community that determines the persuasiveness of any position. And one position that I think was widely held is that the right to self-determination offered a significant basis for reforms relating to political autonomy, and robust procedural rights relating to engagement.

A further important dimension to international law-making is that treaties and Declarations are subject to international monitoring. There are now a host of UN bodies that can comment on New Zealand’s compliance with the Declaration, including the UN Human Rights Council (through the Universal Periodic Review of countries); UN human rights treaty bodies; the UN Special Rapporteur on the rights of indigenous peoples; the UN Expert Mechanism on Rights of Indigenous Peoples, and UN Permanent Forum on Indigenous Issues. And iwi are already using these processes and will continue to do so aware of New Zealand’s sensitivity to its human rights reputation.


Following the Declaration’s adoption, I think New Zealand has to think hard about its implications and how we will respond to them. This is the core part of our extractive industry project. There is no doubt that New Zealand has a fairly robust scheme for the regulation of extractive industry on dry land and in the sea. But there remain serious gaps. These have been identified by Maori, the Waitangi Tribunal and academic commentators, but remain un-addressed. The Declaration provides iwi with another means to address these shortcomings and stimulate ideas for reform.

From the perspective of the Declaration, a core issue is lack of control by iwi of all industry — not just extractive industry — in their traditional territory. Often this is framed as an “environmental and cultural issue”. That is, Maori have a spiritual connection to their land and waters within their rohe and so they should be consulted about activities that could undermine that connection. But the Declaration casts another light on this — it indicates that iwi also have a concern, as the holders of mana whenua and mana moana, to determine what happens in their rohe. To use the international law language — iwi are talking about self-determination. Control is lacking. The RMA and Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act) are administered by the state — central and local governments. Under s 33 of the RMA, local authorities are able to delegate powers to iwi authorities (for example, granting of resource consents) — but this has not been used.

In its report on the Management of Petroleum the Waitangi Tribunal had a lot of harsh things to say about the RMA (Waitangi Tribunal The Report on the Management of the Petroleum Resource (Wai 796, 2011)). A core problem was the lack of effective participation by iwi in the RMA consent-making process. Iwi had limited capacity to engage and the Crown wasn’t providing any help. As result, the Waitangi Tribunal said, “decision-makers tend to minimise Maori interests, and elevate other interests, in their decisions about the petroleum resource” (Waitangi Tribunal letter to Minister, Wai 796). This point has been made about the RMA for many years. But there has been no response by government to these issues. In the Waitangi Tribunal hearing on Petroleum, the Crown said it was taking “incremental steps” including “the empowerment of Maori through Treaty settlements.” (Waitangi Tribunal letter to Minister (Wai 796)).

Does the EEZ Act do a better job? The EEZ Act was adopted in 2012 to “promote the sustainable management of the natural resources of the exclusive economic zone and the continental shelf” (s 10 of the EEZ Act). The general rule is that no person or company may do any activity, including mining, within the exclusive economic zone or continental shelf unless the activity is authorised
by a marine consent (s 20 of the EEZ Act). The newly established Environmental Protection Authority (EPA) is responsible for issuing marine consents and ensuring that permit holders comply with the relevant environmental and safety standards.

The EEZ Act sets out a range of protections for Maori interests. An advisory body has been established to offer a Māori perspective to the EPA (s 19 of the Environmental Protection Authority Act 2011). The EPA is required to notify iwi authorities about a resource consent application but there is no requirement to consult (s 45 of the EEZ Act). When applying for a marine consent, companies must submit an Impact Assessment (s 38 of the EEZ Act), which requires companies to identify the effects of the proposed activities on the environment and on persons with “existing interests”. This includes iwi with an interest in a treaty settlement; the Sealords fisheries settlement; and protected customary rights, or customary marine title recognised under s 4 of the Marine and Coastal Area (Takutai Moana) Act 2011. But there is no requirement to consult with these interests. In short, the impact assessment can be prepared without talking to local iwi and hapu.

The lack of a clear direction to consult meaningfully means that extractive industry applying for consent under the EEZ Act have come up short and put iwi offside. In the Trans-Tasman Resources decision, the EPA noted that the applicant had made some efforts to consult with affected Maori groups (Environmental Protection Authority Trans-Tasman Resources Ltd Marine Consent Decision (June 2014)). But it was also clear from the iwi submitters that no “true” relationship had been formed between Trans-Tasman Resources and the tangata whenua (at [555]). There were concerns over the lack of information that had been provided to iwi on Maori fishing activities, cultural associations, impacts to Maori and ultimately the exercise of their kaitiakitanga. Given the lack of meaningful consultation, a number of Maori groups decided to oppose Trans-Tasman Resources’ application for marine consent. A significant factor in deciding to decline the application was the speed by which the application for marine consent was prepared; Trans-Tasman Resources’ lack of response to iwi questions, which alienated them from the process; and failure to provide a cultural impact report.

The lack of consultation and inadequate information about how the proposal might affect them means many iwi are often left in the dark about a project, especially something as technical as an extractive industry project.

The challenge for Maori is how to obtain greater control over their traditional territory, when faced with an extractives project or indeed other industry. I think the weak measures of participation are due to how indigenous rights are perceived by the state and indeed extractive industry. In terms of land rights in New Zealand, iwi possess very few titles to land. Maori freehold land comprises only five per cent of New Zealand’s total land mass and most of those blocks are centred in the far north, central and east coast of the North Island. Otherwise, much of Maori land was unjustly taken through land confiscation and often dubious land transactions. The result is that, in the absence of tangible property rights, Maori interests in their rohe are limited to the metaphysical — a cultural and spiritual connection to land often framed as “kaitiakitanga”. And if you look at the interests identified in the RMA they concern: “the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga” (s 6(e) of the RMA). It could be argued that the reference to a Maori “relationship” with land may reflect the reality of iwi land dispossession. However, a different mix of language — reference to mana whenua/maoana, say — would have resulted in greater weight accorded to Maori interests by those exercising decision making powers under the RMA.

The RMA was originally meant to dovetail with the Runanga Iwi Act 1990, which envisaged local iwi authorities exercising a range of powers devolved by government. But that was scraped by the incoming national government.

The question is whether the right to self-determination and FPIC can assist iwi in promoting reforms that do a better job of ensuring their effective participation in processes relating to industry in their backyard. FPIC, as we saw, has been called a right of veto by New Zealand. But, in fact, a body of jurisprudence indicates that it’s not — indicating instead that FPIC calls for Indigenous Peoples to be engaged with to obtain their consent in those cases where they may be substantially impacted by industry (Saramaka People v Suriname Inter-American Court of Human Rights, 28 November 2007). The hope, then, is that self-determination and FPIC — together with international monitoring — might persuade law-makers to do more to promote more effective iwi participation in projects in their rohe.

I haven’t commented on extractive industry itself and its obligations in relation to Maori. That will have to wait for another issue. Suffice to say that while the state has the primary obligation to ensure
human rights are enjoyed by all, emerging human rights law recognises that corporates also have a duty to ensure they do not violate human rights. For anyone interested in this rapidly growing area of law (at least outside of New Zealand) a good starting point is the UN Forum on Business and Human Rights website and the UN Guiding Principles on Business and Human rights.

The public trust doctrine in New Zealand

Nicola Hulley, RMLA Scholarship Winner 2014 — a short synopsis on her Masters dissertation

Sustainability and how to best manage the use of finite natural resources is a matter that has occupied the thoughts of New Zealanders for generations. In this sense, we are by no means unique; societies around the world have grappled with balancing environmental preservation and conservation with economic growth and social development.

An upcoming edition of the Resource Management Journal will include a historical review of a novel, albeit potentially familiar, sustainability concept that originates from ancient Roman law. That concept is the public trust doctrine and the purpose of the review is to assess its historical foundations and early development.

The public trust doctrine was originally proclaimed by Emperor Justinian I in 529 and the commonly accepted English translation (of the original Latin) provides: *By the law of nature these things are common to all mankind, the air, running water, the sea and consequently the shores of the sea.*

As societies around the world have deliberated the regulation of public access to common natural resources, the public trust doctrine has emerged and re-emerged throughout history. Indeed, since 529 the concept has been incorporated into versions of the Magna Carta, the English common law and case law in the United States.

In its contemporary form, the doctrine involves a duty of stewardship on the State to ensure that certain natural resources common to mankind (the atmosphere, the ocean and fresh water) are used in a way that precludes the impairment of those resources over time.

Broadly speaking, the basis of this duty can be summarised into three theoretical steps. First is the idea that ownership of certain natural resources which are common to mankind — *res communes* — vests in the citizens of the State at large and that, as a result, the resources are implicitly excluded from private or State ownership. Second, the State therefore derives its authority to manage *res communes* insofar only as it fills a position of “trustee”. Third, in order to satisfy its fiduciary obligations to the beneficiaries of the trust — the citizens — the State must manage those *res communes* sustainably and for the continued benefit of its citizens.

An assessment of the relevance of the public trust doctrine to New Zealand is timely. Recent legal and policy developments illustrate the building tensions between economic development and environmental degradation. One example is the landmark decision of the District Court of The Hague on the tort-based climate change proceedings recently brought against the Dutch Government. This decision has already triggered murmurings of similar litigation in jurisdictions around the world.

The reform of the Resource Management Act 1991 that the Ministry for the Environment embarked on late last year is also illustrative. Despite having already been subjected to an almost inordinate number of minor amendments since it was enacted, this reform proposed substantive policy changes to the core of the Act. The reform has since lost political momentum, however, had it been completed, New Zealand's natural resources policy may have been adjusted significantly.

Similarly, the recent judgments in *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 and *Paki v Attorney-General* [2014] NZSC 118, [2015] 1 NZLR 67 suggest that New Zealand's Supreme Court is willing to actively engage in issues involving the management of natural resources. In this context the public trust doctrine is especially relevant as the concept is central to a growing body of climate change litigation in the United States.

As noted above, historically and again more recently, the public trust doctrine has been the subject of
varying degrees of interest in foreign jurisdictions. Despite New Zealand’s shared legal foundations with some of these jurisdictions the concept has, until now, received almost no attention in this country. It need not, however, necessarily follow that the public trust doctrine is therefore absent from New Zealand law.

The contents of the article to be published will form part of a masters dissertation I am preparing, to evaluate whether this particular tenet of sustainable environmental management is part of the laws of New Zealand. An assessment of the historical foundations of the doctrine is an important precursor to any evaluation of its relevance — this will be the focus of the article.

My dissertation is due to be completed by March 2016 and it will build on the historical review of the origins and foundations of the doctrine in two steps. First it will present a comparative analysis of the recent development of the public trust doctrine in English and United States law. Second it will analyse three theoretical arguments which might support the idea that the public trust doctrine is an operative part of the laws of New Zealand today — although perhaps presently in a dormant state.

Depending on the findings of this research, in the future I propose to complete a larger piece of work to assess the possible implications of the public trust doctrine for the more unique elements of New Zealand law, including our constitution, the Treaty of Waitangi and the State Sector Act 1988.

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### Recent cases

**Urban Auckland v Auckland Council [2015] NZHC 1382**

* Bronwyn Carruthers, Partner, and Rebecca Eaton, Graduate, Russell McVeagh

#### Background

Ports of Auckland (“POAL”) was granted resource consent on a non-notified basis to extend the existing Bledisloe Wharf further into the Waitemata Harbour. The B2 extension would extend the eastern wharf a further 98 metres, and the B3 extension would extend the western wharf a further 92 metres. The consents were in the form of four sets of consent, two each for B2 and B3 — one being under the operative planning framework, one under the Proposed Auckland Unitary Plan (“PAUP”).

Urban Auckland sought a judicial review of Auckland Council’s decision not to notify the public of the consents and to grant the consents. Urban Auckland also contended that POAL required further consent before carrying out the wharf extension.

#### High Court decision

Venning J found that the Council’s decision to grant consent without notification was flawed for two reasons, both of which are discussed in turn:

(a) The applications for consent should have been bundled and processed as a discretionary activity.

(b) Special circumstances existed which required notification and the Commissioners made an error of law in determining that because the extension was a controlled activity and an expected development, no special circumstances existed so that it was unnecessary to notify.

On this basis, Venning J set the consents aside. He declined Urban Auckland’s further application for
a declaration that POAL needed to obtain further consents for the extensions.

Should the consents have been bundled?

The issue of bundling arose in two ways in this case;

(a) whether there should be bundling of the applications under the operative and proposed plans; and

(b) whether there should be bundling of the consents required for the various activities proposed.

Venning J found that the applications could have been bundled under the operative and proposed plans. In coming to this conclusion, he considered that Bayley v Manukau City Council [1999] 1 NZLR 568 (CA) does not require consent applications between operative and proposed plans to be considered separately (as was submitted by POAL). It was considered to be significant in this case that all required applications were simultaneously before the Council (compared to the facts of Bayley, where the applications were filed some time apart).

Venning J then considered whether the various activities for which the consents were required under the operative Coastal Plan, the operative Air, Land and Water Plan (“ALWP”) and the PAUP could properly be said to overlap, so that they should have been bundled for notification and consent purposes. Whilst the extension itself was a controlled activity under the operative Coastal Plan and a permitted activity under the PAUP, the discharge of contaminants was a restricted discretionary activity under both the ALWP and the PAUP and the discharge of stormwater was a discretionary activity under the PAUP.

The Judge found that the proposal to extend the wharves would result in ongoing physical effects which would overlap. Venning J stated that the need to deal with contaminants and to divert and discharge stormwater are directly related to the length of the proposed extension of the wharf. He also found that the applications for consent that are necessary for discretionary activities only arose because of the extension to the wharf and therefore, there was a direct connection between the length of the wharf and the effects generated by its presence. He therefore concluded that the Council ought to have bundled the applications for the purposes of considering whether to notify the applications, and ought to have notified the applications to enable public submissions on those effects.

Did special circumstances exist in this case?

Both the controlled activity rule under the Coastal Plan and s 95A(4) of the RMA provided the Council with a discretion to notify the application if “special circumstances” existed. Urban Auckland submitted that a number of special circumstances applied in this case, including the intense public controversy surrounding the extensions, POAL’s plans for future development at Bledisloe Wharf, the ownership relationship between POAL and the Council and the national significance of the B2 and B3 locations.

In determining that the test was made out, Venning J found that the following special circumstances supported public notification:

(a) POAL is owned by Auckland Council Investments Ltd, which is wholly owned by the Council. Venning J noted at [142] that this was an “unusual feature” of the applications, although “[o]n its own it is not enough, but it is a factor.”

(b) There was significant interest generated by POAL’s plans for future port development. Venning J found this to be relevant, particularly given that the proposed extensions provide a basis for future reclamation.

(c) The public interest generated in POAL’s plans for development in general, and the broad base of interest in the proposed extensions, was found to be “outside the common run of interest shown in applications for commercial development”. In particular, Venning J noted the direct interest of Ngati Whatua Orakei and other iwi in Auckland in consulting with POAL over developments in excess of 3,500m².

Venning J found that the Commissioners made an error of law in considering that, because the extension was a controlled activity and an “expected development”, no special circumstances existed. He highlighted that the relevant rule in the Coastal Plan itself contemplated that even though the activity may be controlled, there still may be special circumstances justifying public notification. He was also satisfied that the Council applied its discretion not to notify (despite those special circumstances) in error, and that the applications should have been notified.

Note: Russell McVeagh acted for Ports of Auckland Ltd in Urban Auckland.
Man O’War Station Ltd v Auckland Council [2015] NZHC 1537

Bronwyn Carruthers, Partner and Rebecca Eaton, Graduate, Russell McVeagh

Man O’War Station Ltd (“MWS”) filed an application for leave to appeal to the Court of Appeal following the High Court’s dismissal of an appeal by MWS against a decision of the Environment Court, relating to the mapping of Outstanding Natural Landscapes (“ONL”) on Waiheke Island and Ponui Island. In its application, MWS set out five questions of law for determination on appeal:

• Whether the identification of an ONL in a planning instrument prepared under the RMA for the purpose of s 6(b), is informed by or dependent upon the protection afforded to that landscape under the RMA and/or the planning instrument.

• Whether the test or threshold to be applied in deciding whether a landscape is outstanding for the purpose of s 6(b) has changed as a result of protection required for an ONL by reason of the Supreme Court’s decision in Environmental Defence Society Inc v New Zealand King Salmon Co Ltd [2014] NZSC 38, [2014] 1 NZLR 593.

• Where a landscape has been identified as ONL under a policy framework and an approach to ONL identification which were permissive of adverse effects and which are not now correct in law or need to be changed by reason of King Salmon, whether that landscape be re-assessed in light of the required changes to the policy framework and approach.

• Whether it is relevant to the identification of a landscape which is a working farm as ONL, that the applicable policy framework would prohibit or severely constrain its future use for farming, such that the determination of whether a landscape is ONL should take account of the “fourth dimension”.

• Whether the High Court was correct to find that in assessing whether or not a landscape is an ONL, there is need to incorporate a comparator.

Section 144(3) of the Summary Proceedings Act 1957 provides that the High Court may give leave for a second appeal on a question of law if, in the opinion of that Court, the question of law involved in the appeal is one which, by reason of its general or public importance or for any other reason, ought to be submitted to the Court of Appeal for decision.

Andrews J affirmed the test for granting leave to appeal from Huia Resorts Ltd v Ashburton District Council CA29/05, 28 April 2005:

... [the applicant] must show that the further appeal would raise questions of law which by reason of their general or public importance, or for any other reason, ought to be submitted to this Court for decision. It is well established that this threshold entails demonstrating that there is a question of law capable of serious argument in a case involving a public or private interest which is sufficient in its importance to outweigh the cost and delay to the parties of permitting another appeal.

Counsel for MWS submitted that the public interest extended beyond the particular circumstances of the case. It was argued that if leave to appeal was granted, the Court of Appeal’s judgment would help inform the Hearings Panel in making recommendations to the Auckland Council regarding the proposed Auckland Unitary Plan (“PAUP”). Counsel for MWS also submitted that judgment in the proceeding would have implications across the Auckland region, particularly for areas mapped as ONLs under the PAUP as well as for other regions in mapping ONLs.

Andrews J accepted that in relation to each of the proposed appeal questions, the question was capable of serious argument. It was also accepted that the case involved public and private interests which were sufficient in their importance to outweigh the cost of permitting another appeal. Accordingly, Andrews J granted MWS leave to appeal on each of the proposed appeal questions.
Background

This Court of Appeal decision related to two applications by Te Whare O Te Kaitiaki Ngahere ("Applicant"). The Applicant is an incorporated society opposed to the use of 1080 poison for pest control.

The Applicant was involved in earlier litigation relating to the consents issued for poison use:

- In July 2012, the Applicant brought proceedings in the Environment Court for declarations under the RMA relating to an alleged breach of the conditions of 12 resource consents granted by the Respondent.

- In June 2013, Environment Judge Borthwick ordered the Applicant to pay increased costs of $10,000 to the Respondent.

- In March 2014, Environment Judge Kirkpatrick made an order that the Applicant provide security for costs in the total sum of $25,000.

- In August 2014, the Applicant appealed to the High Court against the costs decision and the security decision (both of which were dismissed).

In December 2014, the Applicant applied to the Court of Appeal for special leave under s 308 of the RMA. The Court considered the following matters:

- Whether the Court was correct in exercising its discretion to order security for costs?

- Whether the Court had discretion to award increased costs?

- Whether the application for an extension of time to file the application for special leave should be allowed?

Decision

**Whether the Environment Court was correct in exercising its discretion to order security for costs?**

The Court of Appeal acknowledged that the Environment Court has a discretion to order security for costs under r 4.20 of the District Courts Rules 2009 if there is a reason to believe that a plaintiff will be unable to pay the costs of the defendant if the plaintiff is unsuccessful. Here, there was no dispute that the Applicant would be unable to pay the costs of the Respondent if the application were unsuccessful. The Court was satisfied that Judge Kirkpatrick (in the Environment Court) correctly recognised the relevant principles and was entitled to exercise his discretion to order security for costs.

The question of law raised by the Applicant related to whether the public interest in upholding the RMA’s safeguards against misuse of extremely hazardous poison outweighed the pecuniary security-of-costs interests of government controlled poisoning operators. It was not considered an arguable question of law and the Court noted it was made in the exercise of Judge Kirkpatrick’s discretion when making his decision.

**Whether the Environment Court had discretion to award increased costs?**

The Court took a similar approach in the costs decision as the security decision, acknowledging that the costs decision was discretionary in nature. The Court of Appeal found that there was a proper basis for Judge Borthwick to exercise her discretion to award increased costs. Again, there was no arguable question of law.

**Whether the application for an extension of time to file the application for special leave should be allowed?**

The application for extension of time for leave to appeal was granted on the basis that the delay in filing the application was brief, the delay in serving the Respondents was not unduly long, and there had been no resulting prejudice to the Respondents.

Result

In relation to granting leave, the application for an extension of time for leave to appeal was granted but the application for special leave to appeal under s 308 of the RMA was subsequently dismissed. The Applicant was made to pay costs to the Respondents for a standard application Band A with usual disbursements.
Background

In this decision of Collins J, the High Court dealt with a security for costs application from Kaikoura View Ltd (“Kaikoura”) against Friends of Houghton Valley Inc (“Friends of Houghton Valley”).

Friends of Houghton Valley sought a judicial review of a decision by the Wellington City Council (“Council”) to grant resource consent for a 13-property development in Houghton Valley, Wellington to Kaikoura.

Position of the parties

Friends of Houghton Valley pleaded four grounds for judicial review, alleging that the Council failed:

• to have regard to the fact that the land immediately above the site is a scenic reserve, and to consider the effects of Kaikoura’s proposed development on the environment;

• to address the submissions made to it by persons who are now members of Friends of Houghton Valley;

• to provide adequate reasons for its decision; and

• to obtain and consider the hydraulic effects of increased stormwater flow from the proposed development upon contaminated ground water which currently comes from a former landfill in Houghton Valley.

Respondents’ position

These grounds were denied by Kaikoura and the Council, who say:

• the site was already zoned for residential use and the Council made no error when it granted consent;

• all relevant matters raised by those who had concerns were considered by the Council;

• the Council’s decision to grant consent is a detailed written decision; and

• the site is not part of the former landfill and ground

Grounds for security for costs application

Kaikoura then sought $24,278 as security for costs on the following grounds:

• Friends of Houghton Valley was established as a vehicle for the proceeding in order to circumvent the possibility of orders for costs being made against its members if they were to personally initiate the judicial review and lose.

• Friends of Houghton Valley would not be able to pay if judicial review fails.

• There are no merits to the judicial review application.

• No prejudice would be suffered by Friends of Houghton Valley if a security for costs order is made. Conversely, Kaikoura would suffer prejudice and loss if security for costs is not ordered.

High Court decision

The ability to order security for costs is governed by r 5.45 of the High Court Rules. The High Court noted that r 5.45 is effectively codified by s 17(1) of the Incorporated Societies Act 1908 which provided:

17 Security for costs where society is plaintiff

(1) Where a society is the plaintiff in any action or other legal proceeding, and there appears by any credible testimony to be reason to believe that if the defendant is successful in his defence the assets of the society will be insufficient to pay his costs, any Court or Judge having jurisdiction in the matter may require sufficient security to be given for those costs, and may stay all proceedings until that security is given.

Collins J referred to the ruling of William Young J in Reekie v Attorney-General [2014] NZSC 63, [2014] 1 NZLR 737 which held:

[2] ... The jurisdiction to require security poses something of a conundrum for the courts. The poorer the plaintiff, the more exposed the defendant is as to costs and the greater the apparent justification for
security. But, as well, the poorer the plaintiff, the less likely it is that security will be able to be provided and thus the greater the risk of a worthy claim being stifled.

Collins J emphasised this point, also referring to the principle of *Cowell v Taylor* (1885) 31 Ch D 34 at 38, which stated:

The general rule is that poverty is no bar to a litigant, that from time immemorial, has been the rule at common law, and also, I believe, in equity. There is an exception in the case of appeals, but there the appellant has had the benefit of a decision by one of Her Majesty’s Courts, and so an insolvent party is not excluded from the Courts but only prevented, if he cannot find security, from dragging his opponent from one Court to another.

From these established legal principles, Collins J outlined the following factors to be taken into account when making his decision:

- this was not a case in which an order for security for costs would stifle an obviously meritorious claim;
- while Friends of Houghton Valley would face some hardship in paying security for costs, Kaikoura was also facing financial difficulty;
- there is an element of public interest, which is why Collins J set a cost lower than sought by Kaikoura;
- delays in Friends of Houghton Valley’s application for judicial review did not favour either side of the equation; and
- there was no undertaking to pay defendants’ costs, which weighed in favour of the application.

His Honour ruled that Friends of Houghton Valley lacked the ability to pay costs because:

- Friends of Houghton Valley was established after the Council’s decision;
- there was evidence showing it was established for the purposes of protecting individuals from costs; and
- Friends of Houghton Valley only had $1,971.13 in its account (from membership fees and donations).

The Court held that the overall interests of justice were best served by an order for Friends of Houghton Valley to pay $10,000, to provide a level of security for costs which should be attainable, without stifling any chance of it pursuing its claim, while also providing a level of comfort to Kaikoura.

**Comment**

The decision of Collins J shows that establishing an incorporated society as a vehicle for litigation may not be looked upon favourably in a security for costs application. However, the emphasis placed on public interest in this application meant a compromise was able to be reached as to the amount.
Mātauranga Māori

"The bird that feeds on the miro berry reigns in the forest ...
The bird that feeds on knowledge has access to the world."

The Resource Management Law Association’s Annual Conference will be held in Tauranga (Tauranga Moana) for the first time, between 24–26 September 2015. We have secured some fantastic international and national presenters, including Professor Gerald Torres (of Cornell University), Justices Williams and Whata, the Hon Nick Smith and the Hon Chris Finlayson. The theme of the Conference is “Mātauranga Māori”.

Mātauranga Māori relates to knowledge, comprehension or understanding of everything that is tangible or intangible. The phrase is also associated with wisdom. Today, Mātauranga Māori is often used to describe current, historic, local and traditional knowledge perspectives (including the transfer and storage of knowledge), as well as the aspirations and issues of Tāngata Whenua.

In light of the rich cultural heritage of the Bay of Plenty and the abundance of natural resources in the Region, the 2015 Conference will examine how resource management planning and decision-making is attempting to incorporate cultural values, traditional knowledge, and the aspirations of Tāngata Whenua in the context of a rapidly developing region. The Conference will also explore the post-Treaty settlement period where Tāngata Whenua find themselves in seemingly contrasting roles of both kaitiaki and resource / land developers.

In particular, the Conference will evaluate whether the Resource Management Act 1991 and other environmental legislation in New Zealand provide an appropriate framework for the consideration and objective evaluation of the knowledge, values (particularly metaphysical elements) and interests of Tāngata Whenua in managing the use, development and protection of natural and physical resources.

Decisions regarding the management of natural resources in New Zealand have historically been informed by "western” knowledge, science and values — with limited regard for traditional knowledge and assessment perspectives. Often the identification, acknowledgement and implications of cultural values and approaches in resource management decision-making are a lightning rod for media headlines, misinformation and strongly-held opposed views within the community. In light of this, the Conference will examine how local and regional authorities, corporate entities, developers and practitioners can give appropriate recognition to cultural values and interests in the management, protection and allocation of natural and physical resources — and the challenges associated with weighing competing interests into resource management decisionmaking.

Speakers and luminaries for the Conference will be a mix of local and international experts who will offer their insights into a number of topics based on their experience in working on Indigenous matters. The Conference will also include a range of field-trip options that will highlight the rich cultural heritage and natural beauty of the Bay of Plenty Region to Conference attendees.

Conference Registration open now — see <www.rmla.org.nz/annual-conference>.
Ko te manu e kai ana i te miro, nōna te ngahere.
Ko te manu e kai ana i te mātauranga, nōna te ao.
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; i.e. 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 (by invitation from the Editorial Committee).

Articles should be in accordance with the *New Zealand Law Style Guide* (2nd ed) by Geoff McLay, Christopher Murray and Jonathan Orpin, the Law Foundation New Zealand. Note: All references are to be included in the body of the text and footnotes, endnotes and bibliographies are discouraged.

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

All enquiries to Karol Helmink, Executive Officer, tel: 027 272 3960, email: karol.helmink@rmla.org.nz

Resource Management Journal ISSN No. 1175-1444 (print) ISSN No. 1178-5462 (online)

Resource Management Journal is a refereed journal. The Journal may be cited as August 2015 RMJ.

Resource Management Journal is produced by Thomson Reuters three times a year for the Resource Management Law Association of New Zealand Inc.

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