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The fate of existing mining privileges:

The Crown Minerals Amendment Bill 2001

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The Commerce Committee reported back to Parliament on the Crown Minerals Amendment Bill 2001 ("the Bill") just prior to Christmas last year. It recommended that the Bill be passed, but with some important changes.

The Bill proposes a number of amendments to the Crown Minerals Act 1991 ("CMA91"), several of which are expected "to improve the management and allocation of rights to Crown owned minerals".[1] More substantively, the Bill addresses "issues that have arisen because of a recent High Court decision *[Glenharrow Holdings Limited v The Attorney-General [2001] 1 NZLR 578]* concerning the transition from the previous regime under the Mining Act 1971 and the Coal Mines Act 1979 to the regime under the Crown Minerals Act 1991".[2]

The motivation for the proposed amendments arises at two different levels. At one level, the Crown is concerned that the previous regime under the Mining Act 1971 is not continued by savings in the transitional provisions of Part II of the CMA91. The current Bill, as introduced, seeks to extinguish any such transitional rights to renew existing licences granted under the previous regime, or to vary conditions of such licences where that would extend the duration of the licence.

At another level, the issues are complicated by the litigation that prompted the Bill. Glenharrow

cont'd on p.2

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1 Explanatory Note, *Crown Minerals Amendment Bill 2001* Wellington, Government Printer, p1.

2 Ibid.

inside this issue

Holdings Ltd ("Glenharrow") is seeking to renew, or extend the term of, a licence issued under the previous regime to mine (amongst other things) bowenite and serpentine in the Wainihinihi area near Kumara on the West Coast of the South Island - Ngai Tahu territory. Both of these minerals fall within the definition of 'pounamu'[3] under the Ngai Tahu (Pounamu Vesting) Act 1997 ("the Pounamu Vesting Act"). By virtue of that Act, all pounamu existing in its natural state in Ngai Tahu's tribal area became the property of Te Runanga o Ngai Tahu, the tribal entity representing all Ngai Tahu, in October 1997 subject to savings of certain existing rights. It is these savings under the Pounamu Vesting Act, coupled with the transitional provisions of Part II of the Crown Minerals Act 1991, that are the root of the current conflict between Glenharrow, the Crown and Ngai Tahu. At this second level, the Crown wishes to extinguish any existing rights to renew or extend licences to mine pounamu in order to maintain the integrity of the return of pounamu to Ngai Tahu as part of the Ngai Tahu settlement. In this sense, the honour of the Crown is at stake.

This article examines the issues surrounding the Glenharrow litigation and the Government's response to this litigation, focussing on the current Bill.

The story so far...

The return of pounamu to Ngai Tahu was a significant part of the settlement of Ngai Tahu's historical grievances against the Crown for breaches of the Treaty of Waitangi.[4] In making reparation for its historical wrongs, the Crown was very concerned not to create any new injustices in the settlement process. In this regard, the deal struck between Ngai Tahu and the Crown for the return of pounamu was something of a compromise: not *all* pounamu was returned to Ngai Tahu.[5] Specifically, it was agreed that any existing mining licences would continue until expiry as if pounamu remained a Crown-owned mineral. This was achieved by section 4(1) of the Pounamu Vesting Act:

> Nothing in section 3 [transfer of ownership of Crown-owned pounamu to Ngai Tahu] affects an existing privilege [under s106 of the Crown Minerals Act 1991] or the rights or obligations of any holder of an existing privilege and Part II of the CMA91 continues to apply in relation to that privilege as if this Act had not been passed.[6]

The royalties collected by the Crown under any existing mining licences are to be paid to Te Runanga o Ngai Tahu (s4(2)).

The Crown was very concerned not to create any new injustices in the settlement process

As I have discussed in a previous issue of this journal,[7] at the time the Pounamu Vesting Act was passed there were seven pounamu licences in existence, four of which were owned by non-Ngai Tahu operators. Glenharrow purchased one of these existing pounamu licences. The licence had been granted under the Mining Act 1971 subject to a condition that the term of the licence was for ten years rather than the maximum statutory period of 42 years.[8] Glenharrow sought to have the licence either renewed under s77(2) of the Mining Act 1971, or the ten year condition varied to 42 years under s103D of that Act, arguing that the transitional provisions of the CMA91 (Part II) and the saving provision of the Pounamu Vesting Act (s4(1)) saved these existing privileges.

3 Also known as greenstone or New Zealand jade.
4 See M. K. Gibbs (2002) Are New Zealand Treaty of Waitangi Settlements Achieving Justice? The Ngai Tahu Settlement and the Return of Pounamu (Greenstone), unpublished PhD thesis, University of Otago.
5 For a discussion of the limits of the return see M. K. Gibbs (2000) The Ngai Tahu (Pounamu Vesting) Act 1997: Legislation Note *New Zealand Journal of Environmental Law 4*, pp257–269.
6 The Crown Minerals Act 1991, s106 defines "existing privilege" as including every "Mining privilege granted under Part IV of the Mining Act 1971".
7 M. K. Gibbs (2002): "Justice, Treaty Settlements and the Return of Pounamu (Greenstone) to Ngai Tahu" *Resource Management Journal* Vol X, Issue 2, pp9-13.
8 It was the practice of the Ministry to issue licences for a maximum of ten years on the understanding that licence holders would have priority rights to renew under s77(2).

The Crown believed that rights under ss77(2) and 103D of the Mining Act 1971 were not saved, and that Glenharrow, along with other licence holders, had no rights to renew their licences or to extend them by varying any conditions. It gave advice to this effect to mining licence holders and to Ngai Tahu during the negotiations surrounding the return of pounamu to Ngai Tahu and, for example, expressed this view in submissions before the Maori Affairs Committee reviewing the Pounamu Vesting legislation. In line with this view, Glenharrow's first application to the Minister for Energy to have either its licence renewed or the term of the existing licence extended was refused. Relying on the advice of the Crown, several pounamu licence holders allowed their licences to expire. Ngai Tahu, now the owner of most (if not all) pounamu in its tribal area, patiently awaited the expiry of the four licences outside its control, no doubt assured by the Crown's advice that no rights to renew or extend the existing licences remained. It expected to have all pounamu in its tribal area within its control by mid-November 2000. However, Glenharrow saw it differently, and indeed correctly according to Heron ACJ in *Glenharrow Holdings Limited v The Attorney-General* [2001] 1 NZLR 578.

The Glenharrow litigation

The outstanding question before the High Court in the first Glenharrow case was whether the right to renew a licence, or vary the term of an existing licence, issued under the previous regime is a right preserved by the CMA91 and the Pounamu Vesting Act.[9]

In October 2000, Heron ACJ held that the rights of an existing licence holder to have a new licence issued in priority under s77(2) of the Mining Act 1971, and to vary a condition of that licence under s103D of that Act, are preserved by the CMA91 (Part II) and the Pounamu Vesting Act (s4(1)).[10] His Honour noted that the right under s77(2) remained subject to the normal application and approval process, where the Minister retained a discretion to refuse to grant any new licence. He commented that the return of pounamu to Ngai Tahu might be a factor in declining to grant a new licence.

Subsequently, in reliance on Heron ACJ's findings, Glenharrow applied again to the Minister for Energy to have its existing licence either renewed or extended to the full 42-year period. It seems that the Minister of Energy was not in any hurry to process Glenharrow's application before its expiry and suggested that Glenharrow instead apply for a new licence, which would be conditional on Ngai Tahu's approval. Glenharrow persisted, claiming that the Minister had the requisite powers to renew the licence or to extend its term by varying the condition, regardless of Ngai Tahu's wishes. Frustrated by the Minister's failure to process its application, Glenharrow took further action in the High Court just days prior to the expiry of its licence seeking various declarations and interim orders to continue the licence in force until further order of the court.[11]

The Crown's response

In response to the first Glenharrow decision, the Government introduced the Crown Minerals Amendment Bill in late November 2001. As noted above, the Crown wished to remove all debate on the matter by extinguishing any rights to renew an existing mining licence (s77), or to vary a condition of an existing licence (s103D) where that would extend the duration of the licence, under the Mining Act 1971. The Bill also closes off corresponding 'loopholes' in the Coal Mines Act 1979 (also repealed by the Crown Minerals Act 1991). In both cases, no compensation is payable to holders of existing mining licence holders whose rights are extinguished by these amendments. The Bill was referred to the Commerce Committee on 18 December 2001.

During this period, the Ministry of Economic Development received several applications for new licences and variations to the terms of existing licences granted under the old regime. While Glenharrow's was

9 *Glenharrow Holdings Limited v The Attorney-General* [2001] 1 NZLR 578.
10 Part II of the CMA91 clearly provides that any rights conferred under Part IV of the Mining Act 1971 (under which the licence was issued) continue as if the CMA91 had not been enacted (s107), except as specified in s111 which does not list ss77(2) or 103D. Thus, the rights of renewal of mining licences under s77(2), and variation of a condition under s103D, of the Mining Act are preserved.
11 The latter was granted continuing the licence until further orders of the court. For an account of the events described in this paragraph see *Glenharrow Holdings Limited v The Attorney-General & Te Runanga o Ngai Tahu* unreported, Chisholm J, HC Wellington CP242/00.

the only licence relating to pounamu still in force, the transitional savings mean there are potentially many licences to mine all sorts of minerals (including coal under the Coal Mines Act) that might be renewed or extended, thereby prolonging life of the previous mining regime, perhaps indefinitely.

The fate of existing mining privileges will be determined by the courts in the continuing Glenharrow litigation

The Crown was, by this time, feeling the heat of the situation. Previous holders of mining licences who had allowed their licences to elapse were aggrieved. They had relied on the Crown's advice that, according to the first Glenharrow decision, was incorrect at law. Ngai Tahu was also aggrieved. The clear understanding between the tribe and the Crown was that by November 2000 Ngai Tahu would be in control of all pounamu in its tribal area.[12] The outstanding Glenharrow licence meant that this was not the case. By this time Te Runanga o Ngai Tahu had joined the second Glenharrow proceedings in the High Court arguing that the first Glenharrow case had been decided incorrectly, at least in part because Ngai Tahu's views, as owner of pounamu, had not been taken into account. And the Crown was also well aware of the wider issue of the integrity of the mineral regime under the CMA91.

In response to the developing situation, on 19 September 2002 the Associate Minister of Energy, Hon Harry Duynhoven, announced:

> ... anyone who applies for a new licence or a variation to the term of an existing licence [under the old regime] after 5.00pm today will no longer be covered by the Acts that were repealed in 1991.[13]

The Government would introduce changes to the Crown Minerals Amendment Bill to this effect.

The Glenharrow litigation: 'take 2'

Shortly after this announcement, the second of the Glenharrow decisions was released.[14] In October 2002 Justice Chisholm of the High Court held that the statutory scheme of the CMA91 and the Pounamu Vesting Act, particularly the transitional provisions, did not allow the Minister of Energy to issue a new licence under s77(2) of the Mining Act 1971. Thus, existing licence holders, including Glenharrow, cannot renew existing licences. However, the transitional and saving provisions do allow the Minister to vary the conditions of an existing licence, as this right (under s103D of the Mining Act 1971) is expressly saved by Part II of the CMA91 and the Pounamu Vesting Act. Chisholm J held that the condition of the Glenharrow licence limiting the term of the licence to ten years may be varied by extending it to the full statutory period of 42 years. Chisholm J also held that the saving provisions meant that the situation had to be viewed as if the Pounamu Vesting and Crown Minerals Acts did not apply, and therefore that the Crown still owned pounamu. As a result, while it was open for the Crown to consult with Ngai Tahu, the Crown was not obliged to do so (because there is no Treaty clause in the Mining Act 1971) and Ngai Tahu had no right of veto over the Minister's decision. Both Glenharrow and Te Runanga o Ngai Tahu have appealed this decision. The Court of Appeal is scheduled to hear the matter later this month (March 2003).

The Commerce Committee report

Amid all this, the Commerce Committee reviewed the Crown Minerals Amendment Bill, recommending that it be passed

12 Although note the exceptions discussed in M. K. Gibbs (2000) The Ngai Tahu (Pounamu Vesting) Act 1997: Legislation Note *New Zealand Journal of Environmental Law* 4, pp257–269.
13 Duynhoven, H. (2002) Crown Minerals Amendment Bill, Government Press Release, 19/9/2002.
14 *Glenharrow Holdings Limited v The Attorney-General & Te Runanga o Ngai Tahu* unreported, Chisholm J, HC Wellington CP242/00.

subject to a number of changes in direct response to the events described above.

First, the Committee has recommended that the Bill be amended to reflect Hon Harry Duynhoven's 19 September 2002 deadline. In this respect the Bill, if passed in this form, will have retrospective effect (back to the deadline) in extinguishing the rights of existing licence holders to renew or vary licences under s77(2) and 103D of the Mining Act 1971. For applications made prior to 5pm 19 September 2002, the fate of existing mining privileges will be determined by the courts in the continuing Glenharrow litigation.

Second, the Committee has recommended that the final judgement in the second Glenharrow case be preserved and that the decision be applied to any application submitted by Glenharrow prior to the 19 September cut off. This effectively preserves Glenharrow's current application (made to the Minister for Energy subsequent to Heron ACJ's decision). The fate of any existing pounamu mining privileges under this licence will, again, be determined by the courts.

Opposition to the Bill

National and ACT members of the Commerce Committee opposed the Bill on the basis that it "reacts to a particular situation without consideration of what [the Glenharrow] court decision could mean for the entire mining industry".[15] They argued that while the Glenharrow litigation has been preserved, together with the rights of those who applied to renew or vary existing licences before the 19 September announcement, "there are many licence holders who have allowed their licences to lapse over the past 10 or more years because they accepted the advice of Crown Minerals".[16] This statement is supported by my own research and interviews with members of the pounamu mining industry.

The implication is that this situation is unjust. Why should some miners lose their rights because they relied on the Crown's advice while others (whether through good fortune or good management) are able to exercise them? But from Ngai Tahu's perspective, why should existing rights to mine pounamu continue as if pounamu remains a Crown-owned mineral when pounamu was wrongfully taken by the Crown in the first place, and returned to Ngai Tahu as a symbol of the Crown's good faith in the Ngai Tahu settlement.[17] Further, the Associate Minister for Energy's 19 September deadline raises other issues, not least of which is whether the announcement amounts to legislation by 'Ministerial decree'.[18]

The Bill's likely passage through the House

It seems that the Crown, in trying to please everyone, has pleased nobody. If the Bill is passed, as is likely, there will be winners and losers. Just whom will end up a 'winner' or a 'loser' will depend on the exact form of the Bill passed and, in particular, whether the Commerce Committee's recommendations preserving Glenharrow's litigation and implementing the 19 September deadline, are accepted or rejected. What is certain is that the passage of the Bill will be accompanied by vigorous debate from affected parties. This will likely include Ngai Tahu reminding the Crown that pounamu was returned to Ngai Tahu as a symbol of justice in the settlement of Ngai Tahu's claims. The Crown needs to prepare itself: the Bill's passage through the house will be a rocky one.

15 Commerce Committee (2002) *Commentary on the on the Crown Minerals Amendment Bill 2001 as Reported from the Commerce Committee* Wellington, Government Printer, p9. The other objections relate to wider issues of mining and landowner access, particularly in relation to the Conservation Estate.
16 Ibid, p8.
17 See M. K. Gibbs (2002) Are New Zealand Treaty of Waitangi Settlements Achieving Justice? The Ngai Tahu Settlement and the Return of Pounamu (Greenstone), unpublished PhD thesis, University of Otago, chapter 4.
18 See for example Beryman, W. (2002) Minister usurps power of Parliament and courts, *The Independent Business Weekly* 9/10/2002, p8.

EDITORIAL

To read aloud, or not, that is the question - *Jim Milne, Barrister*

His Honour Judge Jackson concluded his thought-provoking article on *Methods of Giving Evidence in the Environment Court* in the July 2002 Journal by looking forward to hearing other reasoned views on this issue. Perhaps the total silence that has followed means that you are all completely convinced by the merits of His Honour's arguments, or are you all still in a state of shock?

Until a few years ago I had a very strong preference that the witnesses whom I was calling should read their written evidence aloud to the Court. Like most advocates, my reasoning was that the bearing and manner of presentation of the witness was an important element in assessing the weight to be given to the evidence. But is that reasoning sound when a witness is being asked to read a lengthy written brief that has already been distributed in advance?

Last year I was involved in a six-week hearing of references relating to the provision for retailing in the proposed Hamilton District Plan which involved 10 parties and a multitude of witnesses. Many of the briefs of evidence in chief were lengthy, up to 151 pages, and a number of witnesses also had rebuttal and/or supplementary briefs. As a rule of thumb, it takes three minutes to read aloud an A4 page of evidence. At that rate, a 151 page brief of evidence would take approximately 7 hours. Allowing for breaks, the Court typically sits for 6 hours in one day.

In considering whether it is reasonable for any witness to have to read material aloud for this length of time, it is worth noting that the longest of William Shakespeare's plays is *Hamlet* at 4,042 lines. A full performance of the play takes in the order of four hours, which can test the stamina of even the most devoted theatre-goer. Shakespeare is generally regarded as the world's greatest playwright and had a pretty good idea as to what was required to keep the attention of his audience. He did not make *Hamlet* a soliloquy (despite the reduced production costs that would no doubt have entailed!) but instead employed seven major and many minor characters to share the dramatic load. The major plot addresses matters central to being human – the conflict between courage and fear, duty and morality, right and wrong – loftier subject-matter than is to be found in the typical RMA evidence. Shakespeare also sustained audience interest by having sub-plots – in giving evidence, digression is to be avoided. He wrote in blank verse, a technique I have yet to see employed in any policy statement or plan.

RMA briefs should be read in advance and the witness examined and cross-examined only

An RMA brief of evidence cannot employ any of Shakespeare's dramatic techniques to hold the interest of the listener but may be considerably longer than the longest of his works. I suggest that not even the late Sir Laurence Olivier could have read a lengthy RMA brief aloud in an attention-holding manner and that it is unrealistic to expect any expert witness to do so. RMA briefs should be read in advance and the witness examined and cross-examined only. That practice was adopted for the Hamilton references for all but one witness with a resultant time saving of two to three weeks and cost saving to the parties of $300,000 to $450,000.

I invite your responses to His Honour's article which demands informed debate.

Jim Milne

President

Clean Streams Waikato

The non-regulatory side of the RMA in action on the ground

Blair Dickie, Programme Manager: Policy, Environment Waikato and Alan Campbell, Project Manager: Clean Streams, Environment Waikato.

The RMLA Award for 2002 was won by Environment Waikato's Clean Streams project for its sound policy underpinning, practical guides to implementation, costings and case studies of successful examples. This paper provides the opportunity for readers to find out more about the project and the use of a non-regulatory approach to achieve RMA policy objectives.

The Clean Streams project encourages and supports farmer efforts to reduce the impacts of farming on waterways. The project runs for ten years and commits up to $10 million from the earnings of an investment fund to provide advice and financial support of up to 35% of the cost of fencing and planting to farmers who want to exclude stock from waterways. The project sets targets of the participation of 2,000 farmers and the fencing and planting of 4,000kms of waterways.

On the surface, the programme could be viewed as a stand-alone funding mechanism that provides financial assistance to landowners for the fencing and planting of riparian margins. In reality it is part of an integrated policy package linked directly to achieving objectives in the Regional Policy Statement. It achieves this through methods in the proposed Regional Plan, supported by the required analysis and justifications, and is translated into the organisation's Funding Strategy and Annual Plan under the Local Government Act.

This paper traces the process within the policy context operating at the time, describes the project and then discuses its implementation and uptake.

BACKGROUND

Under the Water and Soil Conservation Act 1967 and subsequently under the RMA, the quality of point source discharges to waterways has been steadily improving within the Waikato Region. This, coupled with an intensification of land use, has meant that non-point source pollution is gaining in importance and is now the dominant cause of water quality problems in the Region[1].

Diffuse sources of contamination are, however, much more difficult to identify, track and remedy than point discharges. A good understanding of land-water interactions, combined with an integrated catchment-wide approach, is essential for the management and control of these sources of contaminants. In the long term this will require an emphasis on sustainable land use. In the short term, actions can be initiated that reduce the effects on water quality by concentrating on addressing the effect, rather than the cause. The current emphasis on riparian management is one example of this approach.

1 Environment Waikato State of the Environment Report 1998.

POLICY APPROACH

The wide mix of policy tools available under the RMA influences the actions of people and their use of resources, rather than the direct manipulation of the natural and physical resources themselves. These tools can be grouped into three classes[2]; incentives (carrots), enforceable regulatory mechanisms (sticks) and knowledge-based information mechanisms (sermons). Direct manipulation of the environment is commonly left to other legislation like the Biosecurity Act 1992 or the residual parts of the Soil Conservation and Rivers Control Act 1941. In the case of the former, plant and animal pest species are killed, and with the latter, river systems are modified for flood protection.

Mechanisms that will incentivise and guide the behaviour of resource users will be preferred

The issue of land use impacts to rural waterways was first addressed during the preparation of the RPS in the early 1990s. At that time, the RMA was relatively new and the policy-operating environment reflected a rules-averse public sentiment. The final mix of interventions was constrained by these factors, namely the focus would be on the effects of unsustainable land use, rather than the cause and that a non-regulatory emphasis on behavioural change would be required.

Environment Waikato's approach, outlined in section 1.3.3 of its RPS is to recognise that where resources are in good condition and resource use is within the capability of the environment to assimilate any adverse effects, the high quality condition of the resource will be maintained. This may be through the use of a regulatory regime such as a classification of waterways. In contrast, where resource use is currently unsustainable, mechanisms that will incentivise and guide the behaviour of resource users will be preferred. Often a mixture of mutually supporting or complementary methods will be identified as part of the s32 analysis.

The successful use of education and incentives to change attitudes and more importantly behaviours, is over time, predicted to shift actual practices and what is seen as 'normal', not just by the farming sector but also by the general public. At which time, Environment Waikato can expect to come under some pressure by those that have made the change, to review its RMA policy documents and support the practices that have become mainstream with enforcement actions.

Regional Policy Statement

The relevant policy framework that supports the *Clean Streams* project originates in section 3.4.5 of the RPS, Water Quality, and specifically Policy Three; methods 1, 3 & 6 which are directed towards achieving the objective of a *Net improvement of water quality across the region.* Complementary policies and methods throughout the RPS, (e.g. 3.3.11 River and Lakebed Management, and 3.4.9, Public Access), support this section.

> Policy 3
> *Ensure that the adverse effects of land use on water quality and aquatic habitats are avoided, remedied, or mitigated.*
> *Relevant Implementation Methods:*
> *1 Prepare and implement, in conjunction with interested and affected parties, a prioritised riparian management and implementation strategy for the Region.*
>
> *3 Through regional and district plans, advocacy and education, encourage the protection of existing riparian vegetation and its further extension along the margins and beds of water bodies.*
>
> *6 Encourage the protection and planting of riparian margins by offering information, technical*

2 Carrots, Sticks & Sermons, Policy Instruments and Their Evaluation. Marie-Louise Bemelmans-Videc, Ray C.Rist & Evert Vedung Eds Transaction Publishers 1998.

advice and assistance, preparing riparian management plans in conjunction with landowners and other interested parties, and by establishing joint venture programmes for specific catchments.

Policy Three recognises that marginal and riparian vegetation play a significant role in protecting water quality and enhancing aquatic ecosystems. Destabilisation of the beds of rivers and lakes can also occur as a result of removal of bank vegetation. In addition, marginal and riparian vegetation can beautify the landscape and provide important wildlife corridors. The restoration of marginal/riparian vegetation at suitable locations improves water quality; reduces bank erosion and run-off from land, thereby lowering the amount of sediments and nutrients entering waterways.

The methods of implementing Policy Three contain a mix of education, advocacy and advice to both local authorities and landowners to establish and maintain suitable riparian management practices. Rules, conditions and criteria may also be established through regional and district plans and conditions attached to resource consents to maintain and enhance riparian margins.

Proposed Waikato Regional Plan

The proposed Waikato Regional Plan (a single plan covering all regional council functions in the Waikato Region above mean high water springs) treats the management of non-point source discharges to the environment in an integrated manner with four different sections containing 22 methods. Thirteen are non regulatory and the rest are predominantly permitted activities, and cover related issues such as stock access to waterways, fertiliser application etc.

The water module advances the RPS policy direction and contains relevant methods that led to the development of the *Clean Streams* project. Specifically, section 3.9.4 builds upon the methods contained in Policy Three of the RPS and as required under s32(1)(a)(ii) RMA, considers and identifies methods that use other legislation to achieve RMA objectives. The relevant implementation method is:

3.9.4.5 Streamside Enhancement Fund

Environment Waikato will make available a fixed contestable fund, reviewed annually, to support and facilitate streamside enhancement. Investigations will be undertaken to identify areas in the Region that are most at risk with respect to adverse effects on water quality, or will benefit most from streamside enhancement. The results of this will be utilised when considering applications to the fund.

Strategic Plan

The third and final piece of the policy framework underpinning the project came in 2001 with the review of the Strategic Plan under the Local Government Act 1974 and the preparation of the Ten-year Financial Strategy. This provided the funding and the timing for the ten-year life of the project and in addition to the consultation already undertaken, allowed public scrutiny of the proposal as part of the consultation required by the Local Government Act. This also allowed for the inclusion of any changes in public sentiment.

THE PROJECT

The *Clean Streams* project began as a 'Riparian Protection Fund' and was included in the 2001 – 2011 Strategic Plan. It was clearly envisaged as an incentives project as foreshadowed in the RPS some five years earlier. However, in development it quickly became clear that its success would depend on how it was delivered. This was reflected in the final objective, which is; *The Clean Streams project will establish exclusion of livestock as a standard farming practice in the Waikato region over a ten year period.*

It is not focused on the incentives or the specific work they might encourage, but on farming culture. In achieving this objective it is expected that the project will meet a number of targets, including:

- The extension of an additional 4,000 km of water body margin protected with fencing to exclude stock and appropriate planting depending upon circumstances;
- The participation of 2,000

farmers with waterways on their land;

- Key industry partners actively promoting the protection water body margins;
- Business and other agencies actively supporting farmer initiatives to protect water body margins;
- Protection of water body margins continues after the completion of the *Clean Streams* Project."

To achieve this, a package of actions was designed to achieve the goals of making stream protection a standard farming practice, minimising administrative costs, and providing for accurate reporting and accountability. The components of the project are:

- **Publicity and promotion**, to gain the attention of farmers in priority zones and to generate a positive attitude to stream protection. The central message is that stream protection is good for farm management and it is what good farmers do in this regard. The supporting message is that Environment Waikato can help with information, advice and money. A key tactic in delivery of the message is to work with other agencies or businesses that farmers listen to so that they are hearing the same message from a range of sources.
- **Information packages**, to help to overcome some of the key obstacles to action. The information outlines the benefits to farmers and the environment, and the techniques that work best in various situations.
- **Advisory services**, provided by Land Management Officers to meet the very clear farmer demand for human contact in resolving the specific issues of a particular farm setting.
- **Funding**, of up to 35% of the costs of stream protection (fencing and planting materials and labour).
- **Administration**, to handle the processes of dealing with enquiries and applications for assistance, and of record keeping for the purposes of accountability.
- **Monitoring and evaluation**, to enable continuous improvement and reporting on effectiveness.

To generate requests for assistance, the project promotes the benefits of stream protection to farmers in

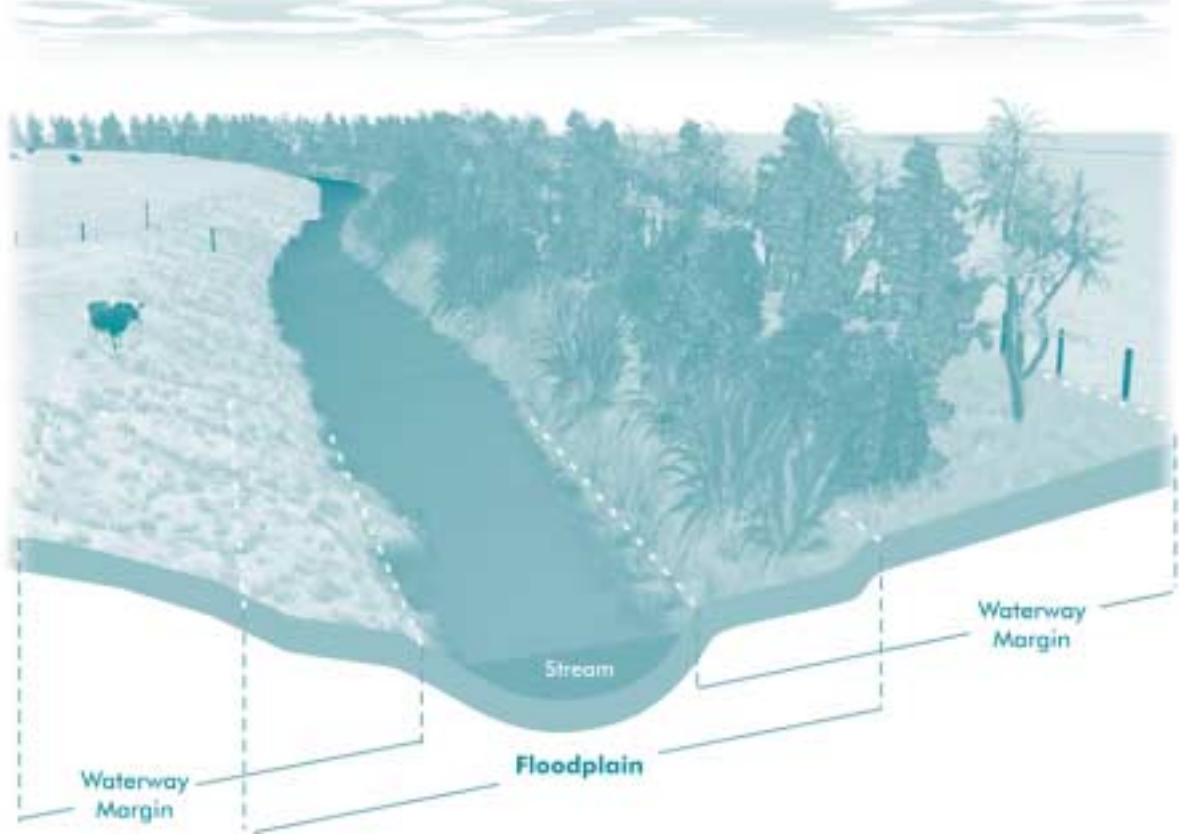

Figure 1 Stylised before (bank on left of picture) and after (bank at right of picture) views of *Clean Streams* programme activities.

priority zones and the availability of financial and technical assistance from Environment Waikato. Staff then respond by sending an information pack that includes an application form. Each application generates a visit to the farm by a Land Management Officer to inspect the site, confirm that it fits the criteria, and to provide detailed advice as required. Completed applications are checked against the criteria and either approved or declined. Successful applicants must then complete the work, and claim the financial contribution from *Clean Streams* on the basis of receipts.

Farming culture should be influenced enough to continue with the task of protecting water bodies

Five key principles have been developed over time from successive consultation processes, policy design stages and council decisions to guide the project. They are:

1. The project will focus on prioritised catchments or management zones and will act as a catalyst for ongoing work, both spatially and over time.
2. Environment Waikato represents the regional community and is a partner that contributes to the work not a donor.
3. The community benefits from the streamside works on farms and therefore is a legitimate partner.
4. The funding is limited and will only be available for a limited time.
5. Once stock exclusion from waterways through riparian fencing and planting becomes mainstream practice, regulation to support those that have made the effort will follow.

Project development

During the development of the 2001 – 2011 Strategic Plan 2001, an internal project team considered options for incentive funds and the scale of the rural non-point source pollution problem and concluded that existing incentives were not enough to get the job done. This was the first time that a complete analysis had brought together up to date information about the nature and scale of the issue, with an economic analysis, a set of implementation principles and a suggested source of funding. By doing so as part of the development of the Strategic Plan and ten-year Financial Strategy, it became feasible to propose an ambitious project such as this, which subsequently drew mostly favourable submissions.

It was notable that some submissions drew attention to the potential risks associated with such an approach. Key among these was a concern that introducing an incentive scheme was a return to the "bad old days" of subsidies, and did not encourage farmers to "own" the issue of runoff from their operations. The project would have to overcome farmer suspicion of subsidies and of bureaucratic involvement in their business.

Consultation

To deal with these concerns, targeted consultation was initiated in 2001 to consider the detail of how best to design and implement the project. This involved asking approximately 70 farmers, scientists, and farm industry representatives to develop the ideal project. It was this process that led to assistance with an emphasis on partnerships, advice and information.

In reaching this conclusion, the consultation workshops settled on a financial contribution of 35% to maintain consistency with other incentives projects. At this rate of contribution, the money available would assist with fencing approximately 15% of the region's waterways. When combined with existing stream fencing and anticipated work in other projects, this would achieve a maximum of 65% of water bodies fenced after ten years. It was therefore important that by that time, farming culture should be influenced enough to continue with the task of protecting water bodies from the effects of farming. The project is intended to be a catalyst in a longer-term process.

Water Management Zones	Aquatic biology	Margin biodiversity	On-site water quality	Downstream water quality	Sum
Coromandel	3	3	3	3	12
Upper Hauraki	2	2	3	3	10
Inflows to Lake Taupo	2	2	3	3	10
Upper Waikato Tributaries	2	2	2	3	9
West Coast Catchments	2	3	2	2	9
Waipa Catchment	1	2	1	2	6
Middle Waikato Tributaries	1	1	1	2	5
Lower Waikato Tributaries	1	2	1	1	5
Lower Hauraki	1	1	1	1	4

Table 1 : Provisional assessment of the relative importance of the nine catchment zones for riparian management (a combined score of 12 = most important; while 4 = least important).

Prioritising processes

Two levels of prioritising were developed to support the principles of the project. Both are based on the principle of protecting the best existing water quality and enhancing the rest. This comes directly from the objectives for water quality in both the RPS and the proposed Waikato Regional Plan. It means that the first priority areas are in headwater streams emerging from forests or springs, and particularly those in volcanic geology.

The first level is used to target promotion and publicity by dividing the region into nine management zones. An analysis of the region was used to place the zones in order of priority using a three level ranking of four relevant factors (see. Table 1). The first five zones are currently being targeted with extra publicity. The intention is to generate a high level of interest and activity in those zones before moving on to other areas, ensuring that the whole region is covered over the ten-year life of the project.

The second level of prioritising is carried out on an individual application basis. In this case a set of additional criteria take into account the promotional, social and educational context of the application. This means that applications from low priority zones may be successful if they are from groups of farmers working together in a *Landcare Group*, or if the site is in a highly visible position, or is otherwise well suited to publicity.

Security

As part of the substantial pressure to minimise bureaucracy, security for the Environment Waikato contribution has been kept simple. Farmers agree by standard letter to maintain the fence and plantings to defined standards indefinitely. In cases where Environment Waikato's contribution exceeds $10,000 an Esplanade Strip Agreement will be registered as a covenant on the title. This is still under development in consultation with our legal advisors.

Progress to date

At the time of writing the project has been operating for seven months. In that

time almost 80 applications have been completed and approved, covering nearly 200km of fencing. This is well on the way to achieving the year's targets of 200km of fencing and 100 farmers involved. The second year of operation will double those targets and then that level of activity will be maintained for the remainder of the project life.

The project design recognises the reality of existing farming practices and culture towards regulation in rural areas.

Of critical importance in this first year of operation has been the progress made in developing partnerships with other agencies. Of particular note here has been the following:

- Training in riparian management for Environment Waikato staff shared with Federated Farmers, Dexcel, and Fonterra staff.
- Joint press releases with the Waikato Federated Farmers' President promoting the value of stream protection.
- A pilot project involving the Hauraki Maori Trust Board in promoting the scheme and providing advisory services on behalf of Environment Waikato.
- Development with nurserymen of an accreditation scheme for nurseries that will define the standard of plants to be used for revegetation work within the project.
- Alignment of messages between all Regional Councils, Fonterra, MfE and MAF embodied in the Fonterra "Clean Streams Accord".

SUMMARY

The project is a highly focussed programme of action that, because of its clear direction, is easy to understand, to communicate and to evaluate its performance. Whilst it is a discrete programme, it is a piece of the jigsaw in the supporting policy framework created under the RMA for the management of the effects of non-point source discharges and is supported by the Local Government Act for funding. It is not an *ad hoc* initiative, rather it is a significant component (incentives) of a balanced policy mix that currently includes permitted activity rules as well as education and information.

The tight focus on the improvement of in-stream water quality also provides collateral benefits with an improvement in stream ecology as well as aquatic and terrestrial biodiversity. The relationships between natural ecosystems ensure such integration. However, the project is achieving benefits beyond those that can be considered as purely environmental. It is becoming a catalyst for the development of social partnerships and the alignment of complementary education and employment programmes by third parties.

The project design recognises the reality of existing farming practices and culture towards regulation in rural areas. It targets the effects of unsustainable land use in priority management zones with education, information and funding to ameliorate impacts on water quality. In so doing, tangible outcomes are being seen from the outset, initially as participation rates. In time, water quality improvements and biodiversity benefits will follow. Neither this nor the social benefits of a partnership with the rural land users would have occurred if regulation of land use practices themselves were introduced from the outset to manage rural non-point source contamination of waterways.

The success of the project thus far can be attributed to its sound policy foundation with a clear analysis of the interventions needed to address the issues, the recognition of the then public sentiment towards the use of regulations and the systematic inclusion of required actions in three relevant planning documents. Acceptance of the programme has been aided by the inclusive process of stakeholder representatives having an active part in the design of the final programme and its delivery. This process gave the flexibility to incorporate changes in public sentiment and therefore relevance, five years after the initial need was identified.

For more information on *Clean Streams* call Environment Waikato's Freephone 0800 800 401 or look up the relevant page on www.ew.govt.nz.

Climate change and resource consent decisions

Gerard van Bohemen, Buddle Findlay

Last year, the Environment Court had to grapple directly with the issue of climate change for the first time and decide whether the contribution of an activity to global warming should be considered in the resource consent context when for all practical purposes the effect is relevant only in the global sense, in combination with activities occurring outside New Zealand. The Government has since announced an intention to amend the RMA to remove climate change considerations from resource consent decisions. The Court's decisions show that, even in the absence of legislative change, the Court has recognised the problems of dealing, in the context of individual consent applications, with what is essentially an issue of national policy.

Background

The issue arose in two cases with essentially similar facts, *Environmental Defence Society (Inc) v Auckland Regional Council [2002]* NZRMA 492 and *Environmental Defence Society (Inc) v Taranaki Regional Council* (A/84 / 2002).

Contact Energy and Stratford Power had obtained consents to build gas fired power stations, one in Otahuhu (Contact) and one in Stratford. Unavoidably, the stations would release significant quantities (over 1 million tonnes per year) of carbon dioxide (CO2), the principal greenhouse gas. However, in granting discharge consents for the release, neither the Auckland Regional Council (ARC) nor the Taranaki Regional Council (TRC) imposed conditions requiring mitigation of the discharge.

The Environmental Defence Society (EDS) appealed both decisions, seeking the imposition of conditions requiring the applicants to offset the CO2 discharges fully by a programme of forestry sequestration (i.e. tree planting). Taranaki Energy Watch (TEW) also appealed the Stratford Power decision. EDS was, in effect, asking the Environment Court to impose conditions similar to those recommended in 1995 by the Board of Inquiry into the application for consent to discharge CO2 from the then proposed Taranaki Combined Cycle station (TCC). In the event, the Minister had not followed the Board's recommendation that the applicant should be required to establish a carbon sink to offset the predicted discharge, but imposed a more general mitigation obligation on the consent holder that could lead to a requirement to establish a carbon sink depending on the total amount of CO2 discharged as a result of the consent as compared with emissions from the electricity generating sector as a whole.

Three further discharge consents for gas fired stations were granted between the TCC consent and the EDS appeals against the Contact and Stratford Power consents (Southdown, Otahuhu B, and Huntly) but in none of those cases – which were all settled without substantive argument before the Court - had the applicants been required to implement planting programmes of the kind proposed by EDS in the Contact and Stratford Power appeals.

The Contact and Stratford Power decisions

Judge Whiting presided over both appeals and Deputy Environment Commissioner Kierney also sat in both cases. Much of the evidence was similar in both cases. As a consequence, the two decisions adopt the same reasoning and reach the same outcome, which was to dismiss the appeals.

Rationale for decisions

The Court was spared any real dispute over factual issues. Thus, the applicants did not put the appellants to the proof on whether the discharge of CO2 is a significant contributor to climate change climate or, indeed, on whether climate change is a real phenomenon.

The Contact justification for resisting the proposed condition was that:

- The proposed station would make a negligible impact to global climate change and would not cause any effect that could be detected at the local or even national level.
- Operation of the station would displace less efficient thermal generation which would mean a lower level of CO2 emissions than if the station was not built.
- In any event, more trees had been planted and would continue to be planted in New Zealand than would be required to absorb any expected national increase in CO2 emissions.
- There was no requirement for additional planting or any other measure to offset the discharge in order to enable New Zealand to meet its obligations under the international climate change treaties, namely the Framework Convention on Climate Change (FCCC) and, more particularly, the Kyoto Protocol to the FCCC.
- Policy announcements from the Government made it clear that the Government was intending to deal with the climate change effects of industrial emissions by means other than the RMA.

Similar arguments were made by Stratford Power which also argued that, as a matter of economic analysis, greenhouse gases required a consistent global response across countries which could be implemented only through national measures adopted by national governments.

The essential counter arguments by EDS were that:

- Climate change effects had to be dealt with under the RMA, even if their manifestation was at the global, rather than regional or local level.
- Regardless of planting by others or of New Zealand's obligations under the FCCC and the Kyoto Protocol, persons discharging greenhouse gases had an obligation to mitigate the effects of those discharges and could not claim credit from the actions of others or from international agreements on the extent of New Zealand's international obligations.
- The fact that Government policy suggested that climate change effects would be dealt with outside the RMA was irrelevant.

Underlying these arguments were some fundamental questions:

- What is the "environment" for the purposes of the RMA?
- What is the relevance of international agreements, including agreements such as the Kyoto Protocol that, at the time of the hearing, New Zealand had signed but not ratified?
- To what extent should the Environment Court take account of Government policy that has not been implemented in legislation?

What is the "environment"?

There were two aspects to this question. The first was whether a regional council or the Environment Court should take account of effects that arise outside its region or New Zealand when the discharge is relevant only in combination with effects from activities outside New Zealand over which neither a council not the Court has any control.

Not surprisingly, the Court was not prepared to hold that the wording of the RMA limits a regional council to consideration of the effects of an activity within its region. The Court

thus declined to limit the territorial scope of the definition of "environment" and also observed that it would be artificial in the overall context of the enhanced greenhouse effect to confine the environment to New Zealand. However, the fact that conditions imposed by the regional council / Court could be rendered meaningless by activities taking place in other countries seems to have strongly influenced the Court's ultimate decision.

Persons undertaking activities had to be responsible for their own actions

The second, related, aspect was whether the applicants were entitled to claim the benefit of the actions of others (tree planting) which, at least within New Zealand, were more than enough to offset the projected CO2 emissions for most of the duration of the consents. The applicants argued that since they must take into account the cumulative effects of their activities in combination with the adverse effects of the activities of others, there was no basis for excluding the beneficial effects of the activities of others. EDS on the other hand argued that persons undertaking activities had to be responsible for their own actions.

The Court did not rule on the underlying issue of principle between the two arguments, but by inference accepted that it was legitimate to take into account the beneficial consequences of the activities of others. However, the Court was uncomfortable with the argument that the balancing of adverse and mitigating effects should be confined to a national accounting in the context of a global phenomenon such as the enhanced greenhouse effect.

Relevance of international instruments

The applicants argued that the Kyoto Protocol represented the only international agreement on how climate change was to be measured and remedied. Thus, they argued that the Court should accept the Kyoto accounting, which measures emissions generated by human activities since 1990, and said that it would be inappropriate and unrealistic to try to take into account emissions from activities prior to that date or caused by natural events. By contrast, EDS argued that the Kyoto targets were essentially irrelevant and that the Court should consider actual effects on the environment of all CO2 emissions, however caused.

The Court held, by reference to established principles of international and domestic law, that the FCCC and Kyoto Protocol were both relevant considerations to be taken into account pursuant to s104(1)(i), their weight to be dependent on the nature of New Zealand's obligations under them, and the extent to which the Government policy had crystallised so as to indicate how New Zealand's obligations would be given effect in domestic New Zealand law.

Relevance of Government policy

The hearings of these appeals took place against the background of an active policy making process which led – after the hearings had been completed and the decisions handed down – to the announcement of detailed policy measures and the enactment of the Climate Change Response Act 2002. However, by the time of the hearings, the Government had released detailed statements and policy papers which made clear its intention to ratify the Kyoto Protocol and the measures by which it was intending to give effect to its obligations under the Protocol. The announced policy included statements that climate change was an international issue that should be dealt with consistently at the national level and that the RMA consenting process was an unsatisfactory method of dealing with the issue given the risks of inconsistent treatment.

The Court took note of those statements and observed that the issue it had to decide – namely whether to impose a condition of the kind proposed by EDS - was quintessentially a public policy

decision, although it went on to observe that it was still required to approach the matter on the basis of the RMA and applicable common law principles. The Court, however, had no hesitation in taking account of Government policy even in the absence of specific legislative endorsement.

The decisions

Ultimately, the Court based its decision on its discretion under s108. It took note of the developing Government policy on climate change, including the policy that consistency of approach was necessary to guarantee efficiency compatible with achieving best environmental, social and economic outcomes. It said it was unable on the evidence to assess adequately either the national and international implications or the social and economic consequences of imposing the proposed conditions. It accepted the scientific consensus on the contributions of greenhouse gas emissions to climate change, and acknowledged that the proposed emissions from the two stations would result in a cumulative way to an impact of some consequence. But it admitted to considerable disquiet about the efficacy of imposing such conditions in the global context. It therefore dismissed the appeals.

While the decisions were based on the circumstances of the two cases, the Court's reasoning indicates that, even in the absence of legislative change, it is unlikely that the Courts will, in the context of resource consent applications, impose conditions requiring mitigation of climate change effects. Since these cases each concerned the discharge of over a million tonnes of CO2 per annum, it is unlikely that the facts of other cases will dictate a different outcome. This suggests that it will rarely, if ever, be appropriate for a consent authority to require as a condition of a resource consent measures to mitigate climate change effects which manifest globally and which have no real local or even regional effect. This should be a considerable relief to regional councils which, even before these decisions, had reached much the same conclusion.

Postscript

Since these decisions, the Minister for the Environment has agreed to vary the conditions for the TCC so as to remove the potential obligation to establish a carbon sink to absorb increased emissions attributable to that station. That decision is presently subject to appeal.

Disclosure: The author was one of counsel appearing for Contact in one of the decisions under review.

Marking a place for taniwha in culture and law

Rob Harris, Resource Consents Officer, Nelson City

Introduction

Engineers and bureaucrats can be uncomfortable with mythic 'taniwha' and spiritual matters such as waahi tapu, sometimes thinking of them as fairy tales and impediments to progress. Maori with traditional knowledge and tribal affiliations however, consider them to be an integral part of their beliefs about the living attributes of land and water. The Judicial, legal and planning professions also find concepts such as taniwha difficult, but in a different way, in that they must make a decision on such questions, often without a basic understanding of what they are, how they may be managed and what they imply in terms of acceptance of other beliefs.

The RMA clearly includes the concept of cultural wellbeing in the definition of sustainable management – see *Cook Island Community Centre v Hastings DC*, W1/1994. This covers Maori and non Maori, but with little other caselaw guidance for dealing with non Maori matters. The definition of the environment in s2 of the RMA includes the cultural, which by definition must include spiritual lore and customs.

Judicial difficulties showed in the *Ngawha* case where a taniwha 'occupied' part of an area chosen to locate a prison. The Courts appeared divided in their response to representations. The High Court holding that the intangible and the spiritual should be recognised in general, but giving no guidance in particular, apart from a discussion about the role of the tiaki or traditional guardian(s) and the differing levels of knowledge about a place they may possess - *Friends and Community of Ngawha v Minister of Corrections*, AP110/2002.

In this respect Wild J was responding to the Environment Court's statement that it "could not recognise the protection of the domains of taniwha or other mythical, spiritual, symbolic or metaphysical beings and the definition of environment did not extend to such" - *Beadle v Minister of Corrections*, A74/2002.

An earlier Environment Court decision had discussed the need for further definition of Maori concepts in L*and, Air, Water Assoc & Others v Waikato DC; Environment Services Ltd & Another*, A110/2001. The Court did not come to a final conclusion on whether it should go beyond the definitions of Maori expressions in the Act, in order to gain an understanding of Maori concerns.

The above suggests that there is a lacuna in that while the courts deal with the relationship of people to place, they are possibly not dealing with the basic assumptions on which taniwha, waahi tapu, and tiaki (guardianship) are based or by implication any one else's beliefs when related to resources.

In this article one of my aims is to assist discussion by defining some of the relevant Maori concepts that form or relate to taniwha and try to place them in a wider cultural and jurisprudential context. Taniwha have proved a lightning rod for cultural debate between Maori and Pakeha. The debate has mostly hitherto ignored Pakeha and other 'spiritual' beliefs about land which do not have status under ss. 6(e), 7(a) or 8, but conceivably do in terms of cultural wellbeing (s5(2)), stewardship (s7(aa)), heritage (s7(e), possibly 6(f) in future), intrinsic values (s7(d)), finite characteristics (s7(f)) and quality of the environment (s7(g)).

There appear to be four basic approaches to the issue. The main conservative Pakeha argument, is

that recognising Maori beliefs is discriminatory and silly and a block to progress. This lacks some credibility, as Parliament has clearly envisaged the spiritual by reference to waahi tapu and cultural wellbeing. Use and development are also subject to the purpose and principles in Part II of the RMA. Other people's spirituality is also not necessarily denied and statutory references to Maori traditional associations arise from Crown Treaty policy to be debated elsewhere.

A more sophisticated secular argument espoused by the Hon Nick Smith (*NZ Herald* 21 November 2002), points out that New Zealand is a secular state and spiritual beliefs should be private and irrelevant at law. This has some wider jurisprudential validity because of the variance in people's beliefs and the difficulty in setting limits. But again, it should be considered in the light of Parliament's intentions. The argument to be credible must also be consistent and promote the repeal of all spiritual references in public laws.

A third approach is epistemo-logically mixed, incorporating a range of philosophical viewpoints on the natural world, but with agreement that the natural world is something greater than a collection of usable resources. The late Professor John Morton, an environmentalist in the Christian tradition, described this sort of relationship with the world as possessing "the utility of the beatitude or blessing given by the natural world" [aesthetic, religious and practical]. (comment in a speech at a book launch of 'Christchurch's Estuaries', November 1992).

The last approach is the traditional Maori (also held by others) belief that a place, animal, plant, formation has a living mauri or life force/pattern which should be considered in its own right in any dealings with land, water and species. Tapsell (1997:329) describes mauri as life essence; life force; the binding between the spiritual and the physical; the sustaining of the form of creation. He states that all things have mauri, even rocks, and are alive in some way and responsive to human actions. In believing in the universality of a life principle Maori inherently oppose a purely instrumental or mechanical view of resources, as do others who share that principle.

Caselaw guidance

Widespread attributes can be recognised in some instances; for example, recognition of the interconnectedness of life force, waiora, chi in water, despite the approach taken in *Beadle & Others v Minister of Corrections,* A74/2002, that waahi tapu areas "do not include a 'holistic' [wide ranging] view of the environment, leading to including relationships across whole districts and links to distant features".

It is essential therefore for those giving evidence to be precise in what is delineated and in the nature of the impacts. In *Friends & Community of Ngawha v Minister of Corrections* (supra), Wild J stated that on occasions a court must first determine kaitiaki or guardianship status and that such guardianship could involve degrees and levels of stewardship [by implication, knowledge held by the parties].

Determining guardianship would usually be different with non Maori as the stewardship may be informal. The emphasis then must clearly be on the nature of the relationship, the perceived values and how they could reasonably be protected through careful practices or restrictions. In principle not too dissimilar to ordinary resource management.

Evidence on waahi tapu and other related concepts is also cross examinable

Evidence is crucial in aiding the court in coming to an assessment of the importance of the spiritual or other related values of the site and their relative weight in a decision on developing the site. Such evidence does not necessarily have to be physical *(CDL Land NZ Ltd v Whangarei DC,* A99/1996).

The courts have also stated that it is up to them to make a decision on

conflicting evidence – see *Auckland RC v Arrigato Investments Ltd & Evensong Enterprises Ltd*, [HC] AP136/1999. Evidence on waahi tapu and other related concepts is also cross examinable – see *Te Rohe Potae O Matagirua Trust v Northland RC*, A107/1996 with an evidential burden on the party making an assertion - *Winstone Aggregates Ltd & Others v Franklin DC & Auckland RC*, A80/2002. This was upheld indirectly in *Ngati Maru Iwi v Waitakere CC*, [HC] AP18/2002, when Doogue J emphasised that "a finding on the credibility of a party would not be an error [question] of law, but a question of the assessment of fact".

Key Maori and European concepts

In the remainder of this article I focus on the particular concepts which underlie 'entities' such as taniwha and explain something of how they fit into the wider context of Maori and other beliefs about land and resources.

Key concepts

- mauri (energy pattern or essence of a place or an entity representing the mauri of an area. It may be in an object such as a mauri stone which becomes a symbol of a place or people or it can be the underlying form or pattern of the place, animal, plant or thing itself);
- noa (ordinary or mundane, the opposite of tapu);
- stewardship (a European concept, similar to guardianship (tiakitanga), but construed in a European cultural context, often relating to the financial or environmental and management for benefit of others, including future generations);
- taniwha (mythic or energy beings bound up with the mauri of a place, sometimes having a guardianship role and sometimes a more malevolent presence comparable to a natural hazard);
- tapu (the concept of tapu embraces the idea of restriction and the inaccessible or beyond human powers and has a modern meaning of sacred. Tapu is used in terms such as puke (hill) tapu or wai (water) tapu, or whenua (land) tapu.);
- tiaki (guardian(s));
- tiakitanga (the role and practice of guardianship), often described as kai-tiakitanga, because of the relationship to the gathering of kai (food) and other resources. "It is an active exercise in authority in a manner that benefits the resource and ensures its continuance. Kaitiakitanga involves the granting or witholding of access to the resource" (Te Puni Kokiri (1993):12 cited Gillespie (1998):21);
- waahi tapu, literally a place which is tapu (note: that many waahi tapu are regarded as temporary or tapu is able to be raised through a traditional ceremony. Some waahi tapu are considered to be places which possess taniwha. Nick Tupara provides a definition of waahi tapu in the context of Historic Places Act 1993 in the February 2000 edition of 'Historic Places', the journal of the Historic Places Trust. Anne Salmond discusses recent issues over registration of waahi tapu in an article in the *New Zealand Herald*, 5 December 2002;
- waiora, life force in water which contributes to the health of its mauri (to some degree a concept that overlaps with mauri) and life-forms that live in or use it;
- whenua tapu, sacred or special land (often a cemetery);

Placing taniwha in context

Taniwha, the central driver of the recent debates represent the natural forces of the land and sea and are part of the essence or properties of a place. They are particularly associated with water, while other forms of mythical being are related to the earth.

In most cases a taniwha symbolise a tribal or family association with place. It is both guardian and symbolic 'parent', to be protected and propitiated through ongoing practices. Stories often have tribal descendants saved from the sea or lake through the actions of their taniwha 'ancestor'; for example, a whale. Sometimes the taniwha is an evil influence to be managed through tapu (Orbell, 1985:127-128). The concept of taniwha also

includes the dangerous, such as white pointers - Williams (1957).

Ranganui Walker describes taniwha as cultural in the same manner as goblins in the European tradition and likewise used as "bogeymen to frighten children away from dangerous places…" and "like most cultures, Maori use mysticism to explain the inexplicable or grossly unlucky…" (article in the *New Zealand Herald* written by Jan Corbett, 9 November 2002). They are therefore a teaching tool in the oral tradition.

Ian Peters, Northland-born former Member of Parliament, sees an ethical virtue in the Maori practice of naming and anthropomorphising things, because "if you give something an identity you tend to have respect for it" (*NZ Listener*, October 2002:23). Bishop Walters in the same article stated that Maori spiritual practices were rooted in the need to protect resources, maintain land and ensure survival and are therefore essentially practical in the manner of John Morton's 'utility of beatitude'.

Tiaki or guardians use traditional ceremonial practices to protect the resources on which people depend, a point emphasised by both Tapsell (1997) and Thornton (1997). This may also be understood in some non Maori religious or spiritual ceremonial relationships with place and nature; for example feng shui and consecration of grounds, specimens and species.

At the deeper level of Maori belief the mauri of a place [sometimes including taniwha] can be a conduit for the energy of the atua (god(s)) [or the underlying energy of the world] - Thornton (1997:383). It is considered wrongful to carry out actions which degrade a place and possibly breach tapu and human actions are considered to trigger retribution from ancestral earth or waters - Orbell, (1985:126-130).

The need for active management of waahi tapu/sacred or restricted place in both Maori and Christian traditions was stressed by Bishop Muru Walters in one of his regular talks on the National Programme (November 30th 2002). Apart from urupa (graveyards) tapu may be temporary and imposed only when needed. An impact on a proposed resource and related life force may, however, trigger a rahui (ban or limitation) for as long as it is needed. Many such placements are only temporary and in certain contexts - Thornton, (1997:383 citing Metge (1976).

The idea of mauri is close to the traditional Chinese belief in 'Chi' (energy) or Indian belief in 'Vaastu' (spiritual architecture within which energy is balanced). These systems link energy flows and careful placement or use of things in a landscape to the health of the people, plants and animals. Some see this approach as more fruitful than the standard mechanical world view because relationships within and between sites and features are considered in depth (pers com William Steyn, sceptic, artist, designer and former lecturer in design).

Some European spiritual beliefs are also similar to Maori in regard to sacred places. Some of us take the symbolic walk from the profane or ordinary to the sacred and vice versa through the lychgate in the church yard. Lych or lich[e] (Middle English) or lycke (German) means of the dead, thus equating church yards with places that are sacred because of the association with the dead, as well as with the atua/god. The sacredness of a churchyard is recognised in ceremonies of consecration and de-consecration, just like Maori ceremonies of tapu imposition or tapu raising.

Church designs/layout typically represent spiritual journeys; for example, the Christian concept of the 'Stations of the Cross'. A recent return to traditional mysticism by some and a shift towards a mystical approach by others and the emergence of feng shui via Chinese immigrants suggests that we should be taking these matters more seriously in decision making.

Conclusion

It is clear that the courts have and can uphold the principle of traditional spiritual associations in principle, but depend on the argument put before them. Both the tangible and the intangible have been given a place in law both through statute and the interpretation of the courts. Concepts such as taniwha have a relevance, not as mythical

beings, but as personifications of values placed on the land / waters. Personification arises from an understanding that everything has a life force or mauri and the mauri in particular places may be regarded as an entity.

The approach is not essentially different to some other belief systems held by non Maori in New Zealand and there is a potential for more general recognition of non tangible or metaphysical beliefs by the courts. The caselaw in the non Maori context is still thin, although the legislation appears to provide for such avenues. The courts may have to draw from similarities of Maori associations with places and resources, and deal with the underlying similarities of the concepts. As is clear I do not consider that a fully secular approach is possible or desirable if a full expression of culture is evolved in the context of resource management under the terms "environment" or "heritage".

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An overview of the new Local Government legislation

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In 1999 both Labour and Alliance committed in their respective election manifestos to a review of local government legislation. The promise was kept, and in the 18 months to the end of 2002 three major pieces of legislation were enacted, including a long overdue revision of the Local Government Act 1974, with the prospect of more to come during the rest of the current Parliamentary term. This article discusses the momentum for the changes, the directions they set for the local government sector, and what is left to be done.

The Promise

The politics of local government have always eluded easy analysis and categorisation. Through much of New Zealand's history, the relationship between local and central government has been largely characterised by neglect, and, at best, mutual indifference. Occasional outbreaks of reforming activity were followed by decades of inaction. At Cabinet level, responsibility for local government was a sure sign of limited prospects for further advancement; and even at local level, notwithstanding the unique ability of the sector to produce passion inflaming issues on a regular basis, the democratic process has historically been more perfunctory than vibrant.

What then to make of the Labour Party's promise in 1999 to review the legislation under which local government operates? There might well have been scepticism as to the energy that would be devoted either to keeping the promise, or, more importantly, to overcoming the notoriously fragmented (and sometimes fractious) diversity of views within the sector itself.

That the newly elected Government kept its promise no doubt surprised many, but that it achieved a suite of new legislation with virtual unanimity of support from the sector within its first 3 years of office, is quite remarkable.

It should be noted at the outset that the Local Government Act 2002, although the most prominent and important component of the new legislation, is by no means the only component of it. For its part, the Government regarded the enactment of the Local Electoral Act 2001, the Local Government (Rating) Act 2002, and the yet to be enacted reforms to the public transport sector as integral to the process. That being so, and recognising that the Government sees effective partnership with all key sectors as fundamental to a stronger economy, the exercise of legislative reform must be judged as a whole, and being incomplete, final judgment is as yet far from possible. What we can say is that the momentum requires further and future change. Not only is there unfinished business in the legislation itself, but the suitability of the structure of local government remains an open question. The current structure has, with very few modifications, now been in place for 13 years.

The legislation, though by no means perfect or complete, represents major progress, not just in removing the many absurdly outdated processes and restrictions imposed on the sector, but also in removing perceived barriers to the achievement of the Government's wider economic agenda. Local government which is empowered to be responsive to the needs of its communities is plainly better placed

to contribute to economic growth and wellbeing.

The journey

The last major governmental reform of local government was the package of structural reforms in 1989. The 1989 changes reformed and rationalised the sector like no other changes before or since. Out went literally hundreds of local authorities and special purpose authorities, some of them models of efficiency, community engagement and democracy; others mysterious closed lodges of almost invisible relevance. But as profound as the reforms were, they suffered from 2 great shortcomings.

First, perhaps most seriously, they appeared to derive almost entirely from the politics of economic rationalism – there was no underpinning coherent social policy, and community engagement was slow to develop and participation remained low. Second, there was no real reform of the aging statutory framework, so the increasingly complex organisations born out of the organisation were hobbled, not only with the new structural, accountability and financial provisions, but an accumulated patchwork of provisions developed and drafted over the past century.

Then, for the next decade, the local government sector underwent a quiet but major transformation. The size, complexity and geographical diversity of many of the new organisations required a redefinition of political and managerial responsibilities with, for the most part, great improvements in the quality of both contributions. Some local government organisations are now, by New Zealand standards, big businesses; many have built extremely strong relationships with their local communities; and many have been outstandingly effective and innovative in contributing to the development of their cities and districts.

By 1999, therefore, the sector was more than ready to work collaboratively to achieve a replacement of the outdated, limiting and confusing legislation under which it worked.

Roles and purpose

Perhaps the most significant change is the scene setting attempt in Part 2 of the new LGA to define, for the first time, the purpose of local government and the role of local authorities. The LGA 1974 certainly provided a statement of purposes (though not until 1989) but they are functional descriptors rather than statements of foundation philosophy. The significance of this innovation lies not so much in the practical impact it will have on the law or on day to day decision making, but in the fact that, by doing it at all, the Government and the sector were obliged to set down their respective views on these fundamental issues and work towards a definition of them that would establish the foundation for local government well into the future.

How then should we assess the effectiveness of this newly defined purpose and role? As a starting point, there is, unsurprisingly, nothing at all radical or novel in these statutory statements. Indeed, the philosophy is scarcely different from that articulated in the preamble to the Municipal Corporations Ordinance 161 years ago:

> *And whereas the inhabitants themselves are best qualified, as well by their more intimate knowledge of local affairs as by their more direct interest therein, effectually to provide for the same: and whereas habit of self-government in such cases hath been found to keep alive a spirit of self-reliance and of respect for the laws …*

And there are echoes too from the United Kingdom, which provided the essentials of our model of local government, in the 1969 report of its Royal Commission:

> *The importance of local government lies in the fact that it is the means by which people can provide the services for themselves; can take an active and constructive part in the business of government; and can decide from themselves, within the limits of what national policies and local resources allow, what kind of services they want and what kind of environment they prefer.*

But acknowledgment of the inclusion of some defining values

and theories of local government, after so many decades of silence, is quickly tempered by a sense that the values and theories are somehow disconnected from the existing structure.

The Government always disavowed any intention to look also at structural reform of local government (such as had been undertaken in 1989), but the enactment of these foundation provisions cannot help but underscore the unanswered questions about their structural implementation. This ought to have particular consequences for many existing organisations. For example why do we have regional councils? What justification is there for having several large territorial authorities within a single metropolitan area? And how are quite disparate communities in many of our territorial districts best represented in terms of these values?

The lack of any differentiating factors for regional local government in the LGA is puzzling. Even in the statutes such as the RMA which endow regional councils with significant powers there is, at best, only an implicit underlying purpose for regional jurisdiction. Nowhere in the legislation is there any guidance as to the things that are best done at a regional level (and if there were, would 'best' be determined by reference to democracy or efficiency?) and nowhere is there any mechanism by which their success in achieving these regional objectives can be defined in relationship to other options.

Similar issues are evident in both Wellington and Auckland, which despite their essentially metropolitan character, are each structurally comprised of several large territorial authorities which compete, collaborate or simply ignore each other as the political mood of the day determines. For these metropolitan areas, this is self-evidently not a structure which has, or is capable of, delivering answers to truly metropolitan issues. Moreover the size of the individual authorities also makes it difficult to identify any countervailing, democratic or participatory benefits either.

There is, of course, no 'right' answer to all of these issues. It is more likely than not, that in the short term at least, there will be no structural changes. In the medium term, however, 2 significant factors may come into play on the issue.

First, there is a strong philosophy in the legislation, implemented in a number of different ways, that different units of local government should work co-operatively. The tacit sanction for failure to do so, where that failure is detrimental to all their interests, is that structural change must follow.

Politics being what it is, there will always be spikes of disfunctionality within and among local authorities, but plainly it is not in the national interest to persist with any structure that has been historically incapable of resolving major issues unless clear and immediate progress occurs.

Second, one of the Local Government Commission's responsibilities is a wide ranging review of both the Act and the Local Electoral Act. Assuming that this provision is not integrally linked with the continued influence of its proponent, the United Future Party, it seems likely that the Commission will be asked to consider whether the anticipated cooperation has effectively occurred.

General power

The general power granted to all local authorities was perhaps the most contentious of the new proposals. It replaces not only most of the heavily defined and limited functional powers in the 1974 Act, but also literally hundreds of local empowering acts which remained in force. But there is a suspicion that the issue of contention was more manufactured than real, and the concerns ultimately somewhat contrived. This power, it should be emphasised, is not a general power of competence in the commercial/corporate sense, and nor with a statutory body could it ever be.

In reality, the major step forward from the previous legislation is, in this respect and many others, mostly one of clarity. The 1989 amendments to the LGA provided a very broad power of competence in relation to 'works', particularly for territorial authorities, but regrettably no thought appeared to be given as to how this would work with the many intricately prescriptive powers and limitations which remained.

An important feature of the new general power is that it remains linked to purpose and role, and those factors, notwithstanding their new articulation in the Act, remain significantly influenced by the current structure of local government, and by the span of activities under other legislation. Perhaps more importantly, the general power is subject to a stringent process of planning and accountability in relation to any significant changes to current operations. In Parliament this was a point not confronted by the opposition parties.

If a local authority, with a mandate through consultation or the electoral process, decides to undertake a significant new activity, the view that it should not be free to do so (inherently expressed by the opposition parties) must necessarily be a view that central government should more tightly define the limits of local government activities. But the difficulty for the opposition parties is that the characteristics of that definition, and its implications for effective local democracy have not been articulated. Equally, if a local authority proceeds to do something significantly different without the necessary mandates, it will face risks from both judicial review and the electoral process.

This reservation is likely to act as a significant constraint on regional councils

It remains only to emphasise the rather odd reservation which accompanies the general power insofar as regional local authorities are concerned. A regional authority may do something on reliance on the general power only for the benefit for most or all of its region, rather than for the benefit of a single area. (This reservation does not affect the powers that regional councils have under other statutes.) This reservation is likely to act as a significant constraint on regional councils expanding their current activities, particularly, again in metropolitan areas.

Accountability and democracy

Large, complex and multi-functional organisations are not typically inherently democratic. They tend, inevitably and at best, to concentrate on what they do and how to do it better, rather than on why they are doing it and for whom. This was a marked pattern prior to the 1989 restructuring of local government. While the small scale of some local government organisations helped make them models of democracy, many others were virtually invisible and functionally self-sustaining. The move in 1989 to much larger organisations presented real challenges to the maintenance of public connections and democratic ethic.

Since 1989 accountability has accordingly been underwritten by increasingly prescriptive statutory requirements which ensure that at any one time a local authority should be able to define its position on any issue by reference to protocols, policies and specific actions on which consultation has occurred. By public law standards the consultation we are referring to is of quite a high order. All this has been retained under the new legislation, and despite some protests that the accountability processes are over-prescriptive, the new legislation largely reflects no more than was widely regarded as good practice within the sector.

Of course, carried to an extreme, processes which require repetitive consultation, and excessively rigid policy and activity planning can militate strongly against good representative democracy. The process itself becomes the point, and the ability of the local authority to lead, innovate and make decisions is compromised. But the legislation does not take us to that extreme. If any local authority reaches such a level of paralysis and ineffectiveness, the root cause is much more likely to lie within the membership and/or executive of the organisation itself than the statutory framework.

Underpinning the new accountability mechanism is the long term council community plan (LTCCP). The LTCCP takes the single year horizon of the current annual plan (which is the dominant document under the 1974 Act) and replaces it with an effective 3 year horizon coinciding with the political term. The statutory expectations of the LTCCP are high – it is not only

descriptive of that local authority's current activities and of the 'outcomes' sought by its community, but it is also required to be the vehicle for 'integrated decision making', 'long-term focus', an accountability mechanism, and an opportunity for participation by the public. Finally, the LTCCP is to operate as the connecting hub for a raft of specific financial management policies, including those required to make rates and borrow money, which are also to be adopted through the consultative process.

Ultimately though the most visible accountability mechanism is the electoral cycle itself. The Local Electoral Act 2001 was the first of the Government's initiatives in the sector, coming into force for the 2001 local authority elections. Unsurprisingly perhaps, as enacted it attracted relatively little attention. That has changed with 2 significant decisions now confronting most districts and regions.

The first of these is whether to retain a 'First Past the Post' system; or change to the complex but ostensibly more democratic STV system. The second (introduced under the LG Bill last year) is whether to make provision for a separate Maori ward to represent that constituency within the council. The latter is, of course, entirely consistent with the 'Treaty provision' in the new LGA. A discussion of the role of the Treaty in new legislation, or indeed the status of the Treaty where there is a devolution of Crown power is well beyond this kind of overview – but what can be said is that a lot of the discussion seemed to miss the point. Local government has, for at least the last decade, established local relationships with local Maori of widely varying depth and practical importance. The pressure for the possibility of distinct representation came from local government itself. The protest that the Government appears unable to exhaustively define the nature of the Crown's obligations under the Treaty appears fundamentally no more valid than a protest that long standing legal concepts such as good faith and fairness cannot be exhaustively defined either.

Limitations

As well as the limitations implied by the 'general' power itself (being limited by statutory purpose) and the sets of accountability and public sector accounting restrictions, the LGA has also established some explicit limitations which should now be considered. Without overlooking the important, and possibly dominant, political dimension to these issues, the immediately apparent common thread is a concern about irreversibility. The aspects of limitation relate then to those current undertakings and assets which, once discontinued or sold, could not readily, if ever, be resumed by the local authority.

The most conspicuous of these limitations is the requirement for local authority which either currently provides or commences the provision of a 'water service' to maintain it at the same level. 'Water service' is broadly defined to include water supply, drainage and waste water treatment services. There is limited ability to contract out the operation of water services, although the local authority will be required to retain control pricing management and policy. Effective divestment can only occur within the local government 'family'. Where a partnership involving other non-local government parties is envisaged, it is subject to the same limitations as operational contracting out.

While the effect of the 'no exit' provisions are lessened to some extent by the ability to close 'small' services (where there are less than 200 consumers) and a relatively wide range of options within the local government sector itself, the limitation is, in all other respects, absolute. There is no statutory mechanism, for example by referendum or ministerial decision, to exit a water service without special enabling legislation.

While this restriction may seem unduly blunt and even oppressive, particularly where capital expenditure requirements, aging assets, declining populations and so on occur, the reality is that the typical water service is, for all practical purposes, incapable of outright sale anyway. Typically a water service will involve a reticulation network on public roads and reserves, a range of statutory powers needed to support it, and a regulatory regime that implicitly supports monopoly provision. In these circumstances, the legal framework for widespread privatisation of water services simply did not exist, even without the new restrictions.

The prohibitions on a local authority guaranteeing obligations or lending money on favourable terms to any of its trading organisations remain from the previous legislation. The drafters appear to have ignored the potential consequences of the position of council-controlled trading organisations in relation to water services. A local authority can transfer a water service to a council-controlled trading organisation, but is under no obligation to maintain that CTO and apparently prevented from doing so except by making further capital injections.

Finally, the new legislation reintroduces the power to require development contributions

The other limitations are of a lower order, requiring compliance with consultative processes before a local authority can exit from the asset or undertaking. The most notable examples are parks which do not have protection under the Reserves Act, 'endowment' land which has been granted to the local authority on specific terms and purposes, and 'strategic assets'.

In the latter category we find not only those assets that a local authority might itself regard as 'strategic', but also public housing and port and airport company shares. In relation to these assets, replacement or abandonment cannot occur unless such a decision is explicitly provided for in the local authority's LTCCP.

Funding

The foundations of local government funding remain rates and borrowing. The potential for private sector investment in local government infrastructure projects remains a much discussed but rarely used option – there is no widespread enthusiasm for it in the sector, and the government's own support for it is ambivalent, to say the least, if the politically compromised proposals in the Land Transport Management Bill are anything to go by.

Rating law itself has benefited from greater simplicity and a certain softening of some of the past rigidities. The Local Government (Rating) Act 2002 (the Rating Act) will, like the LGA itself, largely come into force on 1 July 2003. As with their respective statutory antecedents, neither can be fully understood in isolation from the other. Rating remains the means by which a local authority can ensure the funding of its activities. If anything, the links are greater under the 2 new statutes.

The function of the Rating Act is now a largely mechanical or 'toolbox' regime for the process of making and collecting rates. But rates cannot be made at all without the adoption, through the special consultative procedure, of a framework of policies under the LGA.

The Rating Act introduces the concept of 'targeted' rating which, by incorporating the historically long standing mechanisms of separate and differential rates, creates a matrix of possibilities under which rating systems can be as broad or finally tuned as a local authority wants.

Since 1996, rating decisions are, in theory at least, based on a set of policy choices, transparently made, under which any local authority must confront and inform itself on the true nature of the activities it wishes to fund, and the options and consequences for particular funding approaches. That remains the case, but the new provisions remove the stark and somewhat formulaic step by step approach encouraged by the 1996 provisions in favour of a more rounded, discretionary and integrated set of decisions.

Borrowing, the other major source of local government funding, is even further simplified. From warranting, less than a decade ago, its very own statute, the new provisions are less than half the length of the old. The only significant prohibition is borrowing in foreign currency. Otherwise borrowing is authorised by the general power.

Finally, the new legislation reintroduces the power to require development contributions. Similar powers existed in Part 20 of the LGA 1974 until its repeal by the RMA in

1991. The effect, in the medium to long term, of these provisions is likely to be a reduction in the use of the corresponding RMA provisions. For one thing, a territorial authority's 'development contributions policy' which is required as a foundation to any imposition, is not subject to the rights of appeal that the corresponding policies in its district plan face. For another, there is no right of appeal against the contribution decision itself. And, perhaps most importantly, the basis for requiring a contribution is not ultimately its environmental impact (as under RMA) but the needs of the local authority and its community.

Overall the local government sector would be pleased with the new suite of provisions. No significant changes to the fundamentals of rating and borrowing were ever contemplated, and the ability to target specific developments for capital contributions to infrastructure has been enormously enhanced by the enactment of development contribution provisions.

Unfinished business

The one significant black mark over the reform process is that it leaves the sector with 2 local government Acts in place. Whilst the new Act is commendably brief at just over 300 sections and some 20 schedules, nearly as many have been retained from the LGA 1974. So whilst the coherence, structure and numbering of the new legislation is a great improvement, having to work with 2 fundamentally different statutes with as yet untested relationships and conflicts will not be satisfactory beyond the short term.

The reason for the sheer scale of the unfinished business relates almost entirely to significantly slower progress being made on the Government's transport policies than it was able to achieve with issues which were entirely within the local government sector. In the transport sector local government is less influential, and will have to accept that a great many of the transport related functional responsibilities, powers and assets will remain in the time warp of the LGA 1974.

Included in this time warp category are all the provisions relating to transport enterprises, roads, parking, and the local authorities petrol tax. They include all the provisions relating to Infrastructure Auckland, as well as to other Auckland specific provisions, and all the provisions relating to navigation. Less understandably, they also include a number of provisions relating to drainage and local authority documents and archives.

There has been no clear signal from the Government as to the timetable for the likely replacement of these provisions. The first of the anticipated 2 or 3 Transport Bills was introduced in December, but it did not deal directly with any of the issues outlined above, save for the proposed removal of the barrier to regional council ownership of public transport assets. So the problem looks set to be with the sector for at least the medium term. Whatever the timetable, there does not appear to be any reason to expect a repeat of the bizarre process which accompanied the enactment of LGA 1974, where large fragments of the statute were brought into force over a 5 year period – and followed thereafter with significant amendments at virtually annual intervals.

Much remains to be done. As overdue and welcome as the new legislation is, it represents only the relatively 'easy yards'. More difficult issues remain, such as local authority powers and responsibilities in relation to roads and road corridors, and apparently intractable problems of regional infrastructure. The important lesson from the new legislation, and in time perhaps its great benefit, will be a belief by both Government and local government decision makers that solutions are possible.

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Case Notes

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A MATTER OF PRIORITY

The decision of the Environment Court in *Geotherm Group Limited v Waikato Regional Council* (A245/02) provides further guidance in terms of the relative priority to be given to the processing and hearing of competing applications for the use of a limited resource.

Geotherm Group Limited sought declarations that its applications to establish and operate a geothermal power station should be given priority over competing applications from Contact Energy Limited to renew resource consents for the Wairakei and Poihipi Road power stations. It was acknowledged by the parties that there may be insufficient geothermal resources to meet the requirements of both applicants.

Turning to the facts of the case, the Court noted that both applications were for significant proposals raising complex and highly technical issues

Waikato Regional Council had granted priority to hear Contact's applications first, based on its understanding that priority was to be determined by the time an application reached the point of being able to be notified. Contact's applications reached that stage first.

Geotherm contended that it should have priority as its applications were in a position to be heard first. Following notification, both applicants had been requested to provide further information. Geotherm had satisfied these requests first such that its applications were ready for hearing prior to the applications by Contact.

The Court considered the issue by reference to the Court of Appeal decision in *Fleetwing Farms Limited v Marlborough District Council* [1997] 3 NZLR 257, and the Environment Court decision in *Kemp v Queenstown Lakes District Council* (C229/99)). In the latter case, the "first come, first served" test implicit in *Fleetwing* was applied in determining that priority should be granted to the party which files a completed application first. The Court had found that an application is completed when it is "notifiable" (as opposed to notified). There must be a full application and AEE, along with adequate answers to any section 92 requests for further information.

In relation to the "first come, first served" approach, Geotherm submitted that an applicant can only be properly "served" when it is in a position to be heard. It was argued that it was incorrect to place primacy on the notification phase as the purpose for which the entire statutory process is aimed is to make a decision and ultimately to grant a resource consent.

Contact submitted that if responses to section 92 requests were relevant to determining priority between competing applications then priority could alternate right up to the time hearings commenced. Furthermore, there is no suggestion in the

previous authorities that "readiness for hearing" is a factor that can have a significant bearing on the allocation of priority.

Counsel for Waikato Regional Council also opposed the "readiness for hearing" approach as this would place too much emphasis on section 92 requests after notification, becoming so critical that Councils may be reluctant to issue such requests.

Turning to the facts of the case, the Court noted that both applications were for significant proposals raising complex and highly technical issues. Applications of such complexity tend to evolve or be refined over time. As new information comes to hand new issues can assume significance. Such factors can and do generate the need for further information, potentially right up to the time of a hearing. There were also substantial issues of fairness at stake, given the respective investment by both parties in the projects.

The Court found that Contact was the first to reach the necessary threshold of information required to be included in a resource consent application in accordance with the Fourth Schedule and section 88(4) of the RMA, enabling the consent authority and submitters to make informed assessments. Therefore Contact's application was able to reach a notifiable stage earlier than Geotherm, whose initial application had been substantially lacking.

The Court stated that to place importance on the receiving and answering of section 92 requests subsequent to notification, would mean that a completed application in the sense that it is notifiable could potentially be surpassed by a further section 92 request.

It nevertheless held that notifiability should be the starting point but not necessarily always the determining factor. The Court and indeed a Council should approach the question of priority in a way which is underlain by fairness. Having reached priority by driving the application to a stage where it can be notified an applicant cannot then rest on its laurels. If there were unreasonable delay in responding to a section 92 request issued after notification the position of priority could be displaced.

However the Court found that there was nothing lax in Contact's response to the post notification section 92 request, such that its initial priority in terms of the notifiability test should be displaced. Applying the "first come, first served" principle, and on the basis of Contact's application first being in a notifiable position, the Court held that it should have priority over that of Geotherm.

The decision suggests an incentive to ensure that applications are sufficiently detailed at the initial stages in order to achieve priority in the case of applications for a competing resource. Thereafter however, it will be possible for applicants to lose priority if further requests for information are made but not responded to in timely fashion.

POWERS OF INSPECTION

The decision of the Environment Court in *Re Waikato Regional Council* (A226/02) related to the powers of enforcement officers to enter private property under section 332 of the RMA. Section 332(1) entitles enforcement officers to enter property (other than a dwelling) for the purpose of inspection to determine whether or not Plan rules, resource consent conditions or any enforcement order requirements are being met.

The Regional Council had sought various declarations arising from differences of opinion as between the Council and certain individuals and organisations regarding the scope of such powers.

There were two principal issues for the Court to consider. Firstly, the requirement in section 332(1) that enforcement officers need to be specifically authorised in writing before going onto private land for the purpose of inspection. Secondly, the degree of assistance which may be employed in terms of section 332(6), which states that an enforcement officer may use such assistance as is reasonably necessary. A number of specific declarations were sought as to the scope of section 332, focusing on these issues in particular. Subsidiary

issues regarding the use of force and taking of photographs and the like were also raised.

Before examining those issues, the Court considered the scope of section 332 by reference to common law rights of access and by comparison with section 334 (which provides for warrants to be obtained to enter and search properties where there are grounds to believe an offence has been committed which is punishable by imprisonment).

The Environment Court noted that no reliance need be placed on section 332 where the owner or occupier of a site invites Council officers onto the property. Section 332 is limited to situations where there is no invitation to enter and when no one is present on the site.

The Court also referred to the "implied licence" principle whereby any member of the public including an enforcement officer may enter property for the purpose of communicating with the occupier. The scope of such an implied licence is defined in terms of what is reasonable to enable such communication to take place. It is only if the occupier or owner denies entry that reliance need be placed on section 332.

The Court observed that section 332 is part of a regulatory regime that promotes the integrated management of natural physical resources, designed to ensure that the purpose of the Act is given effect to. As a consequence it is inevitable that private property rights will, to a certain extent, be abrogated. On the other hand, maintaining private property rights is also consistent with the purpose of the Act as the sustainability of natural and physical resources must be balanced with the interests of people and communities. Reflecting that balance, widening the powers of entry under section 332 beyond the plain language of the statute would not be consistent with the purpose of the Act.

The Court stated that section 332 has a regulatory or administrative function as opposed to an investigative one where there is suspicion of an offence under section 334. When an enforcement officer moves from exercising administrative powers to exercising investigative powers the officer can no longer rely on section 332. This will occur when the officer has reasonable grounds to suspect an offence.

For example, if after an inspection under section 332, an officer determines there are reasonable grounds for believing an offence punishable by imprisonment has or is likely to be committed, and considers further enquiries are needed for the purpose of gaining evidence, then entry onto the property can only be gained by permission under section 334 (requiring the obtaining of a warrant).

Turning to the requirement that enforcement officers be "specifically authorised" in writing (the first main issue), the Court rejected an argument made by the private landowners and other parties that a separate written authorisation is required from the local authority to enter each and every particular area of land.

The Court found that an enforcement officer warranted under section 38(5) of RMA to carry out powers of inspection has specific authorisation to enter any land for that purpose. There is not a need for a specific authorisation relating to each property or place.

On the second issue, the Regional Council had sought detailed declarations as to the circumstances in which certain kinds of assistance could be employed (for example, retaining outside experts when Council experts are not available or such experts are not employed by the authority, use of vehicles, appliances, machinery and equipment, and that of Police Officers if assault or obstruction is suspected).

The Court accepted that an enforcement officer may, with good reason, employ a person or thing to assist in exercising powers of inspection. The requirement is that such assistance be "reasonably necessary", rather than "absolutely necessary".

The Court concluded that an enforcement officer may seek help from other persons and may use such devices or physical aids as are needed to carryout his or her duties. This includes, but is not limited to, the help of other experts, or in cases of confrontation the presence of a

Police Officer. It also includes such devices as a motor vehicle to drive over a large property, a boat to assist in the taking of water samples, an auger to take soil samples; and such other technical equipment as is needed to take samples of soil, water, air or suspended contaminants. There may also be cases where it is reasonably necessary to employ heavy machinery for the purpose of inspection and taking of samples.

The Court was nevertheless reluctant to make the declarations sought in the specific terms sought by the Regional Council, given the number of factual scenarios potentially arising.

The Court then turned to a third issue relating to the use of force. A declaration was sought that section 332 confers a right on any enforcement officer to use force for making entry to a property when there are reasonable grounds to suspect that evidence of an offence will only be able to be collected if an inspection is undertaken immediately.

The Court found that such a right was outside the scope of section 332 and more related to the circumstances giving rise to investigative powers under section 334. The Court nevertheless accepted that the situation may arise where an enforcement officer is refused entry to carryout normal inspection procedures. Without evidence founding reasonable grounds for believing an offence has or is likely to be committed, section 334 cannot be invoked. The use of force may be reasonably necessary for the purpose of inspection in such situations.

Finally, the Court clarified by reference to a further declaration sought that taking photographs or video footage, taking measurements and making sketches all fall within the scope of section 332, as they do no more than reflect the observations of an enforcement officer.

The decision will provide a useful reference point for practitioners advising local authorities and landowners and occupiers alike as to their respective rights and responsibilities relating to powers of inspection under RMA.

EVER INCREASING COSTS?

The decision of the Environment Court in *Canterbury Regional Council v Waimakariri District Council* (C173/02) awards what must be the highest amount of costs ever ordered by the Environment Court, namely a total of nearly $650,000, as against the Canterbury Regional Council with respect to certain reference proceedings.

The case involved an application for private plan change to the Transitional Waimakariri District Plan which had been adopted by the District Council and reflected in a variation to the Proposed District Plan also notified by the Council.

The plan changes were to provide for the development of Pegasus Bay, to become a town catering for approximately 5,000 people. The Environment Court had approved the plan changes rejecting the references by Canterbury Regional Council.

Costs of over $700,000 were sought by the applicant, and of approximately $100,000 sought by the District Council.

The Regional Council submitted that costs are rarely awarded against a local authority and should not be awarded in this case involving references rather than resource consents.

The Court referred to practice note 24 whereby costs would not normally be awarded with respect to plan references, but found that this did not provide any particular starting presumption against an award of costs in the present case. It noted that costs have been awarded in cases where Councils have been involved in reference proceedings in the past.

Before turning to specific reasons for awarding costs, the Court referred to the basic legal position relating to costs as set out in *DFC NZ Limited v Bielby* [1991] NZLR 587. Relevant matters supporting an award of costs are:

(a) Where arguments are advanced which are without substance.

(b) Where the process of the Court is abused.

(c) Where the case is poorly pleaded or presented, including conducting a case in such a manner as to unnecessarily lengthen the hearing.

(d) Where it becomes apparent that a party has failed to explore the possibility of settlement where compromise could have been reasonably expected.

(e) Where a party takes a technical or unmeritorious point of defence.

Applying the criteria, the Court first observed that the references were couched in wide terms requiring the applicant to call evidence on an array of matters which as it turned out the Regional Council did not pursue.

The Court stated that it was the duty of the appellant to specifically advise the applicant that it was necessary to call evidence on all potentially relevant topics. It was not until evidence had been exchanged that the applicant would have been aware of the lack of challenge, by which stage much of the evidence would have been prepared and most of the costs incurred.

A further factor in the case related to the fact that the Regional Council pursued cultural issues when the various Maori interests involved in the consultation process had withdrawn.

The Regional Council had approached certain Maori interests calling witnesses and making submissions to add weight to its opposition to the proposal placing a burden on the applicant to counter the evidence of this small group.

A great deal of time was taken in addressing issues of consistency with regional planning documents which concerns were rejected by the Court. The Court noted that the District Council's decisions were made by experienced Commissioners and that in effect the Regional Council was seeking a third opinion. The Court stated that it was perfectly open to it to accept the decisions of the Commissioners and, the fact that the Court reached the same conclusion as those Commissioners was certainly relevant to costs.

Further factors of concern to the Court included the refusal to disclose the results of various testing and modelling relating to geotechnical and transportation issues, resulting in the applicant needing to duplicate such modelling. The Court accepted that it was the applicants onus to prove its case but nevertheless found it extraordinary that it should have been denied access to information which was ultimately exchanged in evidence.

The order for costs to the applicant represented two thirds of the legal costs incurred along with a substantial portion (but not all) of the witness costs claimed.

In considering the costs sought by the District Council, the Court observed that the Regional Council had essentially sought to usurp the decision making authority of the District Council without any support in its plan for that stance. The Court was also concerned that the Regional Council did not appear to have passed any formal resolution to take a matter of such significance to appeal. After reaching a decision based on the findings of the appointed Commissioners, the District Council was entitled to expect that the decision would be accorded some respect and not be subjected to an appeal as a result of officer decisions.

Clearly there were some unique factors regarding the conduct of the case by the appellant Council. The case should however signal a warning to parties to all types of RMA proceedings that orders to pay costs can be substantial; that no party is necessarily immune from an order for costs, and that parties have a duty to refine their cases to the most significant issues and advise the other parties involved accordingly in good time.

Two other recent decisions of the Environment Court also awarded significant costs against resource consent appellants in similar circumstances, namely where issues had been pursued which lacked substance, and proposals had been attacked on a broad front without narrowing the issues (see *Glenfield Ratepayers Association v North Shore City Council* (A004/03) and *Marshall v Whangarei District Council* (AA/005/03).

Case Notes Cont'd

Adam Holloway, Phillips Fox

CANTERBURY REGIONAL COUNCIL V WAIMAKARIRI DISTRICT COUNCIL & PEGASUS BAY COASTAL ESTATES LIMITED (DECISION C173/2002)

The Canterbury Regional Council's failed appeals against decisions of the Waimakariri District Council regarding two references became noteworthy when CRC was ordered by the Environment Court to pay costs to a private developer of $597,802.

The Environment Court has stated in a practice note that costs will not normally be awarded to any of the parties to a reference – and this accords with a policy enabling local authorities to be active advocates in the planning process.

CRC's references were in opposition to the WDC's proposed plan, and a proposed change to its transitional plan initiated by a developer (Pegasus Bay Coastal Estates Ltd). These changes were intended to enable the development of a coastal satellite town north of Christchurch

.

Although they dealt with the same issue, the two references were initially heard separately before independent commissioners. In both cases CDC's objections were conclusively rejected, giving rise to two Environment Court appeals, which were heard together and dismissed.

Although in his decision on costs Judge Treadwell accepted that 'The Regional Council were perfectly entitled to make a decision that a town at Pegasus Bay was not acceptable', and 'Generally the question of the positioning of satellite towns is a major issue in Canterbury', he concluded that (taking into account the two commissioner hearings) 'the Regional Council could not support its case and the appearance before the Environment Court was the third time it had failed in that regard'.

Judge Treadwell's decision then accepted that costs can be awarded against an unsuccessful appellant (including a Council) if allowing its appeal would have imposed 'an unusual restriction' on the applicant's rights. CRC's actions were therefore measured against the usual considerations for determining costs. In summary, these considerations are:

- Advancing arguments which are without substance
- Abusing the process of the Court
- Poorly pleading or presenting a case, including unnecessarily lengthening the hearing
- Failing to explore the possibility of settlement
- Taking a technical or unmeritorious point of defence

The CRC's approach to the case was criticised extensively

The CRC's approach to the case was criticised extensively, most significantly for the following matters:

- Failing to indicate those issues which were not subject to challenge. The Court held that 'it was the duty' of CRC to specifically advise Pegasus Bay Coastal Estates Ltd if it would not be necessary to call certain evidence in opposition.
- Calling evidence from a small group of Maori opposed to the development despite the fact that CRC had been neutral regarding this issue at the commissioner hearings and tangata whenua and local kaitiaki had reached a compromise with Pegasus Bay Coastal Estates Ltd.

- Presenting a lengthy technical argument based on an interpretation of the regional plan which the Court considered had little merit.
- Failing to make relevant information available (for instance regarding the regional transport model), which inhibited Pegasus Bay Coastal Estates Ltd's ability to prepare its case without seeking significant additional expert advice.

This decision (which recovered approximately two-thirds of Pegasus Bay Coastal Estates Ltd's actual costs, plus an award of $50,000 to the WDC) demonstrates the need for local authorities to carefully consider not only the merits of any appeals but also their approach to preparing the case for Court.

CO_2 Tax, Negotiated Greenhouse Agreements and Energy Security

Chris Baker
Greenhouse Policy Coalition, February 2003

From an industry perspective, Negotiated Greenhouse Agreements (NGAs) are one of the Government's key Climate Change policies.

When the Government announced in 2002 that it would introduce a CO_2 tax in 2007, they did so following sustained debate and concern from industry about the impact of such a tax on the competitiveness of New Zealand's economy. New Zealand's most important trading partners were not then, and are not now, considering a similar impost, so increased costs would inevitably have a negative impact - economics 101!!

The Government recognised that there would be no benefit for New Zealand, or the world's environment, if reduced production in New Zealand, through business closure and job losses resulting from the CO_2 tax, was simply replaced by production from other countries. The term carbon leakage was coined to describe this outcome, and NGA's were confirmed as the preferred mechanism to prevent carbon leakage.

Overseas experience is that industry agreements yield substantially higher emissions reductions than a straight tax

An NGA is an agreement between a business – a production unit, a firm, a sector group or a bubble – and the Government. In return for a full or partial exemption from the CO_2 tax, the business commits to a pathway of energy and emissions efficiency improvement intended to achieve "world's best practice" for that activity, over time.

Given the Government's proposed CO_2 tax, NGAs are good for the economy, and good for environment.

NGAs are good for the economy because without them, particularly during the first commitment period of the Kyoto Protocol (2008 to 2012), production would decrease, business closures would occur and jobs would be lost. This is particularly so in the energy intensive sectors of New Zealand's economy which have been, and will remain, the key drivers of the economy.

NGAs are good for the environment for two reasons. Firstly, without NGAs production would shift to other countries, probably countries with much higher emissions in their energy mix[1]. Thus total Greenhouse gas emissions would actually increase. And secondly, overseas experience is that industry agreements yield substantially higher emissions reductions than a straight tax.

This logic is straight forward and leads to the conclusion that, while Government might drive a hard bargain in negotiating an NGA, access to NGA's should be reasonably straight forward, encouraged even. Not so!

1 In New Zealand. 65% of electricity is generated from renewable sources. In Australia, 80% of electricity is generated from burning coal.

Government has proposed a set of tests, or criteria, that firms must pass to be able to negotiate an NGA. To be fair these proposals are the subject of consultation at the time of writing and have not been confirmed. However, the proposed criteria include measures of profitability that immediately favour the inefficient against the efficient – and raise the spectre of Government telling business how best to run business!

This profitability test is based on the impact of the CO_2 tax, direct and indirect, on profit variability and return on capital. The test is complicated, it discourages new investment and new entrants, will inevitably create inequities within and across sectors and will be a boon for lawyers, accountants and consultants.

Why would Government want to devote considerable resources to assessing the financial impact of the CO_2 tax on firms when the purpose of NGAs is to avoid leakage and reduce emissions. The leakage test is simple and objective – does the firm compete in the international market, and can the firm pass on costs. If the answer to both of those questions is yes – and this would include commodity exporters and domestic producers who compete against imports – then the firm should be eligible to negotiate an NGA.

Further, business concern about access to NGAs is exacerbated by the impact Kyoto Protocol policies will have on the emerging energy crisis New Zealand faces. Clearly energy prices will rise significantly over the next few years as the economy and energy demand grows, Maui supplies deplete and new gas, coal and renewable generation comes on line. Arguably more important however is the issue of energy security. What will ensure that new generation gets built in a timely manner and that the backup generation exists to provide an adequate dry year hedge. Maui has always filled that role but can no longer do so.

The answer to those questions is not obvious and the Government's somewhat casual response – not too worry chaps, we can find more gas, the economy can grow without (much) additional energy and anyway, there is a lot of wind around – sends a simple message to any new investment for which energy is an important factor; don't invest!

In summary, these two important and interconnected issues – Climate Change policies and energy security – each have the ability to significantly dampen economic growth. A comprehensive approach is required for policy development, rather than the current silo approach.

Development Contributions

Trevor Daya-Winterbottom, Barrister

Background

The efficacy of financial contributions under the Resource Management Act 1991 ("RMA") as a funding mechanism to recover the costs of upgrading infrastructure to mitigate the adverse effects of development was considered in the consultation document "Reviewing the Local Government Act" (Department of Internal Affairs, June 2001).

The consultation document noted that:

> "Some councils have … sought to use financial contributions as a funding mechanism. This has been controversial and has effectively resulted in the Environment Court making some funding decisions for these councils.
>
> Consequently, the local government sector has suggested that the new LGA should include a new funding power to enable councils to specifically charge developers for the costs of increased infrastructure capacity."

Two proposals were mooted in the consultation document. First, a "modified status quo" with the financial contributions provisions in the RMA remaining available to councils as a funding mechanism, together with a separate provision in the new Local Government Act (LGA) to levy fees and charges to fund increased infrastructure capacity. Second, simply to provide for cost recovery in the new LGA.

Local Government Bill

Subsequently, the Local Government Bill when introduced into Parliament in December 2001 made provision for councils to levy development contributions.

The Bill fixed the maximum level of development contributions for reserves purposes

What are development contributions? Development contributions are contributions of money, or land, or a combination of both. They can be levied by territorial authorities (but not regional councils) when granting:

- A resource consent under the RMA; or
- A building consent under the Building Act 1991; or
- An authorization for a service connection (e.g. when services are physically connected).

They can be levied to enable councils to recover:

> "… costs or part of the costs associated with the incremental provision of reserves and network infrastructure for roads and other transport, water, wastewater, and stormwater collection and management for the development." (Clause 161(1)(a) of the Bill)

The level or quantum of development contributions for network infrastructure was proposed to be prescribed by regulations, whereas the Bill fixed the maximum level of development contributions for reserves purposes. Reserves contributions therefore cannot exceed 7.5% of the value of any additional lots created on subdivision, or the value equivalent to 20 square metres of land for each new household unit created.

Beyond that councils will be obliged to refund development contributions where the resource or building consent lapses

Councils are precluded from levying development contributions under the new LGA in cases where a financial contribution has already been sought under the RMA in respect of reserves or network infrastructure, or where these items are to be funded by a third party.

Expenditure of reserves contributions by councils is limited to the purchase or development of reserves, rather than the maintenance of existing reserves. Where there is adequate provision of reserves in a district the council may apply reserves contributions more generally on the improvement or development of reserves, including the purchase of land outside its district, or provide funding to another local authority or the administering body of a reserve or a school to achieve these objectives.

Additionally, clause 161(7) of the Bill also proposed that the provisions relating to maximum development contributions should not preclude the ability of councils to receive voluntary contributions from developers over and above such amounts.

To ensure that development contributions are paid the Bill also enables councils to withhold the issue of certificates of compliance under section 224 of the RMA in relation to subdivisions or code compliance certificates under section 43 of the Building Act 1991, or to refuse to make a service connection until the contribution has been paid.

Beyond that, councils will be obliged to refund development contributions where the resource or building consent lapses, or the development or building for which consent has been granted does not proceed. Councils must also refund reserves contributions or return land where contributions are not applied for reserves purposes within 5 years after receipt of the money or acquisition of the land.

Cause for concern

During the submission process on the Bill concerns about development contributions were raised by leading practitioners and academics. Two specific issues raised were the uncertainty inherent in councils having a choice of procedures under the RMA or LGA, and the failure to provide any right of appeal to the Environment Court.

In relation to the concern about uncertainty for developers resulting from the availability of overlapping procedures, David McGregor of Bell Gully noted that:

> "This would seem to introduce a level of uncertainty that may be seen as unfair to developers. Further, the concept of prescribing development contributions for network infrastructure by regulation may disadvantage developers in some areas and local authorities in others.
>
> Although it gives an element of certainty as to the potential contribution, it does not seem fair to impose a contribution which does not relate to actual costs of developing infrastructure." (NZ Local Government, August 2002)

When looking at the question of appeals to the Environment Court, McGregor also noted that:

> "It is also of concern that the element of public input is removed. Whereas financial contribution provisions included in a district plan are subject to public submissions, hearing, and on occasion appeal to the

Environment Court this will not be the case for development contributions.

Development contributions are not reliant on any provisions of a district plan, and do not have to fit within the objectives, policies and rules of any district plan. They are entirely arbitrary being set by legislation and regulation, and not open to debate.

Furthermore, a financial contribution imposed as a condition of resource consent is subject to objection and appeal, there is no right of appeal against a council requirement for a development contribution." (NZ Local Government, August 2002)

Similarly, Associate Professor Kenneth Palmer of Auckland University noted in relation to clause 161 of the Bill that:

"The clause does not presently provide for any right of appeal to the Environment Court against the overall quantum of contribution in relation to financial conditions. It would be desirable for a common right of appeal to be applied under both provisions." (Butterworths Resource Management Bulletin, February 2002)

Report back from Select Committee

The Bill was reported back from the Local Government and Environment Select Committee and passed through the remaining Parliamentary stages under urgency to be given assent in December 2002.

The Committee recommended three key changes to the Bill in relation to development contribution policy, legislated calculation methodology, and contributions for community infrastructure.

First, the Committee recommended that councils must adopt a policy on development contributions and financial contributions as part of their funding and financial policies. The policy is required to provide information on:

- The capital expenditure that councils have identified in their long term community plan as necessary to meet increased demand for community facilities;
- The proportion of capital expenditure that will be funded by development contributions or financial contributions; and
- Identify each activity or group of activities for which contributions may be required and include a schedule of the contributions required.

The Committee considered that these amendments would satisfy the concerns expressed about the lack of public participation when fixing the level or quantum of contributions. The report stated:

"Inclusion of the development contributions policy in the long-term council community plan ensures the policy is part of the special consultative procedures for the plan. It is therefore subject to the full scrutiny and involvement of communities." (Commentary on the Bill as Reported Back from the Select Committee)

Second, the Committee recommended that the methodology for calculation of development contributions should be included in legislation. A new Schedule 10A was inserted into the Bill to provide the methodology for calculating the maximum amount of development contributions for community facilities (which is not specifically defined) or network infrastructure (i.e. the provision of roads or other transport, water, wastewater, and stormwater collection and management).

After identifying the capital expenditure necessary to meet increased demand for community facilities in the long term community plan, councils must then identify the share of expenditure attributable to each unit of demand (using the units of demand for the community facility or for separate activities or groups of activities by which the impact of growth has been assessed in the plan). Councils are also required to demonstrate that (when

applying the methodology in Schedule 10A) they have attributed units of demand to particular developments or types of development on a consistent and equitable basis.

Development contributions for reserves will continue to be levied in accordance with the formula set out in the Bill (i.e. 7.5% of the value of the additional lots created by a subdivision, or the value equivalent of 20 square metres of land for each additional household unit created by a development).

Third, the Committee recommended that development contributions may be applied to community infrastructure. This amendment will enable development contributions to be used by councils for funding capital expenditure on facilities such as libraries, community centres, recreation centres, and public toilets located on land owned or controlled by the relevant council.

Significantly, no amendments were recommended by the Committee to address the concern raised by McGregor and Palmer about the lack of any appeal rights to the Environment Court.

Conclusions

Whilst the amendments made to the Bill providing public participation in the preparation of a development contribution policy via submissions and hearing under the special consultative procedure, and providing a legislated calculation methodology will go some way in allaying the concerns expressed by leading practitioners and academics they fail to provide any effective objection or appeal procedures under which the merits of councils decisions can be challenged. This will place land owners and developers required to pay development contributions at a disadvantage when compared with the appeal rights which exist under the RMA in relation to financial contributions.

Additionally, no provision is made in the new LGA to address the situation where resource consent has been granted subject a condition requiring a financial contribution to be made, before a development contributions policy has been prepared by council. As a result some developers may find themselves subject to further levies (for other purposes) when building consent is later granted or a service connection is made. A level of uncertainty will therefore remain during the interim, and land owners and developers will not be able to predict what the final amount of contributions may be in respect of a subdivision or development.

The preparation of development contribution policies by councils should therefore be a matter of interest for prospective developers, and those land owners and developers who hold resource consents which have not been given effect to. Both would be advised to participate in the development contribution policy or long term community plan process by making submissions and exercising the right to be heard, and in appropriate cases giving consideration to judicial review proceedings in the High Court.

Trevor Daya-Winterbottom combines practice as a barrister sole in Auckland together with lecturing in resource management and public law at the University of Waikato

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.

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Karol Helmink

Executive Officer

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