Resource Management Journal

Official Journal of the Resource Management Law Association of New Zealand Inc.

Issue 1 Volume XIII March 2005

Polluter pays?

By Jan Caunter and Anna Cowperthwaite, Ellis Gould

INTRODUCTION

In late 2004, some Auckland landowners were advised by their local authority that their properties were potentially contaminated by past horticultural use and would now be subject to a Land Information Memorandum ("LIM") statement to that effect. Landowners wishing to remove the LIM statement had to pay for soil samples to be taken and analysed, confirming the site was "clean".

The decision by the local authorities concerned to take this step led to a flurry of angry landowner reaction and media coverage. The government sought an opinion from Crown Law regarding the correctness of the local authorities' approach given the information available to them at the time statements were placed on LIMs. Crown Law concluded that land previously used for horticulture does not necessarily equate to contaminated land *per se*.

The motivation for the local authorities' actions stemmed from the Auckland Regional Council ("ARC") who, in 2002, released a document "Pesticide Residues in Horticultural Soils in the Auckland Region". According to the ARC, this was designed to measure the level of residual contamination in soils on horticultural properties and to evaluate the significance of any residual contamination. The ARC recommended that local authorities require contaminated site assessments before allowing a change in land use, subdivision or redevelopment on greenfield sites, and to ensure that the reuse of soil from horticultural properties did not pose unacceptable risks to health or the environment.

Following the release of this information, Auckland City Council did a desktop study, reviewing aerial photographs from the 1940s and 1950s to identify properties that could be sites of former horticultural activities. The Waitakere City Council also undertook the same exercise and recorded information on a number of LIMs after 3,000 properties were identified as previously being contaminated land. Notably, the steps subsequently taken did not appear to relate to the recommendations of the ARC regarding specific land use, change of land use or re-use of horticultural soil.

cont'd on p.2

inside this issue

POLLUTER PAYS? FRONT COVER

MY HISTORY, HIS WHAKAPAPA PAGE 10

CREATING SUSTAINABLE ENERGY SYSTEM FOR NZ PAGE 16

WHAT'S IN AN ALLOCATION? PAGE 21

ACTUAL & POTENTIAL EFFECTS PAGE 25

OLD MINING RIGHTS PAGE 30

CASE NOTES PAGE 36

Many have since queried whether the Councils' actions were in fact lawful. In placing statements on LIMs, the Councils relied on section 44A of the Local Government Information and Meetings Act 1987 ("LGOIMA") that provides for statements to be made on LIMs in particular circumstances. While s.44A contains both mandatory and discretionary elements, local authorities must be careful to ensure statements are included on LIMS only in appropriate circumstances and where the Council has sufficient knowledge available to it to justify the statement being made. In the case of the mandatory test established through s.44A(2), local authorities are obliged to make a statement on LIMs if and only if the following tests are met:

1. There is a *likely* presence of *hazardous* contaminants; and
2. The Council *knows* about the likely presence of the hazardous contaminants; and
3. The information is not apparent from the district plan presently in force.

Steps 1 and 2 can create difficulties for those local authorities that are not properly armed with adequate information to justify the step taken in including statements on LIMs. First, in the absence of actual test data, it has to consider whether there truly is a likelihood of hazardous contaminants being present on the land.

As noted in the Crown Law opinion, the term "likely" was considered by the Court of Appeal in *Port Nelson Limited v Commerce Commission* [1996] 3 NZLR 554, 562-563:

> The appropriate level is that above mere possibility but not so high as more likely than not and is best described as a *real and substantial risk* that the stated consequences will happen. That is a construction adopted in a different context in *Colonial Mutual Assurance Society Limited v Wilson Neill Limited* [1994] 2 NZLR 152, 161 and one well known in the criminal law: R v Harney [1987] 2 NZLR 576, 581." [our underlining]

LGOIMA does not define a hazardous contaminant and neither does the Resource Management Act 1991 ("RMA")

A move by local authorities to make sweeping statements of a general nature on LIMs about likely contamination, based only on a desktop overview of past horticultural use of land in Auckland, does not satisfy this test. In fact, it falls well short of it.

Even if a council does have or know sufficient detail, determining whether the "contaminant" is in fact hazardous is no easy task. LGOIMA does not define a hazardous contaminant and neither does the Resource Management Act 1991 ("RMA"). In most cases, local authorities must make this judgement call once they have had regard to relevant environmental standards at a district, regional and national level. In many cases, those standards are not clear, are inconsistent and do not accord with similar standards overseas.

This lack of clarity and direction does not assist any party, including local authorities, involved in contaminated site matters to proceed with confidence in addressing the issue before them. Some assistance can be gained by reference to the definition of a contaminated site, which was defined by the Ministry for the Environment ("Ministry") in its 1995 Discussion Document[1] as follows:

> "A site at which hazardous substances occur at concentrations above background levels and where assessment indicates it poses, or is likely to pose, an immediate or

1 Ministry for the Environment Discussion Document on Contaminated Sites Management (November 1995).

long term hazard to human health and/or the environment."

A new definition of "contaminated land" has been proposed through the Resource Management and Electricity Legislation Amendment Bill introduced into Parliament recently. It states:

"It means land to which both the following apply:

(a) A hazardous substance has been discharged into or onto it; and

(b) Because of the discharge, it poses, or is likely to pose, an immediate or long term risk to human health or the environment, as determined by an assessment by the relevant Regional Council."

It is proposed that section 30 of the RMA will also be amended so that functions of Regional Councils will now include "the location, monitoring, investigation and remediation of contaminated land". Those responsibilities appear to also include environmental and health risk assessments.

However, the legislation has not addressed how those new responsibilities will overlap with the existing responsibilities of territorial local authorities and health boards to monitor health nuisances within their jurisdiction and, in the case of territorial local authorities, to place statements on LIMs in appropriate circumstances.

NEW ZEALAND LEGISLATION – THE CURRENT POSITION

No legislation in New Zealand specifically addresses contaminated land. It would be fair to say that the current legislation provides a piecemeal approach to addressing contaminated land and its remediation.

New Zealanders have been waiting for ten years for significant action from the Ministry to address this situation. The Ministry's 1995 Discussion Document on Contaminated Sites Management[2] was followed by a lengthy consultation and submission process. Since then the Ministry has been busy preparing a number of guidelines[3]. One of the Ministry's representatives recently confirmed that it was continuing with the process of identifying contaminated sites throughout the country, giving priority to those sites and the management of their contamination. The Ministry has also confirmed that the five guidelines mentioned above set out the government's nationally consistent approach to the management of contaminated land in New Zealand[4].

While these steps are commendable and should assist all players to approach remediation of contaminated land more consistently, a large question mark remains over party liability for the cost of remediation. As highlighted by the recent Auckland horticultural soil debate, in many cases the pollution was caused some time ago and in circumstances where the activity causing the pollution was in fact lawful.

In circumstances where local authorities become aware of the existence of contaminated land (or the potential for land to be contaminated) requiring remediation, the steps presently available to that authority appear to be as follows:

(a) Placing a statement on the property's LIM in circumstances where there is a likely presence of hazardous contaminants, or the presence of the hazardous contaminants is actually known. This step has already been discussed above and does not actually give direct rise to remediation action;

(b) Issuing abatement proceedings under the Health Act 1956;

(c) Enforcement action pursuant to section 314 of the RMA.

Under the Health Act, local authorities have a responsibility to improve, promote and protect

2 Supra.
3 Contaminated Land Management Guidelines No 1 Reporting on Contaminated Sites in New Zealand; Contaminated Land Management Guidelines No 2 Hierarchy and Application in New Zealand of Environmental Guideline Values; Contaminated Land Management Guidelines No 3 Risk Screening System; Contaminated Land Management Guidelines No 4 (Consultation Draft) Classification and Information Management Protocols; Contaminated Land Management Guidelines No 5 Site Investigation and Analysis of Soils.
4 Presentation by the Ministry for the Environment to the Waste Management Institute of New Zealand Incorporated 16th Annual Conference, Auckland, 9-11 November 2004.

public health within their districts, and to identify health nuisances within the district. If such a nuisance exists, the Council can apply to the District Court to abate the nuisance[5] and, if immediate action is required, the Council can enter the property and abate the nuisance itself[6]. In taking these steps, a local authority must show that the presence of the material or deposit of concern is actually offensive or likely to be injurious to health. The enforcement action is specifically directed at the current owner or occupier.

With regard to (c) above, local and regional authorities can bring enforcement proceedings in circumstances where a breach of a resource consent has occurred. Where the basis for the enforcement arises from a general protection of the environment, local authorities can rely on s.314(1)(da) of the RMA, requiring a landowner or occupier to do what is necessary in order to avoid, remedy or mitigate any actual or likely adverse effect on the environment relating to that land. However, in the context of contaminated land, this often raises issues of retrospectivity. As far back as 1995, Crown Law concluded an opinion on this topic as follows:

> "On balance, given the fact that no express provision is made for retrospective application, the Court is more likely to be reluctant to apply the legislation retrospectively, although the alternative position is certainly arguable. In particular, . . . [it would be surprising] . . . if a Court refused to make an order under s.314(1)(da) merely because the cause predates the Act's coming into force.[7]"

When considering the matter in the mid 1990s, the Ministry suggested the implementation of retrospective powers as follows:

> "Creating an explicit liability framework that is retrospective will ensure that there is an effective, fair and unambiguous regime for determining liability (legal and financial) for the cleanup of all contaminated sites.
>
> Implementing this proposal will require retrospective legislation. Because of the often long time period between the polluting event and recognition of the adverse effect, contaminated sites legislation is generally retrospective. This allows for action to be taken on sites irrespective of when the pollution event occurred. Retrospective application of law, although controversial in other applications, is common internationally in contaminated site legislation. For example, most Australian states have pollution control or specific contaminated sites legislation that enables a regulatory authority to require a cleanup irrespective of the date of site contamination." [8]

The issue of retrospectivity was specifically addressed in the *Voullaire v Jones* decision some years ago[9]. Jones was the owner of coastal land on Waiheke Island. In 1986 he undertook a reclamation on the foreshore of the small bay in which his property was located. The works were not authorised under the Harbours Act 1950 and in 1991 a notice of requirement was issued against Jones under s.177A of that Act requiring him to complete the unauthorised works. In 1992 he sold the property to Waikopou Bay Limited. The sale price agreed between the parties provided for the retention of $100,000 to allow the new owner to "solve the reclamation and erosion problem." In 1994 an adjoining landowner, Voullaire, applied for an enforcement order requiring Jones "to do whatever is necessary in order to remedy adverse effects on the environment caused by" him.

The Court did not support retrospective use of the enforcement provisions set out in s314 of the Act but specifically stated that it was not necessary to enforce a clean-up in those particular circumstances for the following reasons:

> "It is clear that the RMA is designed to protect the public against future pollution and other environmental damage . . . it can achieve that by authorising action under section 314(1)(da) against the current occupier. That is certainly efficient, and not necessarily unfair because, as in fact happened in this case, the potential liability of the current

5 See section 33 of the Health Act 1956.
6 See section 34 of the Health Act 1956.
7 Supra, see Appendix 3.
8 Financial Liability for Contaminated Site Remediation, A Position Paper, ANZECC, 1994
9 *Voullaire v Jones*, decision no. C124/97, Judge J R Jackson, March 1997, page 15.

owner can be reflected by a reduction in the purchase price it paid for the land . . .". [10]

While that decision stood on its facts because of the reduced purchase price paid, the Court did indicate that it might be difficult to use s.314(1)(da) in circumstances where the pollution had been caused prior to the RMA coming into force. With specific reference to s.314(i)(da), the Court said:

> Paragraph (da) suggests that a Court may make an order against an innocent owner even though they had no knowledge of or in no way caused adverse environmental effects. We infer that there is no need for the RMA to be retrospective since a "clean up" order may be made against an innocent current owner even if they had no part in causing the adverse effects.
>
> If the RMA were to be retrospective on the basis of paragraph (da) one would expect that the Environment Court would have power to apportion liability as between the former and current owner/ occupier. However it has power to do so under neither 314 nor section 318."[11]

Very often, previous owners or occupiers of the land (and the polluters) can no longer be found. Is it then fair for current landowners or occupiers to bear the cost of remediating land, in circumstances when at the time the pollution occurred the activity which caused the pollution was in fact lawful and at the time of purchasing the property the owner had no notice of the past use or the contamination?

THE OVERSEAS APPROACH TO ASSIGNING LIABILITY FOR CONTAMINATION

England, and a number of Australian and Canadian states have passed legislation specifically concerned with providing certainty and consistency in dealing with contaminated land. Such legislation is generally based around three methods of allocating liability for remediation- polluter pays, owner pays (sometimes called the "beneficiary pays" principle) or state pays - which are used in combination and applied retrospectively to historical contamination.

Legislation that has adopted the principle of "polluter pays" employs it as the starting point for identifying the appropriate person to whom liability should be assigned. Examples of legislation that use this approach include the Contaminated Land Management Act 1997 (New South Wales, Australia), the Environmental Management Act 2003 (British Columbia, Canada) and the Environmental Protection Act 1990 (England).

England, and a number of Australian and Canadian states have passed legislation specifically concerned with providing certainty and consistency in dealing with contaminated land

Given the practical problems that can arise in trying to locate the person(s) originally responsible for contamination, particularly where it is historical, application of the polluter pays principle may be the ideal but is not always possible. Contaminated sites legislation takes a pragmatic approach and provides for a number of parties to be potentially liable, generally in a hierarchy of culpability.

Contaminated Land Management Act 1997 ("CLMA")[12]

Remediation orders can be served on "appropriate persons" who should assume liability for the cost of remediation[13]. Section 12(2) lists the "interested persons" from which an "appropriate person" can be chosen, and places them in the following hierarchy:

10 Supra at page 15.
11 Supra at page 11.
12 The CMLA is administered by the New South Wales Environment Protection Authority and is part of a larger Contaminated Land Management Framework for New South Wales. This framework includes provisions in the Environment Planning and Assessment Act 1979 and State Environmental Panning Policy No.55 – Remediation of Land, which are administered by local councils.

(a) A person who had principal responsibility for the contamination.

(b) An owner of the land.

(c) A notional owner of the land.

As such, an owner will only be liable for remediation where it is not practicable to choose the polluter, and so on. The CLMA provides guidance as to when it will not be practicable to choose a person[14]. In addition to the somewhat obvious situations where there "*is no such person*" or "*the identity or location of the person cannot be found after reasonable enquiry*", the CLMA provides that it is not practicable to choose a person where they are "*unable to pay their debts or would become unable to pay their debts if they complied with a remediation order*". Therefore, potentially, if the original polluter was located but was deemed by the Environment Protection Agency to be unable to meet its debts, the owner could be liable.

The New South Wales ("NSW") government recently reviewed the CLMA to examine whether its policy objectives remain valid. In the course of this review, consultation with the public revealed concerns over the implementation of the "polluter pays" principle, with some submitters expressing concern that it was not implemented strongly enough. For example, as presently worded, section 12 only provides for the "principal" polluter to be held accountable. In situations where that person cannot be identified, it has been suggested that other persons who may have contributed to the contamination be deemed "appropriate" before recourse is made to the landowner. In addition, it was suggested that where the polluting company no longer exists, sister or parent companies should be held liable over the landowner.

The NSW government is currently investigating whether amendments are needed to clarify the concept of the "person principally responsible" and to enable original polluters to be tracked by "lifting the corporate veil". However, the Government has reiterated that:

> "*it will continue to be appropriate for the site owner to become responsible for investigating or remediating a site if a person who contributed to the contamination cannot be identified, no longer exists, or cannot afford to pay for the work to be done. The site owner is the party most likely to benefit from the contamination being addressed*".[15]

Environmental Management Act 2003 ("EMA")

The EMA[16] provides a wider net of potential liability than the CLMA. Section 45 sets out the "persons responsible for remediation at a contaminated site", which include:

(a) A current owner or operator of a site.

(b) A previous owner or operator of a site.

(c) A producer or transporter of a substance that caused contamination.

(d) The above persons where a site was contaminated by migration of a substance from an adjacent site.

While section 45 does not in itself provide a hierarchy of liability, the polluter pays principle is central to

The EMA provides a wider net of potential liability than the CLMA

13 See section 23 of the CLMA.14 See section 12(6) of the CLMA.
15 Department of Environment and Conservation (New South Wales), "A Review of the Contaminated Land Management Act 1997", (October 2003), p.10.
16 The EMA is administered by "directors", who are defined as "a person employed by the government and designated in writing by the minister as a director of waste management …".

the remediation provisions of the EMA[17].

Environmental Protection Act 1990 ("EPA")

Unlike the CMLA and the EMA, the EPA[18] does not specify a list of liable persons. Rather, the "appropriate person" to bear responsibility for remediation is determined by a test of whether they "*caused or knowingly permitted*" the contamination[19]. The EPA essentially provides two tiers of liability. In the first instance, liability rests with the person(s) who meet the above test ("Class A persons").[20] If a "reasonable inquiry" fails to identify a Class A person, liability passes to the owner or occupier of the contaminated land ("Class B persons").

Extent of liability

The groups of persons who may be "responsible" or "appropriate" to assume liability varies between the statutes. The extent to which a statute will expressly set out the scope of that liability also varies. For example, the EMA provides that "*a person who is responsible for remediation of a site is absolutely, retroactively and jointly and separately liable to any person or government body for reasonably incurred costs of remediation of the contaminated site …*".[21] In addition, liability applies where the introduction of a substance into the environment was not prohibited by legislation, and regardless of whether it was authorised at the time.

Under the CLMA, a person can be responsible for contamination where it is "*indirect or delayed or risk arises from change of use*",[22] and where an act or activity carried out by that person resulted in:

(a) The conversion of a substance in such a way as to cause contamination.

(b) A change in some pre-existing contamination of the land so that the land became contaminated.

(c) A change in the approved use of the land and a consequent change in the risk of the harm – even if the contamination itself did not change.

The EPA expressly limits liability of landowners where contamination is caused by migration of pollutants onto their land. Section 78K provides that where a person has knowingly permitted a substance to be in, on or under any land, they shall be taken to have caused or knowingly permitted those substances to be in, on or under any other land to which they appear to have escaped. The person who owns land contaminated in this way will generally not be required to do anything by way of remediation.

Defences and exclusion from liability

Where a statute makes provision to hold a landowner or occupier who has not caused or contributed to the contamination potentially liable, it will usually attempt to limit this liability. For example, by providing an "innocent landowner" defence, or through provision of a list of exclusions. Examples of the different approaches taken are outlined below.

The Environmental Management Act

The EMA provides an innocent landowner defence, and section 46 lists persons who will not be responsible for remediation of a contaminated site. These include:

(a) A person who would only become responsible because of an act of God, an act of war or an act or omission by a third party unconnected with the owner.

(b) An owner who innocently acquired a contaminated site and did not cause or contribute to its contamination. To be excluded from liability under this section, a person must show that at the time they became the owner of a site, it was

17 See section 48(4)(b), which requires a director, in deciding who will be ordered to contribute to or undertake remediation, to name a person(s) "whose activities directly or indirectly, contributed most substantially to the site becoming contaminated…":. See also British Columbia (Hydro and Power Authority) v British Columbia (Environmental Appeal Board) [2003] BCJ No. 1773; 2003 BCCA 436. This case was decided under the Waste Management Act, which has subsequently been repealed. However, the provisions of the Environmental Management Act essentially continue the same regime.

18 The EPA is administered by the Environment Agency, and the local authority in whose area contaminated land is located.

19 See section 78F of the EPA.

20 For a discussion on how this test is applied see Lawrence & Lee, "Permitting Liability: Owners, Occupiers and Responsibility for Remediation", the Modern Law Review Vol 66 (2003) p261.

21 See section 47 of the EMA.

22 See section 13 CLMA.

already contaminated, they had no way of knowing or suspecting it was contaminated and they undertook all appropriate inquiries of previous ownership and uses of the site.

(c) A previous owner who disclosed the contamination to the new owner and did not cause or contribute to the contamination of the site.

(d) A person who owns a contaminated site that was contaminated only by migration of a substance from property owned by another person.

The Environmental Protection Act

The EPA provides a complex system of liability assignment and apportionment, which is comprehensively set out in Statutory Guidelines[23]. These guidelines provide six tests for when a Class A person can be excluded from liability, which include:

(a) *Sold with information* – excludes those who have disposed of the land that they contaminated to another member of the Class A liability group in circumstances where it is reasonable that the new owner should bear the liability for remediation. For example, where the person who acquired the land had knowledge that it was contaminated.

(b) *Changes to substances* – excludes liability for persons who were responsible for the release of a substance, which has only become a contaminant because of interacting with another substance introduced to the land later by another person.

(c) *Escaped substances* – excludes from liability those who would otherwise be liable for the remediation of contaminated land which has become contaminated as a result of the escape of substances from other land, where it can be shown that another member of the liability group was actually responsible for that escape.

The EMA and CMLA provide that an owner of land, who has complied with a remediation order, even though they were not responsible for the contamination, can recover the costs from the person who was responsible[24]. However, in reality, the chances of this being successful have to be measured against the fact that the administering body will have found it "not practicable" to pursue that person.

Government remediation and cost recovery

In situations where it is not possible or practicable to hold a polluter or owner liable for remediation, contaminated site legislation gives a government agency or department the ability to clean up the site. For example, in the case of the EMA, where a site is a "*high risk orphan site*" or "*a contaminated site not otherwise being adequately remediated*" the relevant Minister is able to declare that its remediation by the government is necessary for the protection of human health or the environment.[25] Section 78N of the EPA provides powers for an "enforcing authority" to carry out remediation in a range of situations, which include where necessary to prevent serious harm, where a person served with a remediation notice fails to comply and where no "appropriate person" has been found. Pursuant to section 78P, the enforcing authority is able to recover its costs from the "appropriate person(s)".

Similarly, the CLMA provides that if an "appropriate person" is unable to comply with a remediation order, the local authority becomes liable for the remediation.[26] A local authority is entitled to reimbursement for the cost of remediation carried out as a result of an "appropriate person" failing to comply with a remediation order. The local authority can issue a costs notice to recover its costs and, in certain circumstances, can register this notice on the title of the remediated land.

23 See Department for Environment, Food and Rural Affairs, *Circular 2/2000 Contaminated Land: Implementation of Part IIA of the Environmental Protection Act 1990* (20 March 2000)
24 See sections 47(5) and 48(5) of the Environmental Management Act 2003, and section 63 of the CLMA.
25 See section 58 of the EMA.
26 See section 30 of the CLMA.

SUMMARY

Despite the issue of contaminated land being on the government's radar for at least ten years, and the recent controversy surrounding (potentially) historically contaminated land in Auckland, New Zealand is still some distance away from passing legislation that specifically deals with contaminated land and its remediation.

Despite the issue of contaminated land being on local/regional government's radar screen for 15 years, the recent Auckland example demonstrates a failure at that level (hopefully the exception rather than the rule) to adequately assess and address the issue during RMA planning processes and to have in place appropriate and formal mechanisms to deal with issues arising, often unforeseen at that time.

A review of legislation from other Commonwealth countries reveals they have implemented regimes based around the principle of "polluter pays", which are retroactive in their application and backed by the ability to assign liability to other parties such as the owner, occupier or the state. While the above discussion of English, Australian and Canadian legislation has focussed on the issue of liability for remediation, these statutes implement comprehensive regimes to deal with contaminated land. They provide for the identification, investigation and, in some cases, registration of such land. As such, remediation is only one aspect, albeit a very important one.

In the absence of specific legislation to assign responsibility for identification, notification and remediation of contamination, one way that Councils can implement the principle of "polluter pays" going forward is to be mindful of contaminated land issues when considering resource consent applications and during plan making/changes, and to ensure that, where relevant, a sufficient bond is secured from an applicant at the time consent is granted to cover the cost of any remediation that may be required in the future.

Should legislation one day be introduced, it must clearly focus on liability regimes and appropriate exclusions from liability. This should avoid unnecessary litigation when contaminated land is identified. A further and immediate benefit of having legislation in place is that all landowners in New Zealand will have before them a clear statutory process that can be properly taken account of in the sale and purchase of land. Likewise, local authorities will have the benefit of an authorised regime to follow, which ensures the standards implemented through such a regime are consistent and enforceable nationwide.

New Zealand is still some distance away from passing legislation that specifically deals with contaminated land and its remediation

My History, his Whakapapa:

strengths and weaknesses of historical evidence presented in the context of land and resource claims

Rob Harris

In this article I discuss some of the potential pitfalls of traditional tribal and modern perspectives on history in the context of claims made under the Treaty of Waitangi and customary rights derived by right of ancestry (take tupuna) or warfare (Te Whare Tu/the house of war). I also try to show how different forms of evidence such as oral, written and scientific relating to land and resource claims might be used and critiqued, whether in a resource management or Treaty claims environment.

INTRODUCTION

Historical evidence is often critical in launching and influencing the outcome of land claims, determining the type of matauranga (knowledge) held by kai-tiaki (resource guardians) and the status of claimants or affected parties in a court or tribunal. This comes about because we have recognized the existence of 'aboriginal' common law rights and in some cases imported a non statutory document, the Treaty/Tiriti, into statute. We have also enacted statutes, such as the Historic Places Act 1993 and the *Resource Management Act 1991*, which in part protect heritage, including places with traditional associations. In the following article I look at the assumptions made about the theory and practice of history in order to provide an introduction to some of the potential difficulties with historical evidence and its presentation.

WHAT IS HISTORY AND WHAT ARE ITS LIMITATIONS: THE CLASSICAL WESTERN MODEL?

A history in the western sense is written or spoken as an account of events and in some cases to provide a cultural context. The two main drivers shaping an account are the purpose for which it is constructed, as this defines its scope and emphasis, and the nature of the evidence. It is assumed by most secular historians that any account or part thereof can be refuted, 'improved' or corroborated to move closer to 'what might have happened', despite the tendency for winners and privileged groups to write the account. History in the mainstream western sense is a 'critical activity' carried on in theory by anyone with the skills rather than moral authority (mana). This view of history as work in progress is not shared by all cultures or even within a culture.

A useful description of an investigative historical research model is contained in C Connolly's article in defence of western historical method.[1] His central argument is that differences in social theory or philosophical standpoint do not necessarily mean a lack of common method. His list of matters to consider in writing and assessing history are: (i) research method; (ii) investigation of authenticity; (iii) critical interpretation method, (iv) assessing source reliability; and (v) objectivity, (as in the objectivity to

1 C Connolly Historical Method: postmodernism and truth, in History Now, Feb 2003, Vol 9, No 1: pp17-21

critique ones own beliefs and preferences). He thought that anyone doing serious investigative history as opposed to myth and fiction would need to adopt such an approach.

WAYS OF THINKING ABOUT THE PAST AND ITS 'TRUTHS'

Philosophies or the theories of knowledge of history lie at the heart of all historical activity, as they define its particular purpose and nature. As a basis for writing this article my approach is to reject any claim to ultimate objectivity and to avoid cultural relativism, that is, a belief that any cultural statement has the worth and validity of any other and that the past is merely "an element of present consciousness." [2]

In this I follow Karl Popper the Austrian philosopher[3] who approached 'facts' on the basis of questioning their validity to answer specific questions. Popper was anticipated by some of the ancients such as Aristotle and Hippocrates and by Francis Bacon in the early 1600s[4] who considered jurisprudence and scientific theory to be similar in that they both could be tested against evidence. A version of Popper's critical method is reiterated by E.O. Wilson in the following extract: "*Everyone's theory has validity and is interesting. Scientific theories* [and other investigative rather than reiterative disciplines], *however, are fundamentally different. They are constructed specifically to be blown apart if proved wrong, and if so destined, the sooner the better.*"[5]

An important adjunct to Popper is an adaptation of Ernest Godel's (the Austrian mathematician's) systems 'incompleteness theory' to social science[6] Godel's formal 'proof' is that individual things exist only as sets of like and unlike things and entities are only sensibly explained by comparison and context. Comparison in terms of historiography often involves models of human behaviour, environment, communities and language.

PROBLEMS IN THE THEORY AND PRACTICE OF HISTORY

A common problem in the writing of history is those historians who regard an account as not just a history, but also as a validation of a cultural position. In English scholarship validation history is termed the Whig position[7]. It involves reading history backwards from a present position to 'prove' the inevitablity of present environments or status. "It is a poor sort of memory that only works backwards, the Queen remarked."[8] The western enquiry based ideal is in contrast to become 'the innocent [or contingent] historian' postulated by Angella Ballara,[9]. The trick as Connolly and others argue is being able to display the workings well enough to allow others to review, refine and refute.

Tribal historians like Te Maire Tau [10] take a contrasting view. In his view a narration of people arising from the land and sea and descent from non human entities should not be questioned as if it were an ordinary history even if parts are falsifiable. This view has some validity as descriptive anthropology, spiritual belief or myth. Some philosophers such as Soren Kiekkergard approach beliefs 'not susceptible to reason' on a 'voluntarist' basis. They recognize the validity of the right to believe, but do not necessarily need to believe or disbelieve to understand its effect.[11]

The other 'worm in the western scholarly apple' is cultural relativism mentioned above. As an alternative to investigative critical theory it is influenced by some colonial and Marxist theory, some western literary theory, some anthropological method which treats each society as an isolate 'species' and in the responses of the colonized to western global

2 WH Oliver The Future Behind Us, in Histories, Power and Loss: uses of the past – a New Zealand commentary, p21, published by Bridget Williams Books
3 K Popper The Logic of Scientific Discovery, 1934
4 T Honecker (ed) The Oxford Companion to Philosophy, p75, published by Oxford University Press 1995
5 EO Wilson Consilience: the unity of knowledge, p56, published by Little, Brown & Co, 1999
6 E Godel On Formally Undecidable Propositions of Principia Mathematica, 1931
7 The Whig position was named for the political party prominent in 18th and early 19th Century English politics and the ideology postulated Parliamentary supremacy as a prerequisite and the apotheosis of a worthwhile society, the roots of democracy thought to be evident in earlier British societies.
8 L Carroll Alice Through the Looking Glass, chapter 5, 1872
9 A Ballara The Innocence of History? in Histories, Power and Loss: uses of the past – a New Zealand commentary, ed A Sharp & P McHugh, published Bridget Williams Books 2001
10 Te Maire Tau Matauranga Maori As An Epistemology, in Histories, Power and Loss: uses of the past – a New Zealand commentary, published by Bridget Williams books, 2001 and Matauranga Maori as an Epistemology in Te Pouhere Korero
11 P King 100 Philosophers, Apple Books, 2004

expansion.[12] The significance of cultural relativism to historical debate is that it does not grant critical methodology superior status over any other cultural perspective, and effectively does not allow a historian to evaluate the success or failure of theories about the world.

The test of reality for any belief is that beliefs or approaches are only as good as their outcomes when applied in specific circumstances for answering specific questions. When asking 'what is truth' the answer has to be the further question 'in what circumstances'. That gives us the capacity to dismiss most methodological contenders on the basis that they would lead to 'unreal' or inappropriate answers. The philosopher Hilary Putnam[13] made an important point when he stated that it is essential to retain the distinction between provisionally being 'right' based on current evidence and merely believing one is right, otherwise reality is sometimes bypassed. This distinction is arguably important in the pursuit of fairness.

TYPES OF EVIDENCE AND THEIR STRENGTHS AND WEAKNESSES

Historical evidence comes in a variety of forms with an adaptable set of tools which provide decision makers with the ability to cross reference approaches. An example of a debate informed by different types of evidence is that between archaeologists, demographers, historians and traditional knowledge holders as to when sustained occupation of New Zealand began.[14]

Data is clearly limited by artifact survival. In this sense I use 'artifact' to include both memories and oral tradition which are malleable due to their nature of being both stories and records. Each story also has a focus which leads the reader towards some lines of enquiry and away from others. Note: that judicial fora do not have the luxury of sustained investigation and panels need a witness to be clear on what is important and what is lacking.

Hard science such as physics and soil chemistry is sometimes used to make something more legible, or to date an artifact. Such science is a different kind of evidence from general historical enquiry, which may rely on it; being narrow in the scope in what it says and what it does. For example, carbon dating dates the beginning of a living things death or deposition within a given time range, not the trees age before it became wood, or much about an artifact made from it. In practice the science of isotope dating, linguistic analysis and genetic assay is increasingly important for establishing the origins of Pacific people, particularly where early history has faded and the distinction between pan Pacific and later coastal voyages is confused in oral lore. [15]

Oral history, as opposed to the language itself, can form an important or even predominant basis of a legal claim or the evidence, but, it is more sensitive to changes in a population, due to time, inter marriage, conquest and disaster than other forms of evidence. Its main weaknesses also derive from the purpose of oral history, which is to protect the memories, status and customs of the group rather than investigate. "*..History needs distance, not only from . . . passions, emotions, ideologies and fears . . . but from the even more dangerous temptations of 'identity'.*"[16] "*The earliest common use of the past was to validate the present. This perspective is still habitual in traditional societies lacking a written language and wholly reliant on folk memory.*"[17] [The 'insensitive' outsider can also bias an account – see below.]

THE NATURE OF TRIBAL HISTORY

Traditional tribal societies borrow as much from bodies of knowledge within their culture as western historians, but the material derives from oral epic (the equivalent of literature), myth and spiritual belief as much as memory. But myth is important for a historian because it highlights

12 An important thinker in this regard is Edward Said in the context of colonialism and differing cultural perspectives on the same events. Cultural relativism perspectives are however, often found under the broad label of post modernist thought which under philosophers such as Sartre emphasized the primacy of individual experience, as opposed to the broader culture. In the historical realm this often translated into a denial of an 'objective' and knowable past, and the presence of many 'pasts'.
13 H Putnam cited p170, in P King 100 Philosophers, Apple Books 2004
14 M King The Penguin History of New Zealand, p46, published by Penguin Books, 2004
15 M King supra, p67. Margaret Orbell in her work on Hawaiki migration stories, also treated much material as conflated and mythic blended in such a way as to make the stories useless as history
16 D Lowenthal The past is a Foreign Country, Cambridge University Press, 1985 also cited in W Oliver The Future Behind Us, in Histories, power and loss, supra, endnotes p215
17 D Lowenthal, supra

underlying assumptions about what is significant.

Sometimes myth is adopted because it increases the group's mana. This arguably happened when some 19th century Maori adopted the Pakeha interpretation of the 'Great Fleet' and the Kupe myth as these were then an antidote to European 'discovery'. Equally the adoption of the 'Moriori' myth made the Pakeha less guilty about despoiling Maori.[18] But the basis of cultural status does change. This shows in the currently increasing status of the Treaty/Tiriti and its more pronounced mythic qualities. Such shifts in viewpoints are not confined to Pacific lore and can be encountered in histories of events such as the holocaust or the 1688 'peaceful' English revolution and the resulting Bill of Rights.

As tribal history is arguably designed to restate and reinforce the rights of a group it is not in the tribal knowledge holder's interest to deny a tradition that supports its status or rights. To question tribal history is often seen as questioning a witnesses's values and by implication their cultural identity. This influences how witnesses feel in presenting evidence and in their reactions to 'negative' decisions. Both Professor Munz and Dr Tau from their respective Western and 'traditionalist' standpoints deny that tribal history is intended to be a wider accounting.[19] But tribal accounts have clear strengths just as western accounts have their weaknesses, sometimes over-looking the internal dynamics of a culture and the context of an event. This aspect of being simplistic and an outsider was noted by Professor Munz in his influential 1971 article on the 'Purity of Historical Method'.[20]

TRADITIONAL HISTORY: INFLUENCES ON WHAT IS RETAINED

In New Zealand, traditional oral accounts were often narrations of how families and extended family systems came to exert control over resources. Information is commonly 'restricted' to the family or tribal knowledge keepers and not widely accessible. Differences in interpretation frequently arise between accounts because of different streams of knowledge inherited even within the same group and reliance on the actions of different sets of ancestors and stories. Tau refers to Whakapapa as the skeleton(s) of the bodies of tribal lore (Tau 1996)[21] .

On the tribal rather than the individual level tribes that displace others also tend to forget the stories of those they displace even if intermarriage occurs. It often occurs after migration when immigrants interweave old stories into the new.[22] This sometimes has implications if a hapu or family, as it can allow them the status to make a claim separately from that of the overall tribal group. An example is Ngati Hine and Ngati Hine Waka hapu within Ngapuhi and Kahungungu respectively.[23]

An important complication arising from the past occurs where one set of ancestors sold land occupied or used by others. This is common when a Crown derived title was granted by the Native Land Court from 1862 to a limited range of people who then had greater freedom to dispose of land and rights as individual trustees/owners.

CULTURAL SURVIVORSHIP, TRANSMISSION AND ADAPTATION

Poor survival of knowledge can occur for many reasons. The most common are: that the knowledge holders possess low mana within the predominant group; poor physical survivorship of senior lines after conquest, (and therefore the ritual knowledge of the whole group); loss of the language; and legislation such as the *Tohunga Suppression Act 1908* discouraging certain practices. Note: that all else equal, cultural knowledge of; for example, fishing, is preserved by usage, whereas esoteric knowledge held by few is more likely to lapse when the way of life changes and practitioners die.

18 M King supra, pp40-41 & 59-60
19 P Munz The Purity of Historical Method: some skeptical reflections on the current enthusiasm for the history of non European societies, in the New Zealand Journal of History 5:1 (1971): pp1-17 and TM Tau supra
20 P Munz, supra
21 TM Tau supra
22 M King, supra, p75
23 The allocation of fisheries assets by the crown under the Treaty of Waitangi claims Settlement Act 1992 was managed by the Treaty of Waitangi Fisheries Commission until 2004 when assets were divided amongst iwi and urban groups and a remnant Trust. The claim by some hapu to have separate claimant status arose in the context of this process. This not historically new as such dividing off and development of separate mana is a traditional process in the context of moving out of the old territory and acquiring new assets and new lands.

The Maori faiths of Ratana and Ringatu illustrate how much of the belief fabric changes to incorporate new knowledge (in that case Christian), although the changes are also authentically Maori.[24] As Michael King stated "*The Maori culture of the 21st century is not Maori culture frozen at 1769, nor at 1840*".[25] Ross Calman the compiler of the 2004 edition of the Maori Myths and Legends" has attempted to remove a 'Christian' overlay placed there by the original compiler, AW Reed.[26] However, interpolation may be valid if placed there by Maori and acknowledged as cultural adaptation. The same principle applies to evidence.

THE QUESTION OF MANA AND DIFFICULTIES IN QUESTIONING WITNESSES

Ideally loss of traditional knowledge is factored in when questioning witnesses. A court or tribunal places the evidential burden on the person presenting the case, but there is no presumption on the form that evidence takes.[27] A 'softer' approach to questioning is recognized in the protocols of the Waitangi Tribunal even if an enquiry typically allows more questioning than a court. Maori importantly tend to avoid close questioning if this upsets the mana of a related group. Oliver unfavourably comments on the difference between the demands and outputs of juridical history as opposed to academic history in response to Andrew Sharp's article on the distinction between the two modes.[28] To some degree there will always be time and expertise constraints. This is inevitable as a decision must be certain in its ambit in a provisional field.

RELIANCE ON WRITTEN MATERIAL

Loss of aspects of oral tradition can sometimes force contemporary Maori to rely on early colonial written accounts based on accounts of ancestors. The decline of language fluency has been significant in recent decades but was detected as long ago as the mid 1800s leading to the stories being recorded in written form to combat the effective loss of 'te reo'.[29] The written form however, has traps, not the least, are gaps in transmission and misunderstanding by the recorders. A common bias of history is also only recording directly relevant material. An individual's writings or administrative details may therefore not be as informative as they are thought to be when contrasted with oral information. "*What is the use of a book*", thought Alice, "*without pictures or conversations*".[30]

THE PROBLEM OF CONTEXT

The changing context of how events are seen can result in anachronistic interpretations. It is a problem for all historians irrespective of culture, as even cultural references and attitudes a generation old tend to slip their original meaning. An example is the mindsets of Ngata and others in the 1920s and 30s when they opposed the teaching of Maori in schools, an approach which would now be seen as 'unthinkable', but which was then at least a reasonable policy. The nature of the pre contact 'occupation' in particular was so different that the subtleties and context are more difficult to access, as we do not have written and sometimes even good oral explanations. (People never explain the self evident, as they don't tend to think of subsequent generations needing that sort of information). Similarly, without research and empathy most non Maori New Zealanders cannot understand the medieval European thinking underlying our adversarial legal system.[31]

ADVOCACY v EVIDENCE

It can be argued that all litigants argue their case in a biased way and not just traditional lore carriers, but those who present

24 L Head The Pursuit of Modernity in Maori Society, in Histories, Power and Loss: uses of the past – a New Zealand commentary, ed A Sharp & P McHugh, supra and M King, pp140-144
25 M King supra, p519
26 R Calman (compiler) Maori Myths and Legends, published Reed Books 2004
27 Winston Aggregates Ltd & Others v Franklin District Council & Auckland Regional Council, A80/202
28 WH Oliver, supra, p23
29 A Thornton The Birth of the Universe/Te Whanautanga O Te Ao Tupuku, published by Reed, 2004.
30 L Carroll Alice's Adventure in Wonderland, chapter 2, supra
31 The adversary system of justice arose from the early medieval and post Roman tribal roots of trial by combat or champion with a presiding judge who was often the tribal and later feudal superior of the litigants/combatants acting as referee/arbitrator. It also had religious connotations of a 'moral' trial.

evidence in the western legal tradition present evidence (including affirmation of points and casting doubt) only. The evidential role is often subsumed in the advocacy by traditional claimants. We need to be careful therefore about the quality of questioning.

CONCLUSION AND SOLUTIONS

The above is a brief discussion of the problems for presenting historical evidence in a contemporary adversarial situation or enquiry relating to Maori traditional associations.

What about the possible solutions? Some of the more obvious that spring to mind are the following. One option is to run expert pre hearing sessions in order to highlight areas of agreement and identify key knowledge gaps in claims and submissions, and on the basis of these, resource participants to carry out further research. In the resource management context another option is to be more careful in the construction of heritage related conditions and in their monitoring, enforcement and review. It is probably also obvious to many practitioners that iwi are commonly not well resourced to investigate sites and knowledge baskets within their boundaries and need assistance.

Reliable resourcing to research local history and establish data bases is essential if the act of historiography is to be meaningful. To do this one also needs to train people in the art of constructing and critiquing cultural impact reports. The same comment probably also holds in the resource management field in respect of AEEs and social impact assessments, as many are defective and their role poorly understood despite legislative backing in the RMA.

As I hope I have made clear from the above the activity of enquiring, recording and narrating history is an art but an investigative and self critical art not a method of confirming myth (myth may still be a basis for story telling), wherever it derives from. Applying critical historical practices arguably enables us to be both more reflective as a society and more understanding of where claims about values come from. Given the importance of the Treaty in contemporary society and the wide political debate on founder's politics it is probably an essential practice for resourcing present and future generations to promote cultural wellbeing. As a rule wellbeing is seldom well founded on misunderstandings and ignorance.

Creating a sustainable energy system for New Zealand

Roger Perkins, Director, Ministry of Economic Development

INTRODUCTION

A number of events in recent years have revived debate about New Zealand's energy future. Unusually dry winters in 2001 and 2003, calling for nationwide electricity savings campaigns, the decline of the Maui gas field, the halting of Project Aqua and the emergence of climate change as a global environmental problem have all contributed to the debate. Together, these raise some fundamental questions:

- what will, or should, New Zealand's energy future look like?
- what level of energy security do New Zealanders want?
- what is the role for demand-side measures as opposed to building supply-side capacity?
- how should we respond to climate change?

Few would argue that New Zealand's energy system is in a state of transition and faces immediate and longer-term challenges. In particular, we are presented with two long-term issues that will force the development of a radically different energy system this century – responding to climate change and the coming peak in global oil production. Both these challenges render our current energy habits unsustainable and both compel us to think about the decline of the fossil fuel era, and what comes next.

This situation is not peculiar to New Zealand, but it is accentuated by our vulnerability to dry-year risk and the reduction in estimated gas reserves remaining in the Maui field.

Other governments around the world, faced with similar strategic questions, have sought to articulate a vision for their nations' energy futures. In particular, in 2003 the United Kingdom released its Energy White Paper, *Our Energy Future – Creating a Low Carbon Economy*, and last year the Australian Government published its energy policy framework, *Securing Australia's Energy Future*.

In a similar way, in New Zealand we need a clear, coherent view of our energy challenges and opportunities if we are to make progress towards a sustainable energy system. We need to be able to take a long-term view of the interests of both current and future generations. We need to be able to make decisions about energy that will help ensure future supply is secure, affordable and environmentally responsible. In short, we need an understanding of what a sustainable energy future for New Zealand might look like, and how we might achieve it.

Last September, the government released a discussion document, *Sustainable Energy: Creating a Sustainable Energy System for New Zealand*, which is designed to contribute to such an understanding. The document, which flows from the government's Sustainable Development Programme of Action, offers a framework or context in which energy issues can be considered.

It is not a plan or strategy for energy and it does not review existing policy. Rather it explains the government's thinking on sustainable energy and its policy response so far. It also identifies the energy challenges and opportunities New Zealand faces in making a transition to sustainable energy and suggests a range of possible future directions for policy development. It argues that the place to begin is with the demand

for energy rather than energy supply.

The discussion document is the work of a range of government agencies involved in energy and energy-related policy, not just one. In particular the project brought together the Ministries of Economic Development, Environment and Transport, the Energy Efficiency and Conservation Authority, the Treasury and the Department of Prime Minister and Cabinet. Local Government New Zealand was also involved.

The government is using the document as a basis for an initial discussion with key stakeholders in energy through to the end of this month [ed: March]. It will draw on the results of this discussion and build on the ideas expressed in the document as it develops policies to take New Zealand further towards a sustainable energy system.

MANAGING THE TRANSITION

Sustainable energy can be defined by three sets of characteristics – reliability and resilience, environmental responsibility, and fair and efficient pricing. There is some consensus that these are the right outcomes for New Zealand's energy system. However, views vary on the relative weight that should be placed on each of these characteristics and what is needed to achieve each and all of them.

"Win-win" solutions can be achieved, notably with the promotion of increased energy efficiency and innovation. But sustainability can only be achieved over time, with changes made step by step and priorities or policies adjusted in the light of experience. There can also be tension between sustainable energy objectives when we make energy choices, particularly in the short term. Higher energy supply reliability, for example, or lower environmental impact, can come at the cost of higher energy prices. Sometimes trade-offs between objectives must be made.

To achieve a sustainable energy system, policy choices must be guided by:

- a **long-term view**, which requires the full implications of today's energy choices to be considered, but also opens up a much wider range of possible actions and enables policymakers to adjust priorities for action over time;
- a **system-wide perspective** of the costs and benefits of particular energy choices, which requires an integrated approach by government to the development of energy and energy-related policy;
- the **need to maintain flexibility** in the face of uncertainty about future supply and use of energy, which means a rigid central planning approach is less likely to succeed than a mixture of market solutions, regulation and planning that keeps options open;
- the **need for open and efficient energy markets**, which enable the entry of new sources of supply, fair and efficient pricing of energy services, uptake of new technologies, efficient interaction between energy suppliers and consumers, and the spread of better ways to use energy;
- **good practice in regulation**, when markets fail to do enough to promote energy reliability, appropriate environmental outcomes or fair and efficient prices and intervention is necessary;
- **partnerships and good process** in the government's dealings with energy sector stakeholders, requiring transparent and participatory decision-making and a readiness to share information and understand different points of view; and
- **the best information available** on the energy system, the range of solutions available and the possible implications of policy decisions.

In the past five years the government has introduced a number of specific energy and energy-related policies and strategies that contribute to sustainable energy objectives (see figure 1). These include electricity market reform, electricity security policy, the National Energy Efficiency and Conservation Strategy, climate change policy, resource management reform, gas market reform, incentives for gas exploration, transport reform and local government reform.

These policies and strategies, together with the objectives and principles outlined above, form the framework for future policy development.

SOME POSSIBLE WAYS FORWARD

Two areas of action are fundamental to all sustainable energy objectives – making better use of energy and supporting energy innovation. New Zealand also faces some specific challenges and opportunities in promoting reliable and affordable energy and taking better care of the environment.

A wide range of policy options are available to advance progress towards sustainable energy. Below is a summary of the range of possible next steps outlined in the discussion document.

MAKING BETTER USE OF ENERGY

To make better use of energy more could be done to help New Zealanders make well-informed energy choices. Options include expanding programmes such as energy performance labelling, increasing promotion of energy efficiency best practice to business, undertaking more market analysis and identification of energy efficiency potentials, and introducing new regulatory requirements or incentives for increased provision of smart electricity meters.

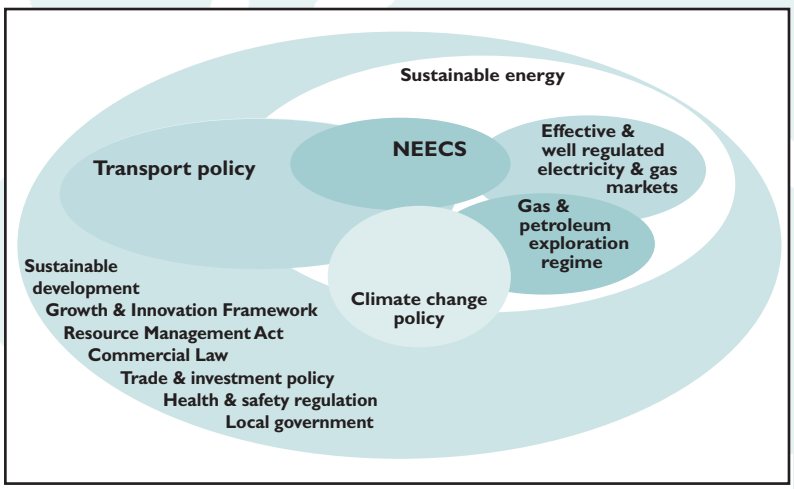

Figure 1: Relationships of key policies with sustainable energy

The energy choices available to New Zealanders could also be improved, for example, by increasing support for the development of sustainable energy industries and services such as solar water heating and energy management. More grants for energy efficiency improvements are also an option as is the more extensive use of minimum energy performance standards to lift the quality of available buildings, products and vehicles; and financial incentives for fuel efficient vehicle purchases. Support or guidance for travel demand management programmes could also be increased, teleworking encouraged, and public sector purchasing used to accelerate technological change and the development of the energy efficiency industry.

SUPPORTING ENERGY INNOVATION

To support energy innovation there could be greater facilitation of the development of New Zealand strengths in energy technologies such as hydroelectricity and geothermal energy, as well as emerging areas of capability such as biotechnologies and information and communications technology for energy applications. Other options include the further development of niche capabilities through increased research funding and/or venture capital funding and expanded partnerships to develop related industry clusters.

The government will build on established international links in energy research. An international sustainable energy watch and information exchange could be established to track global energy developments. A new energy technology transfer programme is also an option and New Zealand's international trade and investment agencies could promote New Zealand as a "test bed" for new sustainable energy technologies.

To focus effort more effectively, the government will undertake a stocktake of R&D capacity in sustainable energy and a foresight analysis of the capacity the country might need in 20 or 30 years. New learning networks could be developed, following models from other countries, and an institutional hub could be created for energy innovation. More social research into the barriers to uptake of energy innovation in key sectors such as transport could also considered.

An international sustainable energy watch and information exchange could be established to track global energy developments

PROMOTING RELIABLE AND AFFORDABLE ENERGY

To promote reliable and affordable energy the government will continue to participate in international oil security arrangements. More promotion of the development of liquid biofuels as a transport energy is an option for the longer term. The government will monitor closely the effectiveness of its recent measures to encourage more exploration for natural gas and oil, and continue to work with the gas industry to develop a more efficient gas market, making use of backstop regulatory powers if necessary.

The government will also continue to address barriers to investment in new electricity generation as they emerge, particularly for generation from renewable energy sources and distributed generation. The Electricity Commission will promote more investment in electricity demand management and continue to evaluate the case for acquiring new reserve energy options, including demand-side measures. Upgrading of the national grid will proceed over the next decade.

Efficient, transparent and competitive energy markets will continue to be the key means for securing fair and efficient energy prices, with competition providing essential downward pressure on costs and prices. Income support policies will continue to be the principal means of dealing with individual and household hardship caused by living costs, including energy costs, and these policies will continue to be adjusted as necessary. The development of a more liquid and transparent forward market for electricity will provide better price information for large consumers and clearer long-term price signals to guide investment in new generation.

TAKING BETTER CARE OF THE ENVIRONMENT

To take better care of the environment greater use of public transport could be encouraged, where it will be efficient, with more public funding and further investment in infrastructure such as busways and railway stations. Pricing policies that could efficiently increase rail's share of passenger and freight transport will be investigated. Another option is to also increase support and guidance for the development of urban travel demand management strategies and telecommuting.

Greater support for use of cleaner and low carbon fuels, such as LPG and ultra low sulphur diesel could be considered in the near term. As a longer-term strategy there could be a more ambitious target for liquid biofuel use, backed by public information, voluntary agreements with industry, increased funding for biofuel R&D and possibly mandatory biofuel sales targets for oil companies. Uptake of more efficient vehicles could be supported by fuel efficiency targets for vehicle imports, public information, mandatory fuel

consumption labelling of vehicles, government "green vehicle" purchasing, and financial incentives.

To accelerate progress towards cleaner electricity generation more specific guidance could be given to local authorities on best practice in dealing with proposals for renewable energy development, fund more mapping of renewable energy resources, increase investment in research, and continue the climate change Projects to Reduce Emissions programme. Cleaner industrial energy could be supported further with stronger incentives for development of on-site renewable energy.

BUILDING SHARED PERSPECTIVES

The kind of transition envisaged to a sustainable energy system cannot be achieved by the government alone. It can only be achieved if perspectives are shared and widely-held. This month a series of workshops in Auckland, Wellington and Christchurch will start a conversation with key stakeholders about the energy challenges and opportunities facing New Zealand and possible next steps towards a sustainable energy system. These workshops will draw on the themes and issues identified in the discussion document and, among other things, look at priority areas for action and how partnerships and ongoing engagement can be developed both inside and outside government.

It is hoped that these conversations will lay the foundation for ongoing discussion that will inform the policy process and move us closer to a shared understanding of an energy future that fits with New Zealanders' values and aspirations.

The discussion document, Sustainable Energy: Creating a Sustainable Energy System, *is available from the Ministry of Economic Development website, www.med.govt.nz. The government welcomes comments on the document. These should be sent to sustainableenergy@med.govt.nz by the end of this month.*

What's in an Allocation?

Trevor Robinson, Barrister, Wellington

INTRODUCTION

Meridian Energy Limited ("Meridian") owns and operates a network of hydro electricity generation facilities in the Waitaki River Catchment[1]. Those facilities collectively represent a very significant part of New Zealand's electricity infrastructure. Accordingly, their contribution to New Zealand's economic and social well being might reasonably be assumed to be significant. They are also capital assets of considerable economic value to Meridian and its shareholders. One part of Meridian's Waitaki generation facilities involves damming of the natural outflow of Lake Tekapo, and diversion of up to 130 cubic metres per second (cumecs) of water into a canal. 130 cumecs is significantly more than the mean natural outflow from Lake Tekapo. Meridian holds water permits to authorise this aspect of its activities. Those water permits do not expire for a number of years.

Aoraki Water Trust ("Aoraki") has plans to facilitate large scale irrigation in South Canterbury utilising water from Lake Tekapo. Aoraki has applied for water permits to authorise taking of some 15 cumecs from Lake Tekapo. Those applications have been called in by the Minister for the Environment. If able to proceed, the volume of water sought to be accessed by Aoraki and delivered to the farms of South Canterbury, would presumably enable a significant increase in farm production. One might assume a significant contribution to social and economic well being would result. The potential interception of a little over 10% of the mean outflow of Lake Tekapo's natural outflow out of the Waitaki catchment might also be expected to attract Meridian's attention.

Clearly, on the hearing of Aoraki's resource consent applications, Meridian's operations under its existing resource consents would be part of the existing environment[2] and, as such, the nature and extent of the adverse effects on those operations would be a relevant issue. It might prove an insuperable obstacle in practice. What has not been clear up to now is whether the existence of Meridian's consents was an insuperable obstacle to Aoraki, as a matter of law under the RMA.

There is also a subsidiary point of interest as to whether, given the existence of Meridian's water permits, the Waitaki Water Allocation Board has any role in relation to the allocation of water in Lake Tekapo.

The High Court's decision on these two questions has been released and gives clear guidance on these points as well as posing some interesting issues for future consideration[3].

CHARACTER OF RESOURCE CONSENTS: PRIVILEGE OR RIGHT

The consents to dam and divert the water of Lake Tekapo utilised by Meridian were granted pursuant to the Water and Soil Conservation Act 1967 ("the Water Act"). By virtue of section 386(1) of the RMA, those consents were deemed to have the status of water permits under the RMA. Under the Water Act, the answer to the first question considered by the Court would have been obvious. Notwithstanding the fact that the Water Act contained provision for "water rights", it was clear as a

1 For the geographically challenged, the Waitaki River catchment drains water flowing down from the eastern side of the Southern Alps via Lakes Ohau, Pukaki and Tekapo. The Waitaki River is among the largest in New Zealand measured by mean flow.

2 Contact Energy Limited v Waikato Regional Council A4/2000.

3 *Aoraki Water Trust v Meridian Energy* CIV 2003 476 000733 High Court (Harrison and Chisholm JJ) 30 November 2004

result of the decision of the then Town and Country Planning Appeal Board in *Stanley v South Canterbury Catchment Board*[4] that the holder of water rights had no guarantee of or priority over the volume of water the water right authorised be extracted. The effect of a water right was just to make lawful what would otherwise be unlawful.

The character of water rights under the Water Act was reinforced by the Court of Appeal's decision in *Auckland Acclimatisation Society Inc v Sutton Holdings Ltd*[5] which categorised water rights as "*privileges*".

While the structure of section 14 is largely the same as the regime which applied under the Water Act, the RMA of course abandoned the terminology of the Water Act. Water rights were replaced by water permits and section 122 declared that resource consents[6] are neither real nor personal property. That of course rather begs the question: if resource consents are neither real nor personal property, what are they?

Aoraki argued[7] that they are a privilege, not a property right and (in this case) conferred no right to priority to the waters from the same source. The High Court characterised Aoraki's argument as equating a water permit with a bare licence.

Meridian, by contrast, argued[8] that its consents were rights, not privileges, and that these particular consents involved an allocation of a resource which could not be derogated from or diminished by issue of a further water permit to a third party.

The High Court held that in a case where a resource is already fully allocated in a physical sense to a permit holder, a consent authority cannot lawfully grant another party a permit to use the same resource[9]. The Court accepted that the RMA might specifically empower the grant of a second permit in such a situation but held that section 104 was not a specific power which provided an exception to the general principle it was enunciating.

The key rationale for the Court's decision is its interpretation of the RMA as revolving round the management of resources. The Court referred specifically to section 5, the requirement to have particular regard to the efficient use of resources[10], the obligations of the regional council under section 30 and the structuring of section 14.

One might observe in passing that the High Court's reasoning gives little comfort in this regard to those, particularly of an economic bent, contending in other contexts that the RMA is about controlling effects and decrying the endeavours of unrepentant "*command and control*" planners.

More generally, the High Court characterised the RMA as effectively prescribing a licensing system and identified[11] the practical problems that would follow if a consent authority could lawfully grant an unlimited number of permits for the same water, even though that resource had been exclusively or fully allocated in the physical sense.

The Court drew support from the leading authority on priority as between competing applications[12]. In that case, the grant of one application necessarily excluded the other because both would be physically occupying the same area. The High Court expressed the opinion that the underlying premise would have been the same even if it had been considering competing claims for use of the same water flowing out of a lake. Again in the view of the High Court, the grant of one necessarily excluded the other[13].

Water rights were replaced by water permits and section 122 declared that resource consents6 are neither real nor personal property

4 (1971) 4 NZTPA 63.
5 [1985] 2 NZLR 94
6 A term including water permits
7 As summarised in the Judgment of the High Court
8 Again, as summarised in the Judgment of the High Court
9 Paragraph 46.
10 Section 7(b),
11 Paragraph 30.
12 *Fleetwing Farms Limited v Marlborough District Council* [1997] 3 NZLR 257 (CA).
13 Paragraph 31.

In particular, the Court accepted Meridian's argument that the grant of a procedural priority on a first come, first served basis would be pointless unless it meant that the first permit in time of grant also had priority in terms of the right to use the resource.

The High Court cited analogous authority which supported the proposition that statutory authorities could not exercise statutory powers in a manner which might interfere with a validly granted right of exclusivity.

That of course assumed that what Meridian had was a right of exclusivity and this is perhaps the most interesting part of the High Court's reasoning. The High Court focused on the fact that in granting Meridian's consents, the consent authority had created the right for Meridian to take, use or divert property, being surface water in Lake Tekapo, for a defined term of maximum rates and quantities and for maximum periods[14]. The Court regarded it as important that Aoraki had conceded that Meridian's consents were of considerable economic value and found that granting a permit to Aoraki to use the same water would reduce Meridian's ability to generate electricity "*thereby devaluing its grant*"[15]. The Court referred to the long standing principle of non-derogation from grant. As the Court noted, that principle traditionally applies to sales of land or leases but, in the Court's view, it was applicable to all legal relationships which confer "*a right in property*"[16]. The High Court separately described a water permit as akin to a profit a prendre[17].

The Court clearly regarded the concept of "*a right in property*" as not being inconsistent with the permit itself not being real or personal property. It also appears to have assumed that surface water in situ could be regarded as "*property*"[18].

The High Court supported its reasoning with reference to the doctrine of legitimate expectation, following recent authority which suggests that that doctrine might have substantive application[19].

On the subsidiary point, the High Court found that as the water of Lake Tekapo was already fully allocated, there was no role for the Waitaki Catchment Water Allocation Board. It had no discretion to allocate water that was already allocated by lawfully granted permits.

IMPLICATIONS OF RECOGNISING ALLOCATION DECISIONS AS CREATING RIGHTS IN PROPERTY

It is not my intention to present a detailed analysis and/or critique of the High Court's reasoning. Aoraki Water Trust and its fellow plaintiffs have publicly announced they have not and will not appeal the High Court's decision. The interesting point for future analysis is therefore how the principles enunciated by the High Court might apply in other situations.

The first point is whether it is critical to the application of those principles that the resource in question was "*fully allocated*". Clearly the Court itself found this to be a critical piece of background. However, it is by no means obvious that the reasoning of the High Court is restricted to that scenario. Take a hypothetical example where 80% of the allocatable water in a catchment after provision for instream uses is the subject of water permits. A subsequent upstream application seeking access to 25% of the allocatable resource surely has the effect, as regards the final 5%, of eroding or otherwise devaluing the existing permits.

Moreover, one can readily foresee other situations where, although a resource is not fully allocated, the subsequent grant of a water permit will devalue or otherwise erode the efficacy of an existing permit.

Take the hypothetical situation of a typical Canterbury braided river. A water permit application to dewater one braid of the river might effectively deprive an existing water permit holder downstream of the water it has previously accessed. Does it really matter that the whole river is not fully allocated? The answer to that question might be that the downstream water holder

14 Paragraph 35.
15 Paragraph 35.
16 Paragraph 36.
17 In the sense of being a right to use the subject resource
18 Cf Halsbury's Laws of England, 2004 Reissue, Volume 49(2), paragraph 47.
19 Rather than the more traditional approach that it is limited to procedural outcomes.

could alter its operations to access another part of the river resource, but that of course assumes that the conditions on the existing permit would permit the required alteration to the way in which the activity was carried out. In addition, because of the additional cost inherent in such an alteration, one could reasonably argue that the permit holder had been deprived of some of the economic value of its existing permit.

This raises a question as to whether there is a distinction to be made between activities which derogate from or devalue[20] an existing permit (and which can not be permitted as a matter of law) and activities which have an adverse effect on an existing permit holder's activities (which might be permitted provided the adverse effects are appropriately avoided, remedied or mitigated), and if so, where the line between the two is to be drawn. It appears that the High Court did not need to consider this point because of the procedural context within which it was addressing the issues, but given the different ways in which the High Court described impermissible effects, and the fact that Aoraki's proposed operations did not preclude Meridian exercising its consents in relation to the bulk of the natural outflow from Lake Tekapo, the answers to these questions are by no means obvious.

More generally, what exactly does it mean to "*allocate*" a resource? On the face of the matter, the High Court meant no more and no less than that Meridian had been granted a water permit under section 14. Arguably, if an existing consent was subject to future consents that might not be the case. However, it is difficult to image how a consent could validly be granted on that sort of basis. If *Fleetwing Farms* has determined authoritatively that the first application in point of time must be determined without regard for any subsequent application(s) made before that determination, surely it must be clear that the application must be heard and determined without reference to applications which have not even been made.

Another point of interest is whether the High Court's decision is limited to the allocation of surface water resources. Again, there is no obvious reason why it should be. To the extent that the structuring of section 14 was relevant to the High Court's reasoning, sections 12, 14 and 15 all follow a similar format. In the case of land use applications, if the relevant District Plan requires that a consent application be made for a particular activity, the end result is much the same also. Looking at the resources themselves, clearly there is little basis for distinguishing between surface water and ground water (including geothermal water). Similar issues will tend to arise in relation to all of them. Perhaps even more interestingly, there are many situations where the grant of a discharge permit can be said to involve the allocation of the assimilative capacity of the receiving environment. The discharge of noise is another example where, although traditionally considered within the rubric of a land use application, a party might in some circumstances be able to argue that it has been allocated either all or a defined proportion of the assimilative capacity of the receiving environment.

In all of these cases, to grant a subsequent permit might be said to erode the first consent in time or to lessen the value of existing consents to the permit holder and thereby to erode the grant of consent.

It would be easy, at a relatively superficial level, to limit the *Aoraki* decision to its facts. In the writer's view, such factual distinctions fail to address the way that the High Court has gone back to the fundamental character of a resource consent, and reasoned from there. At the very least, it is clear that the Environment Court will have some interesting issues to grapple with as parties holding existing consents seek to protect their interests.

Disclosure of Interest:

The writer is currently acting on the reconsenting of substantial hydro and geothermal facilities for an existing consent holder. He also has vivid memories of running many of the arguments which have now found favour with the High Court (largely unsuccessfully) in relation to the fixing of a minimum flow under the Water Act for the Whanganui River and its tributaries in the early 1990s.

20 Both terms used by the High Court.

Actual and Potential Effects:

the changing scope of s104(1)(a) assessments

Ashley Cornor, Phillips Fox

Section 104(1) of the Resource Management Act 1991 (the Act) sets out the factors that consent authorities must have regard to when considering resource consent applications. Specifically, s104(1)(a) requires consent authorities to have regard (subject always to Part 2 of the Act) to 'any actual and potential effects on the environment of allowing [an] activity'.

At least since the decisions of the Court of Appeal in *Auckland Regional Council v Dye*[1] and *Arrigato Investments Ltd v Auckland Regional Council*,[2] the established view seems to have been that s104(1)(a) refers only to effects arising directly from the activity in question. Area-wide cumulative effects, combining the effects of the activity with the effects of existing or potential off-site activities, have accordingly been excluded from consideration.

In view of the perceived problems stemming from the Court of Appeal's interpretation of s104(1)(a), the Environment Court has reconsidered the scope of 'actual and potential effects' in a series of recent cases. The culmination of these decisions is the judgment of Environment Judge Jackson in *Cashmere Park Trust v Canterbury Regional Council*[3], where the effects of off-site, potential permitted activities are explicitly admitted for consideration under s104(1)(a). This article examines Judge Jackson's decision and discusses the potential implications it has for consent authorities.

CASHMERE PARK TRUST – BACKGROUND

It is trite to state that the purpose of the Act is to promote the sustainable management of natural and physical resources, as set out in s5(1). It is clear from a consideration of this purpose, however, that a good part of the Act is necessarily forward looking – that is to say, instant decisions about resources must be made in consideration of effects that may only impact upon subsequent generations. Nevertheless, to make the Act practically workable, limits must be selectively placed on the degree to which consent authorities are required to anticipate the future use of natural and physical resources. This tension between the 'futurity' of the Act and the need for it to be capable of practical implementation is revealed in the competing arguments of the parties in Cashmere Park Trust.

In *Cashmere Park Trust* the Environment Court was asked to consider an appeal against the grant of a discharge permit to the developer of a large-scale subdivision. The discharge to which the permit related was increased stormwater run-off from the subdivided land into a local waterbody. The owners and occupiers of downstream land within the catchment were concerned that the cumulative effects of any consented discharge, taken in conjunction with the effects of discharges from past and/or *future* permitted subdivisions, would lead to flooding of their properties.

CASHMERE PARK TRUST – DECISION

As the case transpired, the Environment Court concluded that potential permitted activities – as opposed to existing, implemented activities – were to be taken into account under s104(1)(a). However, on the basis of the evidence presented, the Court concluded that the effects of

1 [2001] NZRMA 513 (CA).
2 [2001] NZRMA 481 (CA).
3 Decision C48/2004 (21 April 2004).

the discharge were minor, both directly and cumulatively. The appeal failed accordingly.

To assist in reaching its conclusion, the Environment Court considered two broad questions of law, namely:

- Are 'cumulative effects' included in the 'actual and potential effects' referred to in s104(1)(a)?
- Does the 'environment' for the purposes of s104(1)(a) include permitted (but not yet existing) activities on other land near the site of a proposed activity?

CUMULATIVE EFFECTS

The meaning of 'effect' is explicitly set out in s3 of the Act. Significantly, it includes:

> (d) Any cumulative effect which arises over time or in combination with other effects–
>
> regardless of the scale, intensity, duration, or frequency of the effect, and also includes–
>
> (e) Any potential effect of high probability; and
>
> (f) Any potential effect of low probability which has a high potential impact.

Section 104(1)(a) does not refer simply to 'effects', however. Instead, it uses the phrase 'actual and potential effects'. The Court of Appeal noted this distinction in *Dye*,[4] and considered that Parliament had implicitly abandoned the s3 definition of effect, which only applies where the context does not require otherwise. However, the Court acknowledged that the phrase 'actual and potential effects', given its natural meaning, is inherently very wide and capable of encompassing almost all of the subtleties of the s3 definition.

In *Cashmere Park* Trust, the Environment Court commences its discussion of cumulative effects with the observation that: [5]

> In *Auckland Regional Council v Dye* the Court of Appeal decided that 'actual and potential effects' as used in the former section 104(1)(a) did not include 'cumulative' effects.

It is difficult to reconcile this assertion with the decision in *Dye*, which acknowledges that cumulative effects are likely to be caught as an 'actual' effect under s104(1)(a) and which clearly states that: [6]

> Cumulative effects properly understood should also be taken into account pursuant to s105(2A)(a) [now s104D(1)(a)] and s104(1)(a).

Nevertheless, the Environment Court proceeds on the basis that *Dye* excludes cumulative effects from consideration under s104(1)(a). Judge Jackson, however, was able to distinguish *Dye* on the following grounds:

- The former s104(1) considered in *Dye* was repealed and substituted by the Resource Management Amendment Act 2003.[7] This was held to be a ground for distinction, even though the text of s104(1)(a) was unaltered by the process of repeal and substitution; and
- The statements made in *Dye* about cumulative effects were obiter, and had previously been deemed to be inconclusive in *Upper Clutha Environmental Society Inc v Queenstown Lakes District Council*[8] (a previous decision of Judge Jackson); and
- In any event, if cumulative effects were excluded from consideration under s104(1)(a), they could nevertheless be examined under the 'catch-all' of s104(1)(c).9

As a result, Judge Jackson was ultimately able to conclude that cumulative effects do constitute 'actual and potential effects on the environment' for s104(1)(a)

4 [2001] NZRMA 513 (CA) at para 41.
5 C48/2004 at para [16].
6 [2001] NZRMA 513 (CA) at para [49].
7 Effective 1 August 2003.
8 C104/2002 (2 September 2002) at paras [12] – [14].
9 It is respectfully suggested that this approach to the question of cumulative effects might not be as clear-cut as Judge Jackson makes out. This is because s104(2), which allows consent authorities disregard certain adverse effects, only applies with respect to s104(1)(a). If Parliament had intended that s104(1)(c) were to cover certain kinds of 'effects', it would seem logical that s104(2) should refer to it as well. Further, Parliament has specifically provided for environmental effects under s104(1)(a). Taken in conjunction, the tacit implication is arguably that Parliament did not envisage that s104(1)(c) would encompass the consideration of environmental effects.

purposes. However, a subtle point is tagged on to this conclusion. That point is that the cumulative effects to be considered under s104(1)(a) include:[10]

> … the cumulative effects of other permitted potential discharges *on other land* in the … catchment together with those from the discharge for which consent is sought.

The reference to *other land*, or off-site effects, is a surprising one. It may be that support for this proposition can be derived from Judge Jackson's reference to *Emerald Residential Ltd v North Shore City Council*[11] where, after discussing the relationship between cumulative effects and the permitted baseline (as defined in Arrigato), Environment Judge Thompson states:[12]

> … one then comes to para [38] in *Dye* which, taken literally, appears to hold that a 'cumulative effect' can only be one that arises from the proposed activity: *'All of these are effects which are going to happen as a result of the activity which is under consideration'*. The consequence of that would be that only adverse effects emanating from the proposal itself could be brought to account. There could be no cumulative effects (properly so called) created by combining existing or permitted effects with effects arising from the proposal.

And later:[13]

> Such a result cannot have been what was intended. It must be that the quoted comment in *Dye* should be read as being confined to the facts of that case, and not being intended to be of universal application in any case where cumulative effects are to be considered.

Actual or potential effects for the purposes of s104(1)(a) are only relevant to the extent that they are effects on the environment

It should be noted that in *Dye*, the 'cumulative effects' the Court of Appeal was concerned with were those resulting from the 'precedent effect' of granting a consent. The Court in that instance rejected the appropriateness of an 'area-wide' assessment, on the basis that the cumulative effects arising from future consents are best considered at the time applications for those consents are made. Arguably, this at least partially justifies Judge Thompson's opinion that Dye should be confined to its own facts.

While passages quoted from *Emerald* above certainly support the proposition that cumulative effects should not be limited only to the effects arising from a particular activity, it is contestable that they go so far as to bring the effects of existing or permitted activities *on other land* within the scope of 'cumulative effects'. One possible explanation for the reference to *other land* is Judge Jackson's inclusion of the term 'environment' alongside 'actual and potential effects' when stating his conclusion as to cumulative effects.

THE ENVIRONMENT

Regardless of whether they are comprised of cumulative effects or otherwise, actual or potential effects for the purposes of s104(1)(a) are only relevant to the extent that they are effects on the environment.

'Environment' is defined very broadly in s2 of the Act. It includes not only natural and physical resources but also amenity values, and the social, economic and cultural conditions that affect them. Like all the definitions in s2 of the Act, however, it is a context specific definition. The second question arising in *Cashmere Park Trust* (and, as noted above, possibly an element of the answer to the first) was whether the environment contemplated by s104(1)(a) was sufficiently expansive to encompass the effects of off-site activities permitted by a relevant plan.

10 C48/2004 at para [22].
11 A31/2004 (12 March 2004).
12 A31/2004 at para [24].
13 A31/2004 at para [26].

The scope of the 'environment' has been considered by several Court of Appeal decisions in the context of the 'permitted baseline', now statutorily part of s104

The scope of the 'environment' has been considered by several Court of Appeal decisions in the context of the 'permitted baseline', now statutorily part of s104.[14] In *Arrigato*, Tipping J helpfully drew together the preceding authorities to define the permitted baseline as 'the existing environment overlaid with such relevant activity (not being a fanciful activity) as is permitted by [a] plan'.[15] The ambit of the 'existing environment' referred to in the Tipping J's formula was in turn considered by the High Court in *O'Connell Construction Ltd v Christchurch City Council*.[16] Panckhurst J's clear conclusion in that case was that the 'environment' is restricted only to the site in question. Judge Jackson was careful to distinguish *O'Connell* in *Cashmere Park Trust*, on the basis that it is authority only for the extent of the environment to which the permitted baseline relates, rather than for the extent of the wider receiving environment which may be affected under s104(1)(a).

This distinction was recently affirmed by Environment Judge Kenderdine in *Kuku Mara Partnership & Others v Marlborough District Council*.[17]

Judge Jackson carefully notes in Cashmere Park Trust that none of these earlier authorities are specific as to whether or not off-site permitted activities can be taken into account, either for permitted baseline purposes or for a more general assessment under s104(1)(a). He also observes that, in general, the Court of Appeal decisions regarding the permitted baseline and the interpretation of s104(1)(a) take a fairly flexible approach to future effects. In *Dye*, for example, while Tipping J concludes that consent authorities have no mandatory obligation to conduct area-wide investigations as to what others may seek to do in the future, he does not specifically preclude consent authorities from being able to carry out such inquiries should they see fit. The tacit implication is arguably that a similar degree of latitude should be shown when considering whether off-site permitted effects should be considered under the Act.

This leads to the critical conclusion in the *Cashmere Park Trust case*:[18]

> In our view section 104(1)(a) – especially the combination of the definitions of two of its critical words 'environment' and 'effects' – creates (inter alia) a duty to examine (when requested by a party) the potential effects of (and on) possible permitted activities on land, air or water that is also claimed to be affected by the relevant effects of allowing a proposal. It allows a judgement to be made whether there are cumulative effects of both sets of activities that should be had regard to.

This approach to the assessment of potential off-site activities was recently endorsed by the High Court in *Wilson and Rickerby v Canterbury Regional Council*,[19] although *Cashmere Park Trust* was not specifically cited in that decision. In finding that off-site effects from potential permitted activities are relevant for s104(1)(a) purposes, Fogarty J noted:[20]

> There is no RMA purpose or policy to allow individuals to pursue use of their private property without regard to the costs that their private activities may impose on neighbours.

Like Judge Jackson, Fogarty J places some limits on the extent of the inquiry permitted under s104(1)(a), adopting the threshold standard of 'not fanciful' activity adopted by the Court of Appeal in relation to permitted baseline assessment in *Smith Chilcott Ltd v Auckland City Council*.[21]

14 See RMA s104(2): 'When forming an opinion for the purposes of subsection (1)(a), a consent authority may disregard an adverse effect of the activity on the environment if the plan permits an activity with that effect.'
15 [2001] NZRMA 481 (CA) at para [29].
16 [2003] NZRMA 216.
17 Decision W39/2004 (7 May 2004) at para [68]. Judge Kenderdine also considered herself to be bound by the decision in ***O'Connell***, in so far as that decision limits the scope of the existing environment for permitted baseline purposes.
18 C48/2004 at para [33].
19 (unreported, HC Christchurch, CIV 2004-485-000720, 24 August 2004, Fogarty J).
20 CIV 2004-485-000720 at para [66].

WHERE DOES THIS LEAVE CONSENT AUTHORITIES?

The decisions in *Cashmere Park Trust* and *Wilson* establish that off-site, potential permitted activities are relevant 'effects on the environment' for the purposes of s104(1)(a). It must be remembered that a consent authority's obligation to have regard to such effects under s104(1)(a) is a mandatory one. This is so, notwithstanding Judge Jackson's discussion of the flexibility consent authorities ought to be permitted when taking factors into account for s104 purposes.

The area-wide assessment demanded by both cases is seemingly only limited by the following factors:

- Applying *Cashmere Park Trust:* the 'other site' on which a permitted activity might take place must be somehow affected by allowing the subject proposal; and the consent authority is only required to consider off-site effects if a party to the consent process raises them.
- Applying *Wilson;* only off-site activities that are 'not fanciful' need to be considered.

Accordingly, consent authorities are left with something of a bigger task than what one might suggest is undertaken as a matter of current practice. There is also likely to be a fair amount of uncertainty as to where the boundaries of s104(1)(a) assessment lie – is a consent authority obliged, for instance, to consider off-site potential permitted activities if no party makes a request to that effect? On balance, however, assessment of off-site potential effects is arguably conducive to achieving the purpose of the Act. Perceived administrative difficulties, within reason, ought not to be a barrier to obtaining that lofty goal. That said, it remains to be seen whether the burden imposed on consent authorities by the interpretation of s104(1)(a) favoured in *Cashmere Park Trust* and *Wilson* continues to be a workable one, as that interpretation percolates down to related tasks for a consent authority, such as determining the identities of affected parties for notification purposes.

Off-site, potential permitted activities are relevant 'effects on the environment' for the purposes of s104(1)(a)

21 [2001] NZRMA 503.

Security of Tenure, Legislative Change, and Old Mining Rights:

Glenharrow Holdings Ltd v Attorney General

Barry Barton, Professor of Law, University of Waikato

Security of tenure is a persistent theme in natural resources law – the reassurance that a company has of holding its rights against actions of competitors, government departments, or the legislature. At the moment security of tenure is a prominent issue in relation to water and in relation to the foreshore and seabed. In relation to minerals, it is the underlying theme in what may be one of the last Privy Council decisions in this field of law, *Glenharrow Holdings Ltd v Attorney General* [2004] UKPC 42. Glenharrow Holdings Ltd had a mining licence under the Mining Act 1971, which covered 107 ha in the Taramakau Valley on the West Coast, and authorized mining of serpentine, bowenite, talc, and quartz. Serpentine and bowenite are forms of pounamu or greenstone. The licence was issued on 15 November 1990 for a term of ten years, so in 1999 Glenharrow put things in motion for an extension or a new licence. The Mining Act 1971 had been repealed and replaced by the Crown Minerals Act 1991. The 1991 Act contains a transitional provision, s 107(1), which provides that an existing mining licence, as one of the mining privileges under the 1971 Act, 'shall continue to have effect … as if the Act which applied to the privilege before that date continued in force, and as if … the holder of the privilege continued to have the same statutory rights as the holder would have had if this Act and the Resource Management Act 1991 had not been enacted …' Similarly, the Ngai Tahu (Pounamu Vesting) Act 1997 saves existing privileges from its operation. So the matter was to be dealt with under the Mining Act 1971.

The transfer of pounamu from the Crown to Ngai Tahu as part of its land claim settlement underlies the case. Once these mining licences came to an end, when ever that might be, the mineral rights did not return to the Crown but vested in Ngai Tahu.

Glenharrow could not persuade Crown Minerals, on behalf of the Minister of Energy, that it had a right to an extension of term and a right to a new licence, so it went to court and on 6 October 2000 obtained declarations that it did: *Glenharrow Holdings Ltd v Attorney General* [2001] 1 NZLR 578 (Heron ACJ). It urged Crown Minerals to process its applications before the old licence expired. But it did not succeed, and at the last minute on 14 October issued new proceedings. It obtained an order directing that the old licence continue in force until further order. Ngai Tahu joined the new proceedings. It is odd that the issues before Heron ACJ were in effect relitigated even though the Crown had not appealed. In the new proceedings the Crown supported Ngai Tahu's approach. The Crown obtained partial success in winning a ruling that the Minister had no power to issue a new licence: *Glenharrow Holdings Ltd v Attorney General* [2003] 1 NZLR 236 (Chisholm J). Glenharrow appealed, but lost, not only on that point but also on its right to an extension by way of variation of the conditions of the licence: *Glenharrow Holdings Ltd v Attorney General* [2003] 2 NZLR 328 (CA). On the further and final appeal it lost again on both points. The Privy Council described its reasons as largely the same as the Court of Appeal's, so I will consider them together.

VARIATION OF THE TERM OF THE LICENCE

Glenharrow relied on s 103D(3) of the Mining Act 1971, which authorizes the Minister to 'vary the conditions subject to which the mining privilege was granted' – it argued that the term or duration of the licence was such a condition. It pointed to the way that the licence document was worded, and condition 21, imposed by the Minister of Conservation to state that the term of the licence be ten years. The High Court decisions accepted Glenharrow's argument. Heron ACJ (at 587) observed that a condition is a derogation from or modification of the existing grant, and the maximum term possible under the Act was 42 years, so that something less than that had to be a condition. Chisholm J said that condition 21 qualifies as a condition and is capable of variation. It was one that was adopted by the Minister of Energy, and the fact that it had been stated, or repeated, in the body of the licence as being the term could not protect it from the power to vary. Variations of the term could be obtained within the constraints of the statutory maximum.

The Court of Appeal and the Privy Council did not agree that the term of a licence was a condition. They held that the term is essential, a condition is not. A condition is attached to the term. The grant of a ten-year term was subject to conditions. The grant was of a ten-year licence, not a licence with a condition that it expire in ten years. Certainly, the Minister of Conservation had imposed a condition that the licence be for ten years (the land was under that Minister's control), but that was a condition of the Minister's consent, not the licence. It was not a requirement with which the licensee had to comply, on pain of forfeiture of its licence, and hence did not become a condition by virtue of condition 24, which required the licensee to comply with all the terms and conditions imposed by the Minister of Conservation. And when the Minister of Energy implemented that consent, he was not imposing a condition on the grant of the licence; rather, he was defining the term of the licence he was granting. The language and layout of the licence document confirmed this view. On its front page it stated "TERM: Ten years commencing on the date hereof", followed by words of grant, in relation to land and minerals specified, and then the words "This licence is granted for the abovementioned term SUBJECT TO payment of rent … and to the terms, conditions, reservations, and provisions set out in the said Act … and to the additional terms, conditions, reservations and provisions specified in the Third Schedule hereto." Moreover, from the wider perspective of reading the statute as a whole, it was unlikely that Parliament, having prescribed the mechanism for the grant of new licences in section 69, would intend that the equivalent of a new licence could also be obtained by the simpler mechanism of a variation of a condition as to term.

One general point to take from this is the importance of the layout of documents like licences and permits. The layout may be legally significant. A second general point is that the distinction between term and conditions is consistent with property law, although the courts here did not resort to that body of law. A lease as a term of years is generally subject to covenants and powers, many of which could be implied if necessary, but there can be no lease without a term.

How does the Crown Minerals Act 1991 deal with variations? Sections 36 to 38 allow changes by consent or as provided in the permit, including extension of the duration of the permit. But the power to make changes is fenced in and elaborated in 2003, no doubt in response to *Glenharrow*, with different provisions for prospecting, exploration, and mining licences, and a procedure for determining whether the permit holder has stayed in substantial compliance with its permit.

RIGHT TO THE GRANT OF A NEW LICENCE

The key provision on this point was section 77(2) of the Mining Act 1971: "The licensee shall have the right in priority over every other person to have granted to him a new mining licence in respect of the land to which the existing licence relates, if he applies for the new licence not later than 30 days before the expiry of the existing licence." This could be read either as (i) granting a right to a new licence, with priority over

others, or (ii) granting priority over others (ie over rival mining companies) if there was a right to apply for a new licence. Glenharrow relied on the first interpretation, and Heron ACJ agreed with it. However Chisholm J and the higher courts took the second, more restrictive, interpretation. Chisholm J's reasoning was followed only in part in the higher courts. He thought that Glenharrow's argument would result in perpetual renewal of a licence, which Parliament could not have intended; and that the contrary interpretation did not require any straining of language. He referred to the transitional provisions, and he pointed out that (as the other courts accepted) Glenharrow's argument was irreconcilable with section 104A, which gave the Minister an express right at any time to decline any application for a mining privilege like a mining licence.

The Court of Appeal and Privy Council were able to delve more deeply into the history and structure of the Mining Act 1971. The matter was one of close reading of the Act – there was no case law on point – and in particular of ascertaining which interpretation of section 77(2) was more compatible with the Act as a whole. The history disclosed that from the Mining Act 1886 a renewal of a mining licence was available, at the discretion of the mining warden. In the Mining Act 1898 the discretion was removed, so that the licensee had a right to a renewal, on the same terms as before including the right of renewal, so that there was in effect a perpetual right of renewal. But the Mining Amendment Act 1948 changed that, ruling out renewals but allowing the holder to make a fresh application, and to have priority for such an application over all other applications for the same area. It was plain from the statute and the Parliamentary debates that a change of policy was intended. This background rendered it unlikely that in 1971, with less than clear words, there was intended a reversal of policy to go back to allowing licence holders an unchallengeable right of renewal, perhaps indefinitely. And Glenharrow had to concede that it was effectively arguing for a right of renewal.

The Privy Council pointed out that such an interpretation would conflict with other provisions of the Act. It would make a nonsense of section 77(1) which required that licences be for fixed periods of no more than 42 years. It could not be reconciled with section 104A which was inserted in 1981 to make it absolutely clear that the Minister had the power at any time to decline an application for a mining privilege such as a mining licence. It contrasted with section 50(2) which showed that in other circumstances (prospecting licences) Parliament could provide expressly for rights of renewal. Section 57(1) did not support Glenharrow's attempt to show that its language was similar to that of section 77. That section conferred on the holder of a prospecting licence the right to "move up" to a mining licence, free of ministerial discretionary power.[1] On the contrary, it showed that where Parliament wanted to give the miner such an unfettered right, it would shape the provisions carefully to prevent inconsistencies and strange results – in contrast to section 77(2). As for the structure of the Act, the grouping of sections demonstrated that sections 48 and 69 were the key provisions that governed the Minister's powers to grant prospecting and mining licences, respectively, and would apply except to the extent that the legislature had provided otherwise. Section 69 made it clear that grant of a mining licence was discretionary, which of course was consistent with section 104A.

Section 69 made it clear that grant of a mining licence was discretionary, which of course was consistent with section 104A

In relation to the wording of section 77(2) itself, the Crown argued that the words about priority over every other person would be surplusage if

1 Section 57(1) was actually repealed by the Mining Amendment Act 1981, s. 14(2)(e), leaving the new ss. 57A and 57B to control the matter, and imposing ministerial discretionary control over the right of a prospecting licence holder to move up to a mining licence. But the layout of the amendment Act is such that the oversight is not surprising. The oversight does not undermine the Court's analysis if we accept that it is examining the legislature's use of language at different stages of the Act's evolution. But it does undermine Glenharrow's reliance on s. 57 to explain the priority language in s. 77(2).

the mining licence holder had an unrestricted right to a new licence. The Court of Appeal and the Privy Council agreed. Words will not lightly be rejected as surplusage if another meaning is available. The section was mainly concerned with priority than with rights to new licences. The Privy Council demolished Glenharrow's resort to section 57(1) to explain why the priority words were necessary alongside the right to a new licence; it could not argue that it was necessary to deal with competing applications by the mining licence holder and a prospecting licence holder under that section, because under section 87(3) the mining licence holder had exclusive rights to the ground for mining purposes and no one else could hold a prospecting licence for it. Section 77(2) therefore was simply a priority provision, and gave Glenharrow no right to a new licence or renewal.

In the Crown Minerals Act 1991, there is no immediate equivalent of section 77. The maximum term of a mining permit is 40 years, and an application for a new permit, along the lines that Glenharrow claimed, would need to come under sections 36 to 38. Section 32 of the Crown Minerals Act 1991 deals with rights to subsequent permits, usually sought when a discovery is made that can be developed. It provides miners with a better right to upgrade than they had between 1981 and 1991. Subject to meeting a number of stated requirements, the permit holder "shall have the right … to be granted in exchange an exploration permit" or a mining permit, as the case may be. This right, unrestricted by any general ministerial discretionary veto, is valuable to mineral and petroleum companies. Section 32 needs make no provision for priority between applicants. Exclusive rights to minerals within the permit area are normally given by section 30(7).

In the Crown Minerals Act 1991, there is no immediate equivalent of section 77

NEW TRANSITIONAL PROVISIONS – BALANCING SECURITY OF TENURE WITH IMPROVEMENT OF LEGISLATION

On 19 September 2002, while Chisholm J was considering his decision, the Associate Minister of Energy, Harry Duynhoven, announced that the government would seek changes to a Crown Minerals Amendment Bill that was before the House, to deal with the Glenharrow situation. The transitional provisions of the Crown Minerals Act 1991 would be changed so that any application for a variation or a new licence under the Mining Act 1971 received from 5 pm that day would no longer be covered by the of regime and would be covered by the Crown Minerals Act. The Amendment Bill before the House would have made those changes effective in the ordinary way, from the date the new Act became law. The change attracted some criticism for being an undue erosion of the vested rights of companies like Glenharrow that still held mining licences granted under the 1971 Act, and a constitutional usurpation of Parliament's right to make the law, and an effort to deprive Glenharrow of the fruits of its victories in the High Court. (Warren Berryman in "The Independent" 2 Oct 2002, 9 Oct 2002.) What emerged from the Select Committee addressed these criticisms and was enacted as the Crown Minerals Amendment Act 2003.[2]

Striking transitional provisions were the result. The amendment rewrote section 111 and inserted section 111A in the principal Act. These sections deal with rights to new privileges that could have been applied for under specified sections of the Mining Act 1971, the Coal Mines Act 1979, and the Petroleum Act 1937, and with variations of conditions under the Mining Act section 103D. They declare that any application made after 5 pm on 19 September 2002 will not be dealt with under the old Act but under equivalent provisions of the Crown Minerals Act 1991.

2 See M Gibbs, "The Fate of Existing Mining Privileges: The Crown Minerals Amendment Bill 2001" (2003) 11:1 Resource Management Journal 1, and her previous "Justice, Treaty Settlements and the Return of Pounamu (Greenstone) to Ngai Tahu" (2002) 10:2 Resource Management Journal 9.

But any application made before that hour "must be determined under the final judgment, decision, or order given or made (including any appeal) in the proceedings *Glenharrow Holdings Limited v The Attorney-General and Te Rununga O Ngai Tahu* (filed in the High Court of New Zealand at Wellington under CP 242/00)." As it turned out, of course, Glenharrow was held to have no rights to be protected by this novel provision. What is striking is that when it chooses Parliament can be careful to avoid interfering with the rights of a person who is in legal dispute with the Crown. The Amendment Act contrasts strongly with the Foreshore and Seabed Act 2004.

Resource rights, like property rights, tend to be long-lived. So transitional provisions are more important in resources law than in other fields. They call for a nice balancing of security of title with progressive improvement of legislation. Mining companies understandably want to hold on to old resource rights that give them a better deal than they can get under the present regime. *Glenharrow* is such a case but not the only one.

The transitional provisions are intended to allow licence holders under the old Mining Act to hold onto the various particular rights they had under their licences, as well as the mere licence itself. The most valuable of these was freedom from land use planning controls under the Town and Country Planning Act 1953. *Stewart v Grey County Council* [1978] 2 NZLR 577 (CA) held that the Mining Act was an exclusive code in respect of the use of land for mining purposes. This was followed by *Kopara Sawmilling Co v Birch* (1981) 8 NZTPA 166 (HC) in respect of the Planning Act of 1977, and confirmed by the Mining Amendment Act 1981, inserting section 4A. Thus *Opoutere Ratepayers & Residents Assn v Heritage Mining NL* (Planning Tribunal, A33/95, 20 April 1995, Judge Bollard) held that the transitional provisions in the Crown Minerals Act are to be read so that the holder of a Mining Act 1971 prospecting licence need not obtain RMA land use consents. Subsection 107(3) caused some difficulty, appearing on its face to say the opposite of what it must mean when read in context. Indeed it is grammatically incomplete. Subsequently, the Environment Court has held that it has no jurisdiction to make an RMA enforcement order against the holder of a mining licence under the Mining Act 1971 in respect of its operations on the licence land: *Otago Heritage Protection Group Inc v Macraes Mining Co* (Environment Court, Christchurch, C36/98, 9 April 1998, Judge Jackson). Sections 107 and 108 of the Crown Minerals Act 1991 were a complete bar.

Similarly, *Solid Energy New Zealand Ltd v Buller District Council* [1998] NZRMA 385 (HC) held that the Coal Mines Act 1979 was a comprehensive code which governed, inter alia, the construction of buildings connected with coal mining activities. By reason of section 107 of the Crown Minerals Act 1991, Solid Energy could construct a new building on its 1979 Act licence area without a building consent under the Building Act 1991, although it did have to comply with the Building Code.

The Glenharrow decision brings closer the end of the special regime for mining that existed before 1991, and brings closer the full implementation of the Ngai Tahu settlement in relation to pounamu. But transitional questions will be around for some time, for mining licences and coal mining licences issued before 1 October 1991. If they have the standard 42-year term, you will need to keep your copies of the Mining Act 1971, the Coal Mining Act 1979 and the Petroleum Act 1937 on your shelf until 2033.

Letter to the Editor

Dear Editorial Committee

Re: Restorative Justice Processes in RMA Prosecutions

It was great to read Judge McElrea's article in the November Journal outlining the potential for restorative justice processes in RMA prosecutions. I have been facilitating and recording conferences with the Restorative Justice Services Trust in Canterbury for several years, and in my "day job" I am a planning consultant.

Restorative justice conferences can be amazing. Certainly not a "soft option" for the offender – it can be quite gruelling to face your victims, who are not necessarily in a mood to forgive. In my experience restorative justice conferences can greatly assist victims and/or the offenders to come to terms with what has happened, deal with it, and move on.

As far as I know, we have never had an RM case referred to us in Canterbury, but I fully agree that there is potential there. (And it would make a nice change from traffic offences, assaults and burglaries). A few comments on Judge McElrea's article.

First, I'm not sure that there are *"hundreds of trained restorative justice facilitators"* in New Zealand. We have only about 20 in Canterbury, and they are not all fully trained yet. The good news though is that although fees of "generally under $1,000" were mentioned in the article, the service (in Canterbury at least) is free because facilitators are volunteers.

Secondly, I have to question the comment that "*Counsel are entitled to be present*." I have never had counsel present at a conference, and I would be uneasy about a request to be present, because an essential element of restorative justice is that parties have to deal with each other directly, without any sort of advocate intermediary. We encourage parties to bring "support people" (mostly family or friends). They can be useful when the facilitator sees a need to address the balance during a conference, but essentially conferences are for the people directly affected by an offence to talk to each other in a safe and partly structured environment.

Similarly, I am not sure that the complainant (if it is a council) can usefully be treated as a party in a conference. It would probably be useful to have a council officer present or readily available in case some technical matters came up such as possible measures to compensate for the damage caused by the offence. It has to be remembered though that restorative justice is not primarily about negotiating compensation – that is just sometimes a by-product of the process.

These are just niggles though. I hope members of the Association have read Judge McElrea's article and will look for opportunities to include restorative justice conferences as part of RM prosecution processes.

Yours faithfully
David W. Collins
Christchurch

JUDGE McELREA'S RESPONSE

"I welcome Mr Collins' positive and constructive comments. When he says restorative justice is no "soft option" he speaks from experience.

I have checked the figures and can say that there have been at least 150 facilitators trained for the District Courts pilot scheme operating in four courts, and over 60 trained for the 20 community diversion schemes funded by the Crime Prevention Unit.

As to the attendance of counsel at conferences, I regard this as an important right of offenders, if RJ is not to become, or be seen as, unconcerned about defendants' rights. Their role however is not an adversarial one, or to speak for the defendant, and this must be clearly agreed in advance. Rather they are there to support their client, give advice if asked, and ensure that he/she understands what is being agreed to.
The more complex the area of sentencing, the more valuable this assistance can be - and not just for the defendant. Finally, it is only if counsel experience the RJ process themselves that they might recommend it to other clients.

In RMA cases the Informant (Council) should be represented by one of its officers, not only for the information they possess, but because they represent the wider community and its environment. This is especially so if there are no "direct" victims of the offence.

An RMLA travelling seminar may provide more answers shortly."

Judge FWM McElrea

Case Notes

Bal Matheson and Stephanie Browne, Russell McVeagh

VARIATION CANCELLED BASED ON LANDSCAPE AND VISUAL AMENITY EFFECTS

1. The decision of *Infinity Group & Thorn v Queenstown Lakes District Council* (C10/05) highlights the limitations of a Council's ability to amend a variation to a proposed plan after submissions have been heard. It also reinforces that adverse visual and amenity effects may prevent virtually any form of development in areas of particularly sensitive outstanding natural landscape.

2. In this case, Mr Thorn challenged the Council's variation which proposed a special zone for a 75ha site that would enable a limited density residential development. He sought cancellation of the variation. The developer, Infinity Group ("Infinity") also appealed seeking various amendments to the plan provisions.

Amendments to the Variation

3. After receiving submissions, but before notifying a summary of submissions for further submissions to be lodged, the Council purported to place the variation on hold to undertake community consultation, for which a workshop was held. After discussing the views expressed at the workshop, the Council decided to proceed with the variation.

4. After the Council's decision was released, Mr Thorn challenged the Council's authority to amend the variation to allow the maximum number of residential units on the site to be increased from 240 to 400 and to reduce the minimum lot size from 1,000 m^2 to 700 m^2, on the grounds that no submission had sought those amendments.

5. As the Court observed, it has been an accepted part of New Zealand planning law for decades that a planning authority cannot alter a variation except to the extent that the alteration is reasonably and fairly raised by a submission. However, the process of deciding whether an alteration is beyond that limit is not to be bound by formality but approached in a realistic fashion, rather than legal niceties.

6. The Court assessed the submissions received by the Council and found that there was nothing in the submissions capable of being understood as a wish for more extensive high density development, or an increase in the number of residential units. Further, the Council could not rely on an informal meeting such as the workshop which discussed community planning for Wanaka, or any report of it, to justify the Council's decision to alter the variation.

7. The Court held that the variation had to be treated as if those amendments had not been made.

Landscape and visual amenity effects

8. A key issue in the decision was whether, and to what extent, the development provided for by the variation would have adverse effects on the landscape and amenity values in the locality. There was some dispute between the parties as to the correct clarification of the landscape in question. The Court found that part of the site was classified as an outstanding natural landscape and the rest of the site was classified as a visual amenity landscape.

9. The Court considered the visual and landscape effects of the development that would be created by the variation, and decided that part of the area which was higher up on the ridge line of the site was

vulnerable to change and not capable of absorbing the development the variation would provide for. The Court stated:

> while it remains alive in suitable locations and height, vegetation can hide, or at least soften the view of development. But hiding development, softening its appearance, does not excuse providing for development that should not be provided for in an ONL [Outstanding Natural Landscape], or in a VAL [Visual Amenity Landscape] where it would not have the potential to absorb change without detraction from landscape and visual values.

General assessment of the variation

10. It was concluded that in this area, the development provided for by the variation would have significant adverse effects on landscape and visual amenity values and did not achieve the purpose of the RMA.

11. The Court assessed the variation against four criteria:

(a) Is the variation necessary to achieve the purpose of the RMA?

(b) Would the variation assist the Council to carry out its functions of the control of actual and potential effects of the use, development and protection of land in order to achieve the purpose of the RMA?

(c) Would the variation be the most appropriate means of exercising the Council's function of controlling actual and potential effects of the use, development and protection of land in order to achieve the RMA's purpose?

(d) Does the variation have a purpose of achieving the settled objectives and policies of the District Plan?

12. The Court found that while the zoning may be favourable to those taking part in the development (ie developers or purchasers) it was not persuaded that residential development of the site was needed to accommodate the growth of Wanaka, or to enable the community to provide for its social or economic well being.

13. The Court held that, in considering whether development of the site was the most appropriate means of exercising the Council's function, the Council is not required to compare the proposed development with development of alternative sites. Even so, no planning witness gave the opinion that the provisions of the proposed zone would be the most appropriate means of exercising the Council's function of controlling actual and potential effects of the use, development and protection of land in order to achieve the purpose of the RMA.

14. The Court determined and found that the Council's function of controlling effects of the use and development of the site, although assisted by the provisions of the variation, did not go far enough to control development so that it avoided adverse effects on the landscape and visual amenity values on the environment. The variation would also not achieve the objectives and policies of the district plan, of protecting natural resources or promoting urban consolidation and compact urban form.

15. Accordingly, the Court cancelled the variation.

SECTION 274 WAIVER APPLICATION DECLINED

16. The Environment Court in *C & J Pickerill v Rodney District Council* (A4/05) declined to grant a waiver application for a late s274 interested party notice.

17. The appeal by Pickerill was lodged on 15 April 2004. The presiding Judge commenced case management at the end of April 2004, and negotiations commenced between the parties. Towards the end of July 2004 the parties placed a draft timetable for hearing before the Court, but advised that the parties were still trying to narrow the issues. Agreement was reached in principle by the end of October 2004 and on 5 November 2004 the

respondent reported that consent documentation was being finalised.

18. On 7 November 2004 a s274 notice and waiver application was lodged by the appellant's neighbour, apparently on the grounds that the neighbour had believed that they would be informed of when the hearing would occur in the Environment Court and that they could simply participate at that time. The application for waiver was strongly opposed by the other parties on the basis of undue prejudice.

19. After reference to *Whangapapoua Environmental Protection Society Inc and ors v Thames-Coromandel District Council and Waikato Regional Council* (A157/2004) and *Carter Holt Harvey Limited and ors v Bay of Plenty Regional Council* (A160/2004) the Court determined that the neighbour's lateness was not due to exceptional circumstances, and that undue prejudice would occur if a new party was now admitted after the significant period of time that had passed and the hard work involved in resolving the appeal. The application for waiver was refused.

COSTS AWARDED IN FAVOUR OF CROWN FOR WASTED MEDIATION EXPENDITURE

20. In *Cann Farms Limited v Whangarei District Council* (A6/05) the Environment Court awarded costs of $316.96 against the appellant in favour of the Crown for wasted mediation expenditure after the appellant failed to attend a scheduled mediation.

21. In July 2004 the appellant lodged an appeal against a subdivision consent. In October all parties entered into Court assisted mediation. All other parties and an Environment Court Commissioner attended a scheduled mediation. The appellant did not attend. When located, the appellant advised that the appellant's property had been sold and that the Council had been told two weeks prior by the consultant planner. The Council staff member expressly disavowed knowledge of receiving such advice.

22. The respondent filed a memorandum with the Court about the failed mediation, advising the Court that the respondent had received a call from the appellant's planning consultant saying that there had been a mix up and a letter cancelling the mediation was supposed to have been sent by the appellant.

23. The Court addressed the appellant's non-attendance in this way:

> Having given the appellant every reasonable opportunity to explain the situation, I have reached the conclusion that it relied unnecessarily and inappropriately on the council concerning steps being taken towards mediation. Mediation is a function of the Court expressly established by statute (s268 RMA). Court staff have a hard enough task making arrangements for mediations at places reasonably convenient for parties, and arranging the attendance of a Commissioner, parties and often many other persons. The Court expects that parties and their representatives and advisors will approach Court-assisted mediation with the seriousness that it deserves, and co-operate fully with Court staff over these arrangements. It is surprising in this case, that an appellant who was wanting finality in the form of a consent, would treat arrangements for the mediation it had agreed to, in such a casual manner.

24. The Court ordered costs in favour of the Crown to make the point that those who seek the benefit of the Court's free mediation service should co-operate constructively and courteously with the registrar's staff, and in particular not allow the Court and others to waste time and money in the process.

APPLICATION FOR WITNESS SUMMONS

25. In *Casata Limited v The Minister for Land Information* (W3/05) the Court considered an application by Casata Limited that the Court issue witness summons to four individuals in relation to the hearing of its objection to a Notice of Intention to Take Land served under

the Public Works Act 1981. The individuals had previously been involved in the public hearing of Transit's notice of requirement of designation for the SH2 Upgrade Project.

26. The Minister for Land Information and Transit opposed the request for witness summons. It was submitted that the earlier statements made by the witnesses were in preparation for a previous appeal and were not relevant to the current proceedings. Two of the witnesses were already expected to present evidence in the hearing of the objection to the taking of land. The Minister and Transit also argued that it was impermissible for Casata to summons the witnesses for the sole purpose of cross-examination.

27. Casata replied that:

(a) the prior statements were relevant to the objection;

(b) the scope of the cross examination of the witnesses was subject to the normal rules of evidence, including relevance of earlier documents, and that these matters may be ruled upon by the Court at the time of hearing;

(c) two of the individuals were already attending the hearing in which case there can be no issue raised by the summons securing their attendance;

(d) the other two witnesses cannot appear for Casata due to their earlier commitment to Transit. It is therefore necessary for witness summons to be issued so that Court may benefit from their expertise on matters relevant to the objection.

28. The Court concluded that on balance Casata's points were sensible and reasonable. The Court was satisfied that the witnesses may be able to give evidence that is relevant and reasonably necessary for the Court to determine the objection and agreed that witness summons for the four witnesses may be issued.

INTERFERING WITH WAIRUA

29. In *Ngati Tamaoho Trust v The Auckland Regional Council and Papakura District Council* (A93/2004), the Environment Court overturned a consent to allow tidal gates to be erected on the Pahurehure inlet into the Manukau Harbour due, in part, to the effect on Mäori spiritual values - the tidal gates were considered by the Court to interfere with the natural flow of the tide, and therefore with the wairua of the water.

30. The Pahurehure inlet was in an urban environment and had been significantly modified from construction of a motorway which left only a 12m wide culvert for the natural tidal flow. At the time the causeway for the motorway was built, measures were put in place to allow a tidal gate to be installed at a later date.

31. The tidal gates in the current application to the Auckland Regional Council for consent (made nearly 40 years after the motorway was built) were to be used to create a higher water level to allow a lake to be created for water sports and recreation.

32. Ngati Tamaoho appealed the grant of consent to install the tidal gates as they wished to keep the harbour as natural as possible. They objected to the interference with the natural flow of the tides. Ngati Tamaoho had been taught from their ancestors that water from the peaks of the mountains to the sea must not be halted. For tangata whenua the inlet was an integral part of the Manukau Harbour and must be able to release its water into the outer harbour. The Court accepted that if this water was interfered with, the wairua of the water would decay and when the gates were reopened the resulting decay would effect the wairua of the greater Manukau Harbour.

33. The Court found that there would be some effect on Maori spiritual values by an interference with the natural flow of the tide. The Court weighed the benefits of the short ten year term of consent (ie the greater recreational opportunities provided for the community) against the loss of habitat for birds, and effect on Māori and, exercising its discretion, concluded that the appeal should be allowed and the consents overturned.

34. In conclusion, the Court recommended that Papakura District Council address the future of the inlet "in an all embracing way" that would enable long-term benefits to be balanced against any negative effects on the environment.

Project Leaders – Roles and Responsibilities

In July 2002, the National Committee appointed various members of its Committee to undertake specific roles on behalf of that Committee. These job descriptions have now been reviewed and updated and this short article provides an insight into each of the revised roles and the Committee member responsible.

AWARDS

Mike Foster is the new Awards Project Leader. It will be Mike's job to ensure that the Call for Nominations is widely advertised; organise the appropriate judging of nominations; and make the award(s) at the annual conference dinner.

ROADSHOW

Dave Serjeant will continue his role in organising national presentations, with a commitment to ensuring that each region have no less than three roadshows per year.

LEGISLATION

Jim Wiltshire (together with Camilla Owen and Helen Atkins) is responsible for this portfolio. Their role is to ensure that submissions are made that further the objects of the Association, but avoid addressing matters of policy because of the significant diversity of opinion within the Association.

SCHOLARSHIPS

Jim Wiltshire (together with Dave Brash and Helen Atkins) is responsible for ensuring that annual applications for the graduate scholarship are assessed and a recipient chosen.

ANNUAL CONFERENCE

The current Project Leader is Dave Serjeant who ensures continuity with each year's Conference Organising Committee so that the objective of a profitable and premier RMLA event is met. He is assisted by Amanda Douglas who is also the 2005 conference organising committee chairperson.

MEMBERSHIP RECRUITMENT / RETENTION (PROFILE/MARKETING)

Mike Foster and Alan Dormer are responsible for the active recruitment of new members and the monitoring of membership satisfaction. Their role is also to ensure that the Association maintains and continues to improve upon its excellent profile as a high caliber Association providing a forum for resource management practitioners to interact and learn.

EDITORIAL

Trevor Daya-Winterbottom's role is to ensure that the Newsletter and Journal continue to facilitate communication between RMLA members on all matters relating to resource management and provide members with a public forum for their views.

REGIONAL DEVELOPMENT AND CO-OPERATION

The Regional Development Project Leader is Trevor Daya-Winterbottom who is the point of contact for the Regional Chairs and is there to facilitate dialogue between them and the National Committee and to ensure that an appropriate level of service is being provided to members.

COURTS

Bill Loutit is responsible for liaison with the Courts but primarily the Environment Court on matters relating to practice notes, legislative issues and general issues of concern to the RMLA membership. The role is seen as a channel for two way communication between the Courts and the RMLA.

PROFESSIONAL BODIES / GOVERNMENT RELATIONS (INCLUDING QUALITY PLAN)

Blair Dickie's role is to represent the Association as a member of the QP website Management Panel. The QP website is owned and administered by the Ministry for the Environment and supported by the Association and other environmental bodies that provide the primary on-line help for resource management professionals. Together, Blair Dickie and Alan Dormer will liaise with other Professional Bodies and Government Relations to ensure co-operation between all parties.

GOVERNMENT LIAISON

Dave Brash will maintain a watching brief on government policy and legislative initiatives relevant to the RMLA and brief the National Committee on these.

WEBSITE

Karol Helmink, the RMLA Executive Officer, will continue to monitor the RMLA website to ensure the members are kept up-to-date on forthcoming events, can easily contact National or Regional Committee members, have access to recent Association Newsletters, Journals, Speeches and annual Conference Papers in the Library section, can link through to other useful resource management related websites, and can access the Members' Only section where there is a Members' Directory and the ability to post Vacancies for job positions.

These above roles have been developed to ensure that there is excellent communication with the regions, that there is every opportunity for member participation, and overall that the best value for members is achieved. The Project Leaders all have the power to co-opt, so if you are interested in assisting with any of these roles, please let us know.

For more detailed information, or a copy of the roles, please contact our Executive Officer, Karol Helmink at email: karol.helmink@xtra.co.nz or telephone (09) 626-6068.

Membership of RMLA Editorial Committee

The RMLA Editorial Committee currently comprises:

Jan Caunter, Trevor Daya-Winterbottom,
Rosemary Dixon, and Mike Patrick.

Expressions of interest are sought from RMLA members who would like to serve on the Committee. At this stage the Committee would like to co-opt two new members.

Given the current composition of the Committee expressions of interest will be particularly welcomed from non-lawyers.

Interested members should contact the Chairperson by e-mail: daya-winterbottom@xtra.co.nz.

Trevor Daya-Winterbottom
Chairperson, RMLA Editorial Committee

Call for contributions

Resource Management Journal

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

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

Publishing Date	Synopsis Deadline
July 2005 edition	2 May 2005
November 2005 edition	5 September 2005

Publishing Date	Copy Deadline
July 2005 edition	13 June 2005
November 2005 edition	17 October 2005

As a general guide, articles should be approximately 2,000-3,000 words and should be produced in Word format.

Letters to the Editor are also welcomed.

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

Karol Helmink,
Executive Officer,
Tel/Fax: (9) 626-6068,
Email: karol.helmink@xtra.co.nz

RMLA Membership Form

Tax Invoice GST No 60-742-715
When sending in your cheque please retain a copy for your records

Surname .....First Name .....

Title .....Company / Organisation .....

Postal Address.....

Street Address .....

Suburb / Area.....

City.....Region.....

Telephone .....Facsimile.....

Email .....

OCCUPATION CATEGORY

Please tick one of the following

❑ Architect ❑ Engineer ❑ Environmental Manager ❑ Judge

❑ Planner ❑ Scientist ❑ Solicitor/Barrister ❑ Surveyor

❑ Other (please specify) . . . . . .

- Membership Subscription – $125 ($60 for fulltime students) for 12 months from 1 October
- Please photocopy this form and enclose a cheque payable to Resource Management Law Association of New Zealand Inc, c/-4 Shaw Way, Hillsborough, Auckland
- To allow the Association to keep members up to date could you please indicate your three main areas of interest

❑ Resource Management
❑ Land Use / Planning
❑ Water Rights
❑ Discharges to Air
❑ Coastal Management
❑ Maori Issues
❑ Heritage
❑ Flora & Fauna
❑ Environmental Impact Assessment
❑ Local Government law
❑ Waste Management
❑ Hazardous Substances
❑ Soil Management & Land Management
❑ Litigation / ADR Practice & Procedure
❑ Climate Change
❑ Greenhouse Effect

Resource Management Journal ISSN No. 1175-1444
Resource Management Journal is produced three times a year by the Resource Management Law Association of New Zealand Inc, c/- 4 Shaw Way, Hillsborough, Auckland, Ph/fax (09) 626 6068.

The Journal's mission is to facilitate communication between RMLA members on all matters relating to resource management. The views expressed in the Journal are those of the individual contributors and not necessarily those of the Resource Management Law Association or the Editorial Committee. Unsolicited material will be published at the discretion of the Editorial Committee.

All enquiries to Karol Helmink, Editorial Assistant, Ph. (09) 626 6068, Email: karol.helmink@xtra.co.nz

RMLA Home page: http//www.rmla.org.nz
Published on behalf of RMLA by T.P.L. Media.