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The resource consent process: Environmental models and uncertainty

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Introduction

The resource consent process for major development proposals often involves consideration of complex environmental modelling of potential adverse effects. This can include modelling of groundwater hydrology, water quality, air quality, noise contours, flooding risk, traffic numbers etc. The complexities and uncertainties involved in modelling potential adverse effects result in a significant challenge for all parties involved in the resource consent process. In addition, as the capacity of some receiving environments approaches defined limits, it becomes increasingly critical to have a clear understanding of the level of confidence about modelling results, the implications of this for environmental outcomes and the extent to which there are effective mechanisms available to take uncertainty into account both in the resource consent decision process and in any subsequent management of environmental effects.

Uncertainty (the estimated amount or percentage by which an observed or calculated value may differ from the true

▶ Continued on page 2

Inside

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▶ Continued from page 1

value) is an integral part of science. It is accepted by the scientific community, and methods for taking uncertainty into account in environmental monitoring and in simple environmental modelling are well developed. However, there is frequently a divergence during the resource consent process between the technical experts' understanding of uncertainty and the expectations of some parties that the resource consent process will provide certainty in the prediction and management of adverse effects.

Environmental models used in the consent process can range from one simple equation to an extremely complex mathematical model that requires various experts to develop, implement and interpret. The uncertainties involved in environmental modelling can range from a relatively trivial matter that has little or no environmental consequence, to major factors that can have significant implications for resource consent decisions and environmental effects. The key challenges are to identify, quantify and interpret the uncertainties involved in environmental modelling in the context of a range of technical, legal and policy considerations to meet the requirements of the Resource Management Act ("RMA").

The results of environmental modelling are frequently put to resource consent decision-makers who have limited expertise in interpreting and applying complex specialised environmental models. Often there will be a reporting officer/officers (including a technical expert/experts) with knowledge of the relevant model who is able to objectively audit the modelling and provide relevant advice to decision-makers. Occasionally a submitter will engage an expert witness who has the expertise to critically review an applicant's model and conclusions.

There can clearly be significant risks if important aspects of modelled environmental effects are not critically audited by qualified and experienced experts. Without expert assistance, even experienced decision-makers may not appreciate the significance of some environmental modelling choices and associated uncertainties, may not know what questions to ask, may not appreciate what level of confidence should be given to the conclusions based on the modelling, and may not appreciate how to address modelling uncertainty in resource consent conditions.

The purpose of this article is to highlight how environmental modelling uncertainties should be explicitly identified and considered in the resource consent process, and to raise awareness of robust and lawful resource consent condition mechanisms that can be used to address such uncertainties.

The Environment Court Expert Witnesses Code of Conduct

There is a commendable trend at major resource consent hearings for expert witnesses and reporting officers to specify that they have complied with the Environment Court "Expert Witnesses — Code of Conduct" ("EWCC") in the preparation of their evidence or report. However, the EWCC is a relatively high-level document and does not include the level of detail that ideally would be needed to ensure that environmental modelling uncertainty issues would be explicitly identified and adequately interpreted in the course of a resource consent hearing or appeal. The relevant parts of the EWCC require the expert witness to:

> 5.3.1 ...
> d) identify the data, information, facts, and assumptions considered in forming the witness's opinions;
> e) state the reasons for the opinions expressed;
> f) state that the expert witness has not omitted to consider material facts known to the witness that might alter or detract from the opinions expressed;
> g) specify any literature or other material used or relied upon in support of the opinions expressed;
> h) describe any examinations, tests, or other investigations on which the expert witness has relied, and identify, and give details of, the qualifications of any person who carried them out; and
> ....
> 5.3.2 If an expert witness believes that his or her evidence, or any part of it, may be incomplete or inaccurate without some qualification, that qualification must be stated in the evidence.
> 5.3.3 If an expert witness believes that his or her opinions are not firm or concluded because of insufficient research or data, or for any other reason, that must be stated in the evidence.

These generic requirements provide high-level guidance, but they do not provide specific direction or an assurance that the full implications of environmental modelling uncertainties would be made explicit during the resource consent application process. To assist with that goal a more detailed framework is needed that can provide a transparent and robust framework to identify the significance of uncertainty in environmental modelling.

An example of a more specific code is the United Kingdom Office of Science and Technology's "Code

of Practice for Scientific Advisory Committees, December 2007" which recommends that scientific advice to decision-makers should make clear the sources and extent of uncertainty, including assumptions, and alternative scenarios and data interpretation.

Similarly, but more specific to environmental models, the United States Environmental Protection Agency ("USEPA") guidance on the use of environmental models "Guidance on the Development, Evaluation, and Application of Environmental Models" Council for Regulatory Environmental Modeling, 2009, states that model developers and users should:

a) subject their model to credible, objective peer review;
b) assess the quality of the data they use;
c) corroborate their model by evaluating the degree to which it corresponds to the system being modelled; and
d) perform sensitivity and uncertainty analyses.

Uncertainty in environmental modelling

The sources of uncertainty in environmental modelling can be divided into five distinct categories (based on W E Walker et al, "Defining Uncertainty: A conceptual basis for uncertainty management in model-based decision support" Integrated Assessment, 2003, vol 4, No 1, 5-17):

Sources of modelling uncertainty	Brief description and comment
Context and framing	This can include choices about the physical boundaries of the system being modelled, the range of factors to incorporate into a model, and specific prediction choices.
Inputs	Uncertainties about inputs that drive the model, eg quantities of contaminants discharged, amounts of water recharging groundwater etc.
Model structure	Models simplify reality and may be based on an incomplete understanding of the processes and structure(s) being modelled.
Parameters	Parameters used in the model need to be estimated or inferred from sometimes very limited data, eg background water quality, the characteristics of an aquifer, the air temperature etc.
Model implementation	This can include technical modelling choices such as the time scales chosen and potential software bugs.

Table 1. An outline of the sources of uncertainty in environmental modelling.

Environmental models are not perfect representations of reality. However, the results of such models are often, but not always, depicted at resource consent hearings as a specific environmental result with no explicit uncertainty analysis, eg PM_{10} concentration of 49.0 $\mu g/m^3$, groundwater nitrate nitrogen concentration of 7.3 g/m^3, groundwater level reduction of 0.35 m, noise level of 78.0 dBA etc. This depiction of certainty may indicate that many experts consider that they have to simplify results of complex modelling for decision-makers who sometimes have little or no relevant technical expertise. Conversely, it may reflect pressure on an expert to depict one specific result rather than provide a more accurate picture of the range of probable results, ie a probability distribution. There appear to be very few published examples of assessments of environmental effects that have been submitted as part of a resource consent application where the environmental modelling has included an explicit account of uncertainties and their implications. It is relatively common for issues relating to model uncertainty to be raised in a s 42A report.

Some models more accurately reflect and predict reality than others. This can be a result of many factors such as the relative simplicity of the physical, chemical and/or biological processes, the care with which the model is designed and implemented, and the amount of appropriate data on inputs and parameters used in the model. Conversely, there are many environmental models where the underlying mathematical model provides a very crude approximation of highly complex interrelated processes, there are model design and implementation limitations, and the available data to use for inputs and parameters are very limited.

Environmental models also range from generally accepted or approved (by some regulatory authorities) industry models for specific situations, eg "Ausplume" for modelling the dispersion of emissions to air, to one-off models written for one specific situation. The range of uncertainties to identify and consider is often reduced if approved or generally accepted models are used. There is at least one New Zealand good practice guide for environmental modelling: "Good Practice Guide for Atmospheric Dispersion Modelling", Ministry for the Environment, 2004. Even this guide though provides very broad guidance, such as:

a) ... choose the most appropriate model for the intended purpose, and
b) justify this choice in the methodology of the study.

For the vast majority of model inputs and parameters there will be levels of quantifiable uncertainty, and those uncertainties should be explicitly identified

both individually and cumulatively at every stage of modelling, from model design to the application of modelling results to resource consent decisions.

A key issue in environmental modelling is that there are usually multiple uncertainties that often cannot easily be distilled into one simple probability expression such as 95 per cent confidence limits. This issue contributes to uncertainty analyses not being incorporated into environmental modelling and results being frequently expressed without any uncertainty bounds.

In the last two decades there has been increasing attention paid to this issue in the scientific community and an increasing recognition that there are a range of uncertainty analysis methods available for environmental models. Because of the individuality of each specific environmental modelling situation there are some difficulties in prescribing standard methods for uncertainty analysis. However, there does appear to be increasing recognition in the scientific community that environmental modellers should explicitly identify the extent and range of uncertainties involved in their modelling.

Making uncertainty transparent

While specific uncertainty analysis guidelines are not available for all environmental modelling situations, any environmental modelling used as part of an assessment of environmental effects for a resource consent application should include an explicit and appropriate uncertainty analysis of the model.

A systematic and transparent approach to uncertainty in environmental modelling should involve complementing environmental modelling results and interpretations with a detailed breakdown of the assumptions and uncertainties under the specific categories outlined in Table 1. For example, the data used to estimate appropriate parameter values to use should be made explicit together with the reason for those choices and a probability distribution provided for those parameters. This should then be complemented by at least a simple or complex sensitivity analysis (changing model inputs and parameters within a specific range to determine the effect and relative importance of those changes).

Any such basic uncertainty analysis would need to be extended to take account of other sources of uncertainty in the modelling (sometimes a distinction is made between sensitivity analysis and uncertainty analysis, however, for the purposes of this article sensitivity analysis is considered as a subset of uncertainty analysis). This could range from multiple sensitivity analyses to more complex statistical methods such as Generalised Likelihood Uncertainty Estimation ("GLUE") (Keith Beven *Environmental modelling: An uncertain future?* Routledge, London, 2009), which explicitly treats model results as probability distributions of possible outcomes. A relatively common form of sensitivity analysis, a Monte Carlo simulation, involves repeatedly running a model with different input values provided randomly from a probability distribution. The results can be compared with a range of observed results. This can assess the extent to which a model is consistent with actual observations. The appropriate uncertainty analysis method/methods will depend on the type of model and the specific circumstances.

A relatively common phenomenon in complex technical hearings is for there to be a technical disagreement between two or more experts on the likelihood of a model's prediction, with eventually a decision-maker often favouring one professional opinion over another ("winner takes all"). Often a decision-maker considers that they have no alternative but to choose one opinion over another. An alternative to this is to promote a process where the applicant's expert witness is directed to detail all model assumptions and uncertainties. This in combination with "expert witness conferencing" is likely to lead to greater clarity and potentially focus attention on specific technical issues where there is some material difference of professional opinion. This can lead to considerable clarification of the implications of specific modelling uncertainty issues.

A decision-maker may accept the evidence that a specific adverse effect is "highly unlikely" to occur or that it will not exceed a specific threshold and grant a resource consent application. However, in many situations it would be appropriate to recognise the potential significance of uncertainties and incorporate conditions that require monitoring for that effect and require a response mechanism to remedy or mitigate adverse effects if they exceed the model expectations.

Extending the Environment Court Expert Witnesses Code of Conduct

There would be significant potential benefits if the EWCC is extended to explicitly address issues relating to modelling uncertainty. For example, the following could be added to clause 5.3.1 (d):

d) ...; and where a mathematical/computer model has been used:

1) specify the extent and nature of peer review that has been undertaken including the qualifications and experience of the person(s) who undertook that peer review;

2) specify the evaluation undertaken to corroborate the model to assess the degree to which it corresponds to the system being modelled; and

3) describe the uncertainty analysis undertaken and the level of confidence that indicates for the model results.

Consent condition mechanisms for addressing uncertainty

Once the uncertainty and implications of a specific environmental modelling exercise are made explicit, they can be considered along with other matters in the resource consent process, and consideration given to whether appropriate mechanisms exist to adequately avoid, remedy or mitigate the relevant actual and potential adverse effects.

Consideration of the conditions available to avoid, remedy or mitigate adverse effects should include taking account of potential adverse effects that are reversible and do not have long-term consequences, or potential adverse effects that are effectively irreversible with long-term consequences. For example, readily reversible adverse effects with minimal consequences may be able to be effectively addressed by resource consent conditions, while effectively irreversible potential adverse effects with significant consequences may not be able to be adequately addressed by conditions.

There are a range of resource consent condition mechanisms that can be used either individually or in combination to address uncertainty about adverse effects. Not all these methods are legally robust, ie secondary approvals. However, they are included here for completeness. Each mechanism has particular characteristics and is briefly categorised and reviewed below (in alphabetical order).

- Bonds,
- Certification of a standard, requirement or event,
- Feedback control ("adaptive management"),
- Monitoring and reporting,
- Resource consent review conditions.
- Secondary approvals and management plans,
- Shortened resource consent duration,

Bonds

Bonds have been used effectively for many years, particularly to address low-probability events with high potential adverse effects. Basic guidance is outlined on the Quality Planning website (<www.qualityplanning.org.nz/consents/conditions-res-con.php#bonds>). There are a number of situations where bonds can be used to effectively address uncertainty issues, particularly if the potential adverse effect is significant but with a low probability of occurrence, would require significant financial resources to adequately address and the "longevity" of the consent holder is not guaranteed. Bond conditions can be formulated to adjust the bond amount to match the level of risk that for example, may change over time, eg a major landfill.

There is scope for greater use of bonds to address significant low-probability adverse effects identified as part of comprehensive environmental modelling. Bonds can also be particularly useful for major developments that may have a design life and/or risk profile of 50 or more years and the maximum duration for some resource consents is 35 years. The duration of a bond can be for a longer period than 35 years.

Certification of a standard, requirement or event

Certification normally provides for a specifically qualified and/or experienced person/persons to make a technical assessment and verify in writing that a specific design or performance standard has been complied with. The situations where certification conditions are usually applicable have been outlined on the Quality Planning website (<www.qualityplanning.org.nz/consents/conditions-res-con.php#existing>). There are also additional, relatively infrequently used certification methods that can be used to specifically address uncertainties associated with environmental modelling.

An example of a more advanced certification mechanism is in a situation where periodic modelling is required, eg to determine nutrient loading to land or the effects of a groundwater abstraction on wider groundwater levels/pressures, and the modelling choices need to be certified by an independent person in accordance with a specific or generally-accepted method. Similarly, a certification condition could provide a resource consent holder with flexibility if it provided for operational changes, provided that a qualified person certified that the changes do not

increase the modelled adverse effects. This would enable a consent holder to make operational changes that have no additional environmental consequences without having to go through the process of applying for a change to a condition or applying for a new resource consent.

Another example of a more demanding certification condition is in a situation where a consent authority wishes to ensure the highest possible level of scrutiny during certification, a condition can provide for the consent authority and consent holder to nominate a joint certifier, instead of the certifier being appointed solely by the consent holder. Similarly, if a consent authority requires a high level of assurance about a certification process, a condition could require a copy of the certifier's qualifications, copies of all technical information used as the basis for certification etc. This can enable a consent authority to assess all the technical information while reinforcing the consent holder's responsibility for compliance.

Many consent authorities appear to favour ultra vires secondary approvals over certification or other mechanisms, presumably because of a perception that an "approval" process provides a greater level of control over outcomes and because of a limited range of relevant professional qualifications that could be specified for a certifier. However, qualification requirements can be specified or developed, and appropriately formulated certification conditions have the benefits of being lawful and certain.

In summary, certification conditions can be powerful and flexible mechanisms that can provide a high level of assurance for the consent authority and the community about adverse effects. They can also provide considerable certainty and flexibility for a consent holder to manage operational activities for example, without having to go through a resource consent application/condition change process provided that clear environmental standards are maintained.

Feedback control (adaptive management)

Feedback control or "trigger response" conditions have been used in various forms in New Zealand since at least the 1970s. They have included conditions that require river water abstractions to reduce or cease when the river-flow drops to specific flows, or similarly, a discharge of a contaminant into a river has been controlled relative to the available flow to ensure that a specific receiving water standard is not breached. However, it is only in recent years that the concept has begun to be applied to more complex environmental issues, for example linking variable groundwater recharge with specific consent take/use entitlements, controlling nutrient loading to land in response to the quality of receiving water affected by drainage/run-off water etc. Feedback control can also be used to respond to a specific adverse effect that would require a predetermined response to avoid, remedy or mitigate that adverse effect.

The difference between "simple" and "complex" feedback control resource consent conditions is essentially that more demanding monitoring/investigations are required, often with a time delay between establishing information on the state of the environment and the application of a control on the exercise of a resource consent. Complex feedback control is occasionally referred to as adaptive management. However, adaptive management implies that the environmental objective sought has not been defined with absolute certainty, whereas feedback control implies that it has.

When there is a prescribed numerical environmental standard or outcome that triggers a control, the term "feedback control" is considered to be more appropriate. Where further investigations and/or monitoring are needed to determine an appropriate environmental trigger this would be more appropriately defined as adaptive management. Such adaptive management conditions would need to be very carefully developed to ensure that environmental outcomes would be achieved that are consistent with all applicable provisions.

There is significant potential for greater use of complex feedback control conditions that have the potential to provide greater certainty about environmental outcomes and provide considerable operational flexibility for a consent holder, while at the same time providing a clear signal for a consent holder about the controls that would apply if those outcomes are not achieved.

Monitoring and reporting

Monitoring and reporting requirements, if specified appropriately, can provide essential information that can be taken into account under a current resource consent or in a future resource consent review or application process. However, very careful technical design and specifications are essential to ensure that the information obtained will be relevant and useful, for example, chemical analytical detection limits need to be specified to ensure that meaningful information is obtained.

Secondary approvals and management plans

Secondary approval conditions are still commonly used to address resource consent uncertainties, ie a matter is left to be decided (arbitrated rather than certified) by a council officer after a resource consent is issued. These types of conditions usually provide for one nominated council job title holder, who may or may not have appropriate qualifications or experience, to "approve", "determine" or be "satisfied about" a significant matter. Such "approvals" have been discouraged by the courts in New Zealand since at least 1971 (*Turner v Allison* [1971] NZLR 833 (CA)) with numerous subsequent court decisions requiring certification by a suitably qualified person rather than giving a council officer arbitration power.

Secondary approvals are generally invalid, unenforceable and vulnerable to judicial review, unless they have been volunteered by the consent applicant (the Augier Principle, which provides that if otherwise ultra vires conditions are volunteered by a resource consent applicant, if a consent is granted with those conditions, they are enforceable, *Augier v Secretary of State for the Environment* (1978) 38 P & CR 219 (QB)). More importantly, secondary approvals generally do not provide certainty about exactly what is required to gain "'approval" or provide certainty about the level of eventual adverse effects. Such conditions would usually also offend the principle of transparency and the parties right to have input to the resolution of significant issues during a notified resource consent process.

Secondary approvals are often used in conjunction with a management plan, that provides for the resolution of a substantive matter that is "approved" by a council officer after the grant of consent. Management plans provided after the grant of consent should not provide for the resolution of substantive matters. They should be resolved prior to a decision on the consent application or resolved via an appropriate certification process. Management plans are most appropriately applied to providing assurances about *how* other conditions will be complied with.

In virtually all circumstances effective lawful certification and/or other conditions can be used instead of secondary approvals, for example, a certification condition(s) complemented by other conditions such as for monitoring and reporting and/or feedback control.

Shortened resource consent duration

It is relatively common practice to endeavour to address uncertainty by granting a resource consent application with a significantly shortened duration, for example, reducing a sought duration of 35 years to 10 years. (A distinction is made between an applicant applying for a short-term resource consent regardless of the reason, and a consent authority *shortening* the duration applied for — a shortened duration.) This is often done because of uncertainties about potential adverse effects and/or because it is considered that additional information or alternatives will be available at the end of that period. However, the tendency for decision-makers to shorten the consent duration sought may at times be because of a lack of appreciation about other possible methods to address uncertainty.

While shortened resource consent duration may be complemented by other conditions such as a requirement to undertake monitoring and reporting of specific adverse effects, there are significant limitations to the use of shortened consent duration as the principal resource management tool to address uncertainty. The often-cited case law that the applicant "is entitled to as much security of term as is consistent with sustainable management" (*Bright Wood New Zealand Ltd v Southland Regional Council* EnvC Christchurch C143/99, 17 August 1999 at [10]) provides limited tangible guidance for specific cases. However, the High Court has stated that "in a situation where adverse effects on the Maori respondents have been identified, but appropriate measures to mitigate them have not, to limit the resource consents to 10 years is indeed to wield a blunt instrument" (*Genesis Power Ltd v Manawatu-Wanganui Regional Council* (2006) 12 ELRNZ 241, [2006] NZRMA 536 (HC) at [89]).

An applicable operative planning provision (eg a regional policy statement or regional/district plan) that includes specific objectives, policies and guidelines relating to consent duration can be useful. However, such policy guidelines would always need to be considered in the context of the individual merits of each specific resource consent application.

Key limitations of shortened consent duration can be one or more of the following:

- adequate monitoring and reporting requirements may be challenging to develop and implement;
- there may be non-compliance with a monitoring and reporting requirement that results in the opportunity to collect critical information being

lost;
- expected new information may not be available at the expiry of the consent, and/or expected alternatives to some aspect of the activity may not eventuate;
- a replacement resource consent application is not considered on the same basis as a new application by virtue of the requirement of s 104(2A) ("when considering any applications affected by s 124, the consent authority must have regard to the value of the investment of the existing consent holder");
- protracted and expensive appeals that may eventuate in a court granting a long-term resource consent;
- a potentially acceptable development may not proceed; and
- the expense and resources consumed in repeated resource consent application processes may add little to the previous consent process.

These limitations indicate that the use of shortened consent duration would need to be clearly justified by one of two general reasons: where the receiving environment is likely to become more sensitive over time, or adverse effects are only acceptable for a limited period. Where a shortened consent duration is justified and information needs to be available, or a response occur, before or at the expiry of the consent, this needs to be clearly specified in conditions.

Resource consent review conditions

Consent review conditions can be used to address uncertainty: a general or specific review condition often provides for a review in the event of a specific situation and/or an adverse effect occurring. An appropriately drafted review condition is usually an essential component of many long-term resource consents. However, there are some important limitations to consent reviews as the primary mechanism to address uncertainty. First, the onus is frequently on the consent authority to identify a cause and effect relationship between an adverse effect and the exercise of a resource consent before serving notice of intention to review conditions (s 128(1)(a)(i)). In some situations establishing such a relationship can be extremely challenging. Secondly, the consent authority would normally have to bear the expense of investigating such adverse effects and preparing the case for any review process. Thirdly, in a review process the consent authority must have regard to whether the activity allowed by the resource consent would continue to be viable after the proposed change (s 131(1)(a)). Lastly, the review process can be complex and lengthy, particularly if it involves appeals which can delay addressing an adverse effect for many years.

A review condition is usually an essential "backstop" for many long-term resource consents. However, a review condition should not be relied on as the sole or primary mechanism to address significant uncertainty about potential adverse effects.

Conclusions

Uncertainty is an inherent part of environmental modelling used in the resource consent application process. Greater explicit recognition and identification of uncertainties involved in the use and application of these environmental models is essential. Informed resource consent decisions that meet Resource Management Act requirements require the level and implications of those uncertainties to be made clear to decision-makers.

There are a range of resource consent condition mechanisms that can be used to address uncertainties and there is significant potential for greater use of for example, feedback control and certification to provide enhanced certainty for resource consent holders and to provide greater certainty about the achievement of specific environmental outcomes.

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WAI 262 Report: Recommendations for major changes to Māori involvement in planning and consent

■ **Daniel Clay, Partner and Eliza Prestidge-Oldfield, Solicitor, Minter Ellison Rudd Watts**

The Waitangi Tribunal issued its report on the WAI 262 claim in July ("the Report"). This claim relates to contemporary breaches of the Treaty of Waitangi which affect Māori culture and identity, and is commonly known as the indigenous flora and fauna and cultural intellectual property claim. Of relevance to environmental management and the RMA, the claimants asserted that there was a lack of adequate recognition of iwi interests and cultural perspectives in decision-making on resource management issues. The Report is the first Waitangi Tribunal report to consider the ongoing Treaty-based relationship between the Crown and Māori once historical grievances have been settled.

The Report frames the central issues for resource management as follows: "*How can the voice of mātauranga Māori, etched as it is in the land, still speak in our changed circumstances?*" A key concern for claimants was the effect of environmental degradation on the ability to retain mātauranga Māori (cultural knowledge), as environmental degradation threatens to undermine the ability to exercise kaitiakitanga in respect of the environment.

In responding to the claim, the Tribunal analysed the current mechanisms in the RMA for iwi interests to be recognised and protected, and has recommended substantive changes to the Act to improve these mechanisms. It also considers the role of values which are integral to tikanga Māori, including kaitiakitanga and whanaungatanga (kinship, including with natural features), in guiding resource management decisions.

Treaty duties for local government

The Tribunal found that devolution of powers from central government to local government must be done in a way that ensures Treaty duties are fulfilled. Therefore, local authorities must be given clear Treaty duties by central government, and according to the Tribunal a failure to do this has lead to ad hoc and reactive iwi involvement in resource consenting processes, which it noted can be costly and frustrating for all parties involved. In the Tribunal's view, "those with powers under the [RMA] need to accept that iwi involvement in RMA matters within their respective rohe [territory or boundary] will be compulsory, formal, and proactive, just as it is with any other public authority within the relevant district or region".

Improvements needed to enhance the role of Māori and Māori interests

Acknowledging that kaitiaki control will not always be appropriate, and to balance other legitimate interests, the Tribunal recommends a three-tier system of kaitiaki involvement:

- *Kaitiaki control* — kaitiaki should have control of taonga where it is found that kaitiaki interests should be accorded priority;
- *Partnership model* — a partnership model (co-management) should be adopted where it is found that kaitiaki should have a say in decision-making, but that other voices should also be heard;
- *Effective influence* — where decisions are being made by others, kaitiaki should have effective influence in all areas of environmental management.

The Report recommends changes to the resource management framework to better support kaitiaki relationships, including greater use of delegated powers (to achieve kaitiaki control), strengthened iwi involvement in local decision-making (to achieve partnership) and the increased use and relevance of iwi management plans (to achieve effective influence).

The Tribunal recommends that reforms be made to the RMA provisions which provide for the transfer of powers to iwi authorities, joint management agreements between iwi and local authorities and for the appointment of heritage protection authorities. It considers that these powers have the potential to deliver kaitiaki control where justified. The recommendations include making these powers more user-friendly by removing unnecessary barriers to partnership or the transfer of powers, and more substantively that they should be reviewed to encourage the transfer of control or partnership where appropriate. The ability of local authorities to unilaterally revoke transferred powers under s 33 is recommended for removal, and the Tribunal suggests that local authorities be required to explore options for delegation to kaitiaki. Similarly, it is recommended that the Ministry for the Environment

should be required to proactively explore options for kaitiaki to be appointed as heritage protection authorities. A further mechanism identified for achieving kaitiaki control is for iwi authorities to be appointed as heritage protection authorities under the Historic Places Act 1993. This could be used for areas of particular archaeological or cultural importance, and could include areas that are culturally important for environmental reasons.

Iwi management plans are currently provided for in the RMA, however, they are seldom used. The Tribunal recommends that the relevance of these plans in the decision-making process be enhanced, by giving them the same weight as district and regional plans and regional policy statements, subject to local authority agreement. Where the parties cannot agree on the weight to be given to Iwi Resource Management Plans (the new nomenclature suggested by the Tribunal), then the Iwi Resource Management Plan would either be a non-binding but relevant planning document, or otherwise be referred to the Environment Court for determination. The suggestion is that Iwi Resource Management Plans would be required to set out the circumstances when decision-making power under the RMA would be transferred to iwi, when formal negotiation with iwi would be required, and the general resource management priorities of the iwi in respect of taonga and resources within their rohe.

The Tribunal also recommends that the Ministry for the Environment develop national policy statements on Māori participation in resource management processes to facilitate nationally consistent use of Iwi Resource Management Plans and other means of influence or joint management.

To help facilitate iwi involvement in environmental management, Government funding is recommended to build the capacity of iwi authorities to actively participate. The Tribunal considers that the availability of funding and expertise will ensure that Iwi Resource Management Plans are comprehensive and drafted in a way which allows for easy integration into the wider planning system.

The Government has not yet issued a detailed response to the Report. The Government response is likely to take considerable time, as the Report has a very broad scope, and raises complex issues.

Editorial

■ **Trevor Daya-Winterbottom, General Editor**

This issue of *Resource Management Journal* ("RMJ") leads with an article by Mike Freeman of URS on "The resource consent process, environmental models and uncertainty". This builds on papers commissioned by the RMLA for the annual Salmon Lecture series. For example, Professor Malcolm Grant considered the role of scientific evidence in the authorisation process for genetically modified organisms in "Science, evidence and values in environmental dispute resolution" [2005] *RM Theory & Practice* at 7, and Dr Caroline Foster considered the role of scientific evidence and the precautionary principle in "Scientific evidence and the precautionary principle in international courts and tribunals" [2011] *RM Theory & Practice* at 10. The article by Mike Freeman covers both presentation of modelling results in resource management hearings before local authorities and the Environment Court, and how modelling results can be used as the basis for including consent conditions on the grant of resource consent. In particular, he considers the Expert Witness Code of Conduct and suggests that it should be amended to ensure that the process and conclusions drawn from it are robust. These recommendations echo the comments of Judge Jackson in *Shirley Primary School v Christchurch City Council* [1999] NZRMA 66 (EnvC) at [148] in relation to "hard" science where the Court considered that the techniques used should be reliable, that the error rates should be known and published, that the research is statistically significant, that the research has been peer reviewed and published, and that the research is repeatable and has been replicated.

Francelle Lupis and Kate McDonald in their article "A more than minor debate: the correct use of effects terminology" consider the language used in resource management decisions regarding the assessment of environmental effects. They draw an important distinction between the statutory language used in s 95D and s 104D of the Resource Management Act 1991 ("RMA") when assessing whether resource consent applications should be notified and whether they

... continued on page 15

A more than minor debate: the correct use of effects terminology

■ **Francelle Lupis, Senior Solicitor, and Kate McDonald, Solicitor, Russell McVeagh**

Introduction

We should all be proud pedants when it comes to our choice of words. Words are the primary medium through which your ideas and opinions can be conveyed. Words mean what they say, and if you want to say what you mean, then you must choose your words with great care. With that in mind, how many times have you somewhat aimlessly written or thought "the effects will be no more than minor" or "the effects are de minimis"? Be honest. It happens. A lot. These phrases have become somewhat of a mantra, trotted out automatically without a great deal of thought being given to exactly what is meant in any particular situation, or any thought being given to whether it is appropriate to use this phraseology at all. As a result, the court still finds it necessary to remind experts and lawyers that the "no more than minor" assessment is solely a threshold test for otherwise non-complying activities under a district or regional plan.

It is apparent that lawyers and experts alike are still confused (or forgetful) when employing appropriate effects terminology. Experts frequently give evidence, with the endorsement of legal counsel, to confirm that controlled or discretionary activities, for example, will have effects on the environment that are "no more than minor", despite this test being relevant only to whether a non-complying activity might be allowed through the s 104D "gateway":

> Generally we note that ... evidence reached conclusions as to whether effects were more or less than minor. This test appears to be derived from the threshold test under section 104D. However such a test is irrelevant to the substantive evaluation that must be undertaken under 104(1)(a) and under Part 2 of the Act.
> (*Upland Landscape Protection Society Inc v Clutha District Council* EnvC Christchurch C85/08, 25 July 2008, at [93].)

Council decisions often reflect the same misuse of the threshold test, no doubt as presented to them in evidence or prehearing reports:

> We note that the Hearings Panel refer to *effects more than minor* as a ground for declining consent. Given than the applications are for discretionary activities, this test arising under section 104D is not relevant.
> (*McKinlay Family Trust v Tauranga City Council* EnvC Auckland A119/08, 29 October 2008, at [9].)

So why are we still getting it wrong? "No more than minor effects" is a phrase that has evidently found popularity with lawyers who are wary of overemphasising adverse effects when advocating for a client's proposal to the court, and experts who are cautious of speaking in absolute terms. The court does not have the same admiration for the phrase and is more often seeking clarity as to what is really meant when an effect has been described in that way. When it is used as an evaluative measure, rather than as a simple threshold test, it appears to do little to assist the court's understanding of the significance of a particular adverse effect. Simply put, outside of its proper context, it seems to lose its meaning altogether.

This article will examine what experts can do instead to introduce shades of meaning to their analysis, and will ask whether "no more than minor" has crept into our resource management vernacular in place of a proper evaluation of the impacts of an activity — namely, what are the actual and potential effects on the environment and does the activity, on balance, promote sustainable management?

The only other area in the RMA where the more than minor test is applied with real meaning is with respect to decisions regarding public or limited notification. Section 95A provides a consent authority with the discretion to publicly notify a resource consent application if it considers that the activity will have or is likely to have adverse effects that are more than minor. Where public notification is not required, limited notification must be given to those individuals who are affected by the adverse effects of an activity in a minor or more than minor way (but not less than minor). These notification provisions have their own peculiarities, not least the inability for a consent authority to consider both positive and adverse effects when making a decision to notify. For that reason the "more than minor" notification test is beyond the scope of this particular article and will not be discussed further.

Section 104D — a threshold test

The "no more than minor" descriptor is derived

from the threshold test for non-complying activities under s 104D of the Resource Management Act 1991. That section provides that a consent authority may only grant consent for a non-complying activity if it is satisfied that either the adverse effects on the environment *will be minor*, or that the activity is one that will be not be contrary to the objectives and policies of the relevant plan or plans.

For all applications (including those non-complying applications that have passed through the s 104D "gateway"), s 104 sets out that a consent authority must, subject to Part 2, have regard to any actual or potential effects on the environment, any relevant provisions of any relevant environmental standard, regulation, policy statement or plan, and any other matter deemed relevant by the consent authority. The "test" in s 104 is therefore simply whether the activity meets the singular purpose of the Act set out in Part 2 — does it achieve sustainable management? In considering whether the application meets that test, a consent authority must consider each and every actual and potential effect, including positive effects, regardless of their scale or degree.

There is therefore no requirement for a consent authority determining an application, other than a non-complying application under s 104D, to first consider whether the adverse effects of allowing the activity will be minor. The test of "no more than minor" is simply not relevant to the consideration of other types of activities, unless it can be shown that that particular evaluation of the level of adverse effect provides a useful clarification for the court or consent authority during the balancing exercise required by s 104. So, does it?

Defining no more than minor — a helpful descriptor?

On the face of it, the "no more than minor" test should provide a helpful descriptor of the degree of relevant effects for a decision-maker who is considering granting consent for an activity. But what does it actually mean?

While the RMA defines other terms important to the s 104 assessment, such as "effect" and "environment", there is no corresponding definition of the concept of "minor". In *King v Auckland City Council* [2000] NZRMA 145, (2000) 6 ELRNZ 79 (HC) at [29] the Court stated that a minor effect will be "at the lower end of a scale including major, moderate and minor effects but must be something more than de minimis". Various other decisions have followed that interpretive theme.

Effects that are "no more than minor", then, will register somewhere on a scale. That might serve a purpose in the context of a threshold or gateway test, but is it useful when describing effects that are to be assessed in the round? A decision-maker undertaking a broad s 104 assessment is not necessarily concerned with effects which register on a scale of de minimis to moderate, but whether the effects are indeed significant enough to be considered adverse in the context of a particular proposal and, if so, whether or not they are counterbalanced by a suite of conditions, mitigation measures and positive effects that will also flow from the application in question.

If the test of "no more than minor" effects is irrelevant to the assessment of anything but a non-complying activity, what is the relevant test? The RMA is not a "no effects" statute — in other words, it is not about preventing any or all effects on the environment or only allowing activities with a certain scale of effect. As s 104(1)(a) is concerned with *all* actual and potential effects, there can be no requirement to classify effects on a scale or more or less than minor. Whatever their magnitude, the effects should properly be considered by the court or decision-maker as part of their overall assessment.

There are very few applications that would not generate any effects or any adverse effects. It is obvious that whether or not an application would result in adverse effects is not the ultimate test. Applications for resource consent which would generate very significant effects can, and often are, granted by the court. Any large hydro-electrical development proposal, for example, will by its very nature have a significant impact on its receiving environment. However the adverse effects resulting from the construction of a dam may be offset by extensive mitigation, comprehensive conditions, and the numerous positive benefits associated with a new renewable energy source.

The Environment Court has helpfully described the issue in this way:

> Case law clearly establishes that activities with very significant effects may be granted consents, while others without such particular effects may be refused consent. The scale of the effect is clearly a matter which will go into the evaluation necessary under Part 2 of the Act but is not determinative of it.
> (*Upland Landscape Protection Society Inc v Clutha District Council* EnvC Christchurch C85/08, 25 July 2008, at [94].)

So the scale or significance of effects will not

necessary preclude a resource consent from being granted, but will simply factor in the overall evaluation and balancing of the application against Part 2 of the RMA. What the decision-maker needs to know then is, on balance, how much weight should be given to the effects in question when undertaking the balancing exercise. Are the effects greater than de minimis? Are they significant or moderate? What are their impacts on the various affected parties / receptors / the environment?

It is clear then that outside of its s 104D context, an assessment of an adverse effect as more or less than minor is of little assistance to the court. As a threshold test it has value, but as an evaluative tool it loses its meaning in the face of other, more balanced assessments.

So why is "no more than minor" so attractive?

As we have noted above, it is often said that the RMA is not a "no effects" statute. Why is it then that expert witnesses loathe to describe any proposal as having an adverse impact on the environment? Why do practitioners find comfort in the safety net of "no more than minor"? This ability to assess adverse effects in the round when undertaking a proper balancing exercise means that experts (and lawyers) should have confidence in acknowledging adverse effects when they are in fact likely to occur. But is there a perceived risk in doing so?

We suggest there are a number of reasons which, cumulatively, are responsible for the regular use of the "no more than minor" terminology in an improper context.

The first, and most obvious, is that the phrase has fallen into popular use. Experts and practitioners are used to saying it, used to hearing it, and feel like they are using "RMA language" when describing an effect in that way. This is understandable. On the odd occasion the use of the phrase appears to crop up when evidence has, from appearances, been worked up on the basis of a template document for a previous activity — one that was in fact non-complying. This is less excusable. Experts should be encouraged to always start from scratch when preparing evidence, and to give careful thought to how best to describe a particular effect.

The qualification as "no more than minor" must also have an inherent level of comfort for those giving an evaluative judgment. The effects have been acknowledged, there can be no question about that, but have been assessed as no more than minor, or nothing to worry about. This, then, is an assessment that covers all the bases. There is no element of controversy — for example by suggesting there are no effects or no adverse effects. (As any practitioner will know, an expert will seldom accept that there will be absolutely no effects — in science, that is an unlikely proposition, as even the smallest proposal is likely to create a measurable impact, if your degree of measurement is small enough!)

A further reason for the popularity of the description could be that it is used by experts who want to describe effects as being very minimal indeed. However that concept has been encapsulated by the description of effects as de minimis — a term that has been very strictly confined in case law:

> The term "de minimis" has survived ... since there is no equally convenient and pithy English alternative. It is a shorthand way of expressing the full Latin maxim "de minimis non curat lex". This is usually translated as "the law is not concerned with trifles". In the present context, it means that an adverse effect ... is so trifling that the law should regard it as of no consequence. That is a much more stringent test than whether the adverse effect is minor.
> (*Rea v Wellington City Council* [2007] NZRMA 449, (2007) 13 ELRNZ 185 (HC) at [10].)

If the de minimis definition is not available but the expert wants to acknowledge some level of adverse effect, albeit one that does not give cause for any alarm, then "no more than minor" might appear to fit the bill.

Another explanation may be that experts are nervous about how their message will ultimately be conveyed and understood by the decision-maker. Experts could fear that the shades of meaning in their assessment may not be immediately apparent and, unless they are questioned in detail by the court or by opposing counsel (giving rise to an opportunity to provide a detailed justification), their evidence might not be given the appropriate weighting by the court when the time comes to undertake the balancing exercise.

Alternatively, experts may fear that the positive effects of any given proposal will not be given sufficient weight, so that any acknowledged adverse effect *at all* may be enough to tip the scales against the proposal seeking consent. If a proposed activity does not find sufficient favour with a decision-maker (with respect to the enabling purpose of the Act), then a lesser degree of adverse effect may represent ample justification for declining consent.

For example, a proposed residential development may be accepted by one decision-maker to be a beneficial use of a scarce land resource, thereby rendering the increase of traffic on the local network as an acceptable adverse effect when the proposal is assessed in the round. The same residential proposal might be viewed by another decision-maker as an unnecessary overdevelopment of the site, which changes the character of its surrounding neighbourhood. Context is everything, and in the context of a development proposal that has perceived limited positive effects, the same level of adverse impact on the local traffic network might assume a greater level of significance in the balancing exercise.

The expert traffic witness has assessed the same level of adverse effects, but in the second scenario his analysis may be cited as a contributing factor to the decline of consent. Is it safer then for an expert to acknowledge effects arising from the proposal, but to describe them as "no more than minor" — because surely a proposal cannot be turned down on the strength of effects that are no more than minor?

The obvious solution here is for lawyers and experts alike to ensure that the positive effects of any given proposal are illustrated carefully for the benefit of the decision-maker. Often applications are framed in such as way as to minimise or justify the adverse effects, and the positive effects of the activity are only added as an afterthought. These should be emphasised up front as they are a crucial aspect of the Part 2 balancing exercise. To undersell the positive effects of a proposal is to run the risk of the acknowledged adverse impacts assuming greater significance in the round.

Reminders for experts and lawyers

What then can, or should, be kept in mind when drafting (or reviewing) expert evidence? Should experts and lawyers ensure that the language used in expert evidence and submissions accurately matches the statutory tests for the particular activity? The answer is yes, to the extent possible. Although it is the court that has the final responsibility to assess the effects against the relevant statutory tests, both lawyers and expert witnesses have a duty to assist the court as much as possible in undertaking this evaluation.

Ultimately it is for the expert witness to decide how to set out his analysis for the court and lawyers should be wary of suggesting changes which impact on the meaning that the expert is trying to convey. In saying that, it is the lawyer's job to remind themselves of the relevant statutory tests and, when reviewing expert evidence, ensure experts are aware of the correct terminology and/or are prepared to justify their conclusions to the court in a way that will be easily understood.

What a decision-maker really needs to hear from an expert witness is, on balance, what weight should be given to effects relevant to any given area of expertise when undertaking a holistic assessment of the resource consent application. Experts may like to consider employing language which still provides an adequate detail of scale but avoids importing an irrelevant statutory threshold. For example, expert witnesses could explain adverse effects that are nothing to worry about as "nominal", "insignificant" or "negligible". It is also important that, if an expert witness does consider that there are no relevant adverse effects arising from the activity, he or she does not feel precluded from saying so in the simplest possible terms. While this may be scary, an expert witness should be prepared to be tested by the court and to explain how they arrived at that conclusion.

If adverse effects are more serious, but can be appropriately mitigated through conditions and other measure, it may be more accurate to describe them as "acceptable", all things considered. This is a term that has found favour with the court in the past:

> We would only alter the words of their decision *more than minor* to read *unacceptable*.
> (*McKinlay Family Trust v Tauranga City Council* EnvC Auckland A119/08, 29 October 2008, at [55].)

Although the use of "no more than minor" out of its proper context will not necessarily detract from the court's final evaluation, it does put a decision-maker to an unnecessary task. When selecting appropriate evaluative language to be used in evidence and in legal submissions, it is plain that lawyers and experts can greatly assist the court by being accurate and precise.

Conclusion

Judicial comment on the use of s 104D language when assessing activities other than non-complying has sparked a more than minor debate. Although it is ultimately for the court, and not experts and lawyers, to undertake the final evaluation of the activity under the RMA, practitioners and witnesses have a responsibility and a duty to appropriately employ the relevant statutory tests and RMA terminology. Whatever the language used in the final

product, experts should be prepared to explain their conclusions and reasoning in such a way that will add value to a decision-maker's overall assessment under Part 2.

Ultimately adverse effects will be considered in the round, weighed up against the positive effects of a proposal and any conditions or mitigation measures that lessen the impact of the proposal. Experts and lawyers alike should have confidence in this balancing exercise and adopt a brave and upfront approach where adverse effects are concerned, forgoing the safety blanket of "no more than minor" once and for all.

... Editorial continued from page 10

pass the "gateway" tests for non-complying activities on the one hand and, on the other, the language used in s 104 of the RMA regarding the overall balanced judgment required when deciding applications. They emphasise the fact that the RMA is not a "no risk" statute.

Bronwyn Carruthers asks in her article "A weighting game: what statutory weight will Auckland's spatial plan be given in the RMA?" This is a significant question as the Council discussion document *Auckland Unleashed* assumes that the plan would be given effect to by the unitary plan prepared by the new Council under the RMA to replace all existing statutory planning instruments. This assumption gives rise to a number of important constitutional principles. First, the need to ensure that natural justice is observed in local authority hearings. Secondly, whether recourse to judicial review will be sufficient to give effect to the rule of law and ensure access to environmental justice. Thirdly, political and judicial deference to spatial plan provisions when making decisions on submissions or deciding appeals regarding the proposed unitary plan under the RMA. Clearly, the answer to the third question will determine the quality of the spatial plan hearing process, and will assist in determining whether merits review would be more appropriate. The article concludes that there is currently no statutory basis for assuming that unitary plan decision-makers will be required to defer or give effect to spatial plan provisions. Time therefore remains to grapple with these constitutional principles.

Daniel Clay and Eliza Prestidge-Oldfield provide a timely summary of the WAI 262 Report on linkages between indigenous flora and fauna, biotechnology and intellectual property rights. The recommendations in the report regarding the potential for use of iwi management plans will be significant in relation to future regional and district plan reviews.

Freshwater management continues to be a topic for debate with Government releasing the National Policy Statement for Freshwater Management ("NPS") on 12 May 2011, including a suite of objectives and policies regarding water quality and quantity. At regional level, the Environment Court hearing regarding appeals against decisions on the Variation 6 to the Waikato Regional Plan on water allocation concluded on 4 August 2011. These topics were debated at the 2010 RMLA Conference, and the paper presented by Dr Brent Layton of the New Zealand Institute for Economic Research is republished in this journal. From the speech given by the Minister for the Environment at the EDS Conference on 2 June 2011 it is likely that we may see further reform and regulation regarding freshwater management in 2012. The Minister will be giving a state of the nation address at the 2011 RMLA Conference in Hamilton in October, so watch this space!

Finally, after enactment, implementation and review of the New Zealand Emissions Trading Scheme, the first New Zealand based legal text on climate change has been published by LexisNexis. *Climate Change Law and Policy in New Zealand* includes chapters from a range of authors, including Vernon Rive of AUT who is also a member of the Editorial Committee for this journal. The book follows on neatly from *Climate Change Law: Comparative, Contractual and Regulatory Considerations* published jointly by NELA and RMLA in association with Thomson Reuters in 2009. A review of this new New Zealand legal text is included in this journal.

A weighting game: What statutory weight will Auckland's Spatial Plan be given in the RMA?

■ **Bronwyn Carruthers, Associate, Russell McVeagh**

Introduction

A Spatial Plan for Auckland is one of the new Auckland Council's early priorities.

The purpose of the Spatial Plan, what it is intended to include, and how it is to be prepared are all clearly set out in Part 6 Spatial planning for Auckland of the Local Government (Auckland Council) Act 2009 ("Auckland Council Act"). However, the Auckland Council Act is completely silent on the role of the Spatial Plan once prepared and adopted. No guidance is provided in the Resource Management Act 1991 ("RMA") either.

The intention was to overcome the past struggle to provide infrastructure and planning in the coordinated manner needed to match the region's rapid growth. The aim was to agree and implement a strategic direction. The irony is that the Spatial Plan is in gestation with no one being any the wiser as to what its statutory weight will be. Will it be the one plan to rule them all, or will it be just another doorstop of limited relevance?

This article explores the original intent of Parliament and the development of the Auckland Council Act, and considers the role the Spatial Plan will play in decisions made under the RMA.

Discussion

Situation pre-1 November 2010

The Auckland Council Act, and its requirement for a Spatial Plan to be prepared for Auckland, is the latest attempt to achieve a strategic approach to growth and development in the region. In order to understand the current approach it is worthwhile to briefly consider the last two attempts.

The Local Government Amendment Act 1998 inserted new sections into the principal Act under the heading "Auckland Regional Growth Strategy". The Auckland Regional Council needed to prepare and adopt a regional growth strategy for the region in accordance with the special consultative procedure in the LGA. Its objective was "to ensure growth is accommodated in a way that meets the best interests of the inhabitants of the Auckland Region". It was to "not be inconsistent with" the regional policy statement.

The *Auckland Regional Growth Strategy: 2050* was subsequently prepared, and was adopted by the Auckland Regional Council in November 1999. Its title was "A vision for managing growth in the Auckland Region".

Once adopted, the Council had to "have regard" to the ARGS when preparing or changing any regional plan or district plan (ss 66(2)(c)(i) and 74(b)(i)). By 2004 it was clear this was not sufficient, leading to the Government introducing the Local Government (Auckland) Amendment Act 2004 ("LGAAA") with additional obligations on local authorities in the Auckland Region. In particular:

a) Each of the local authorities in Auckland had to prepare and publicly notify proposed "land transport and land use" changes to their planning documents (s 39). They were given a deadline of 31 March 2005.
b) One purpose was to give effect, in an integrated manner, to the growth concept in the Auckland Regional Growth Strategy (s 40(1)(a)).
c) The other purpose was to contribute, in an integrated manner, to the following matters specified in sch 5 of the LGAAA (s 40(1)(b)):
   - providing increased certainty in the assessment of resource consents, designations, and plan changes related to transport and urban form, and ensuring that transport and land use patterns are aligned to achieve sustainability, efficiency, and liveability in the Auckland Region; and
   - managing transport and transport infrastructure, facilitating a multi-modal transport network, and facilitating integrated transport management; and
   - reducing adverse effects of transport on the environment (including improving air and water quality, reducing noise and stormwater, improving heritage protection and reducing community disruption and transport land use), and reducing the adverse effects and increasing the positive interactions of transport and land use; and
   - supporting compact sustainable urban form and sustainable urban land use intensification (including location, timing and sequencing issues, and associated quality, character, and

values of urban form and design); and
- integrating transport and land use policies to reinforce metropolitan urban and rural objectives of the Auckland Regional Policy Statement ("RPS"), the development of a competitive and efficient economy and a high quality of life, underpinned by a quality environment and amenity.

It is clear from the dual purpose of these plan changes that integration between the ARGS, the RPS and all district plans was the primary driver. The "land transport and land use" changes to the RPS and all district plans were prepared and notified by 31 March 2005. Six years later, some of those plan changes are still being finalised through the Environment Court appeal process.

In summary, the ARGS was prepared using the special consultative procedure under the Local Government Act 1974. It was then implemented into the RPS and district plan using the sch 1 process under the RMA. But this only happened after the LGAAA introduced a new legislative linkage, that required the RPS and district plans to give effect to the ARGS, instead of it simply being a strategy prepared under another Act that had to be had regard to.

While the LGAAA improved the integration between the current Auckland Regional Growth Strategy and the current RPS and district plans, it only required one round of plan changes to be prepared in 2005. It did not require future plan changes to implement subsequent regional growth strategies. Nor did it set up an ongoing legislative linkage between the RGS and plans prepared under the RMA.

Reorganisation amendments

Which leads to the question: What do we have now?

One of the seven purposes of the Auckland Council Act is "to require the Auckland Council to adopt a spatial plan for Auckland".

The provisions relating to the Auckland Regional Growth Strategy were repealed on 1 November 2010, by the Local Government (Auckland Transitional Provisions) Act 2010 ("Transitional Act"). Sections 80 and 81 of the Transitional Act, however, go some way to clarify the relationship between the Spatial Plan and the Regional Growth Strategy.

First, s 80 states:

> (2) Until the Auckland Council adopts a spatial plan under Part 6 of the Local Government (Auckland Council) Act 2009,—
>
> (a) sections 37SE, 37SF and 37SH of the Local Government Act 1974 apply, despite their repeal by this Act, as if the Auckland Council were the Auckland Regional Council; and
> (b) the Auckland Council is deemed to have adopted the regional growth strategy; and
> (c) the regional growth strategy remains in effect; and
>
> ....
>
> (3) The regional growth strategy has no effect once the Auckland Council adopts the spatial plan.

Secondly, s 81 explains how the appeals on the proposed "land transport and land use" changes prepared under the LGAAA are to be finalised:

> (2) The appeal must be determined as if—
>
> (a) sections 38 to 43 of the Local Government (Auckland) Amendment Act 2004 had not been repealed by this Act; and
> (b) the Auckland Council had not adopted a spatial plan under Part 6 of the Local Government (Auckland Council) Act 2009 (so that section 80(2)(a) to (d) of this Act applies).

The previous provisions of the LGA1974 relating to the ARGS, introduced in 1998, continue to apply until the Spatial Plan is adopted. The ARGS remains in force until the Spatial Plan is adopted. The appeals on the LGAAA plan changes are determined as if the ARGS is in effect. On the face of these provisions, it seems that the Spatial Plan is clearly intended to replace the ARGS. But, instead of addressing the shortcomings of the LGAAA moving forward, the provisions were simply repealed and were not replaced.

Intent of Parliament

This raises the question: Is the situation any better than in 2004? To consider this question, it is useful to review the process followed, and material considered, by Parliament when the Auckland Council Act was being prepared.

The Royal Commission Report identified a lack of alignment between the respective planning instruments, growth policies and investment plans of local authorities and major infrastructure providers as a major issue holding back Auckland's performance. The Royal Commission Report

recommended an integrated approach to all Council planning, to be achieved through a hierarchical system of plans, few in number and closely linked. It was to involve a single Long-Term Council Community Plans ("LTCCP") that fed into:

a) A statutory Regional Infrastructure Investment Plan that would identify projects, timing, priority and funding; and
b) A Spatial Plan that would:
   - Visually illustrate how the region will develop in the future;
   - Identify and guide the location of critical infrastructure services and associated investment; and
   - Identify and guide the future location and mix of residential, business and industrial activities within specific geographic areas.

The Regional Infrastructure Investment Plan and the Spatial Plan would then be given effect to in all other Auckland Council plans.

On receipt of the Royal Commission Report, the Office of the Minister of Local Government prepared a high-level Government response to the Report and the key issues it raises. It summarised one of the critical issues for Auckland as follows:

> Integrated Planning
>
> The lack of integrated planning has been identified as a key issue affecting Auckland's performance. The new Auckland Council will be responsible for adopting an integrated approach to planning across the city-region. It will develop a single Long-Term Council Community Plans ("LTCCP") for Auckland that will be reflected in a Spatial Plan and a Regional Infrastructure Investment Plan. These plans, in turn, will inform other local plans.

This paper supported the integrated planning approach recommended in the Royal Commission Report. The paper noted that it would strengthen the Auckland region's planning mechanisms, reduce existing conflict and inconsistency in planning mechanisms and allow for growth in a more targeted, efficient and effective manner. The Minister recommended that Cabinet agree in principle that the functions of Auckland Council should include the development of a "single Spatial Plan and Regional Infrastructure Investment Plan" that would sit alongside the existing requirement for an LTCCP.

On 6 April 2009, Cabinet agreed with this recommendation and invited the Minister for the Environment to report to Cabinet with more detailed advice on the Spatial Plan and Regional Infrastructure Investment (CAB Min (09) 12/7).

Subsequently, on 30 July 2009, the Cabinet Committee on Implementation of Auckland Governance Reforms invited the Minister for the Environment to consider integrated planning as part of the Phase Two RMA reform process (AGR Min (09) 5/1). A later direction was for the Ministry for the Environment, in consultation with the Ministry of Transport and the Department of Internal Affairs, to consider the appropriate legal status of a Spatial Plan and its relationship to, and implications for, the other planning instruments (AGR Min (09) 9/1).

These directions led to the preparation of a very detailed and thorough report by the Office of the Minister for the Environment ("MfE Report"). The MfE Report started by explaining that the existing problem is threefold:

a) No mechanism currently exists for requiring a long-term, strategic direction for the region that takes account of the range of issues relevant to managing growth and integrates across broad objectives;
b) There is limited ability to implement a strategic direction consistently through plans and decision-making, because there are currently no legislative linkages between any agreed strategic direction and the Councils' plans.
c) There is no basis upon which to target and agree the type, scale, timing or location of investment decisions, so as to better coordinate activities that are critical for delivering the strategic direction.

It noted that while Auckland already has a different statutory planning framework to the rest of the country (with the requirement to have a Regional Growth Strategy), the weak legal relationship between the ARGS and other plans (including RMA plans, funding plans and other plans) had resulted in weak implementation of the ARGS.

The MfE Report says:

A spatial plan would provide high level, forward looking, regionally significant direction to other plans, while leaving the detail to be contained in lower level implementation plans (eg the District Plan). In particular, this direction would enable effective management of rapid growth in the region, and integrate and target land use planning and infrastructure investment, and sequence development and investment over time to maximise

benefits. There were considered to be significant risks in relying on a purely voluntary approach, which led to the conclusion that the Auckland Council should be required by statute to have a Spatial Plan. The MfE Report notes:

> A voluntary plan, *or a statutory plan without effective legislative linkages*, would not necessarily overcome the issues associated with implementing an overarching strategic direction through all council plans and decision-making. (emphasis added)

It goes on to say:

> In the absence of a clear legal relationship between plans, the regional strategic direction may not influence a court decision. Such decisions may in practice have a substantial impact on how a development occurs and, over time, on the shape of the region.
>
> In order for a spatial plan to give direction and guidance to other plans, *it needs to have influence. Further analysis is required* on the appropriate statutory basis for providing a consistent and clear legal relationship (legislative linkages) between plans prepared under different statutes, to enable the direction from the spatial plan to feed through other plans, and decision-making. (emphasis added)

The MfE Report then assessed five options for introducing a Spatial Plan:

1) Status Quo — wait for possible changes through Phase 2 of the RMA reform process (urban planning work stream) to the RMA, Local Government Act 2002 and Land Transport Management Act 2003 ("LTMA");
2) An LTCCP that contains elements of a Spatial Plan with a legislative linkage to other plans, under the Auckland legislation;
3) A statutory Spatial Plan that replaces existing strategic plans under the RMA and LTMA, under the Auckland legislation;
4) A statutory Spatial Plan with strengthened legislative linkages to effectively influence other planning, under the Auckland legislation; or
5) A statutory Spatial Plan with no additional or strengthened legislative linkages to other plans, under the Auckland legislation, and further consideration on replacing existing strategic plans, legislative links, appeal rights, and consultative procedures through the Phase 2 RMA reform process.

The Minister's preference in the long term was for option 3, where the Spatial Plan would replace the RPS, and possibly the Regional Land Transport Strategy ("RLTS"). But in the short term, and in recognition of the detailed, comprehensive analysis and assessment that would be required for options 2, 3 and 4 and the available timeframe, the Minister recommended option 5 be adopted. The Minister noted:

> I note, however, that the legislative vehicle for making any subsequent changes to legislative links to other plans or for replacing other plans will be investigated as part of Phase Two of the resource management reform process. There may be a need to amend legislation, possibly the Local Government (Auckland Council) Act 2009 to establish legislative linkages between the spatial plan and other plans. *It is quite possible that any Bill to achieve this would not be before Parliament until early 2011, maybe later, delaying establishing or strengthening legislative linkages. Risks caused by delay will need to be monitored.* (emphasis added)

The intent, at the time the Minister prepared the MfE Report, was that:

- The Spatial Plan would have no additional or strengthened legislative linkages to other plans, but would:
  - replace the ARGS; and
  - be available to inform the RLTS, RPS and LTCCP with its strategic direction through existing and voluntary mechanisms.
- The urban workstream within Phase 2 of the RMA reform would investigate "opportunities to further simplify, streamline and make planning instruments and mechanisms more effective". Four particular points to be investigated were:
  - Whether a Spatial Plan should supplement or replace existing strategic plans, such as the RPS and RLTS;
  - The strength of the legal relationship between the Spatial Plan and other plans (ie district / regional plan, LTCCP);
  - The relationship of the Spatial Plan to national planning instruments (ie National Policy Statements, Government Policy Statements, National Infrastructure Plan); and
  - Consultation procedures and appeal rights.

All of these matters, each of which is quite a significant issue or question, were deferred to the Phase 2 RMA reform process. Back in 2009 the Minister for the Environment was aware there could be some delay with the Phase 2 RMA reform. However, there is nothing (in the material reviewed for this article) to indicate the delay with that reform would be this long.

The Auckland Council is now required to prepare a Spatial Plan without knowing what role it will have, or what weight it will be given in the future. Perhaps more importantly, other stakeholders are entirely in the dark on the potential weight or influence the Spatial Plan will have moving forward. These issues need to be considered and satisfactorily resolved before the Spatial Plan is prepared and adopted.

What role will the Spatial Plan have?

The process for preparing the Spatial Plan is likely to inform its future role. The Spatial Plan is to be prepared using the special consultative procedure ("SCP") set out in s 83 of the Local Government Act 2002. A draft will be prepared and made available, and any submissions filed will be heard at a Council meeting before the Spatial Plan is adopted. There is no right of appeal, either to the Environment Court or the High Court, and the only avenue for challenge will be by way of judicial review.

The Spatial Plan will be a document prepared through a non-RMA process, with no right of appeal or challenge beyond Council level. In this respect it is the same as the ARGS, the RLTS and the Public Transport Plan. Under the current provisions of the RMA these documents are "management plans and strategies" prepared under "other Acts". They are documents the Council "shall have regard to" when preparing the RPS (s 61(2)(a)(i)), regional plans (s 66(2)(c)(i)) and district plans (s 74(b)(i)). This is a much weaker legislative linkage than "give effect to", and even "not be inconsistent with".

From the material reviewed in the preparation of this article, there does seem to be a clear intent that Auckland planning documents will need to "give effect to" the Spatial Plan. While this is not the current situation, it appears likely from the material discussed above that Phase 2 of the RMA reform will strengthen the legislative linkage.

The LGAAA provides a precedent for this to occur. As with the Spatial Plan, the ARGS was prepared following the SCP at a time when there were no legislative linkages in place between the ARGS and the region's RMA planning documents. A legislative linkage was subsequently introduced by the LGAAA, together with a requirement that the RPS and all district plans in the region be amended to give effect to the ARGS. The sch 1 process had to be followed, and while the parties involved could not challenge the ARGS there has been plenty of challenges to its implementation in the RMA plans. It may be for this reason that the MfE Report recommends further consideration of "consultation procedures and appeal rights" in the Phase 2 RMA reform.

What is clear from the material reviewed is that these issues were considered during the preparation of the Auckland Council Act, and were deferred to allow more thorough and careful consideration in the context of the wider RMA reform. That reform has taken longer than anticipated, and there is a very real risk that the Spatial Plan will be prepared and adopted under the current legislative regime, then be given effect to in planning documents under a "simplified" sch 1 process with limited consultation and appeal rights. This is far from ideal.

And what about in consent decisions?

Another issue is the relevance of the Spatial Plan in resource consent decisions.

Under s 104(1)(c), a consent authority considering a resource consent application is to "have regard to" any other matters it considers relevant and reasonably necessary to determine the application. The Environment Court has often recognised the relevance of both the ARGS and the RLTS as an "other matter": *Transit New Zealand v Auckland Regional Council* EnvC Auckland A100/2000, 18 August 2000; *Merton v Rodney District Council* EnvC Auckland A008/07, 2 February 2007. While it will be "relevant", the Court may choose to place little weight on a document that has been prepared through the SCP, rather than through the sch 1 process with its opportunities for submission and appeal.

Conclusion

The lack of any legislative connection between any agreed strategic direction and all the Council's and CCO's plans and decisions, will seriously limit the Auckland Council's ability to implement an agreed strategic direction. This was acknowledged by the Minister for the Environment during the preparation of the Auckland Council Act. This issue needs to be resolved before the Spatial Plan is prepared and adopted so that all stakeholders understand its importance from the outset and can act accordingly. Without this clarity, Auckland will be no better off than it was in 1998.

Blue horizons

■ **Trevor Daya-Winterbottom, Senior Lecturer, Centre for Environmental Resources and Energy Law, Faculty of Law, University of Waikato**

The Ministry for the Environment ("MfE") has recently consulted on RMA Phase II reforms, and officials are now considering and refining the policy options. They build on the Government's focus of simplifying and streamlining process under the Resource Management Act 1991 ("RMA") evidenced in the Resource Management (Simplifying and Streamlining) Amendment Act 2009. The Government's objectives for the RMA Phase II reforms are (inter alia) to provide greater central government direction on resource management, to improve economic efficiency without compromising environmental integrity, and to avoid duplication of processes under the RMA and other statutes. This paper offers some preliminary views on further improvements in RMA practice.

National and regional guidance

The RMA provides for an elaborate hierarchy of planning documents to guide decision-making by councils. Critical components of the planning hierarchy are national policy statements ("NPS") and national environmental standards ("NES") prepared by central government. However, national guidance has been slow to emerge and councils have been left in a policy vacuum to decide how they should administer the RMA via regional policy statements ("RPS"), regional plans and district plans.

NPS are now being prepared, notified, and litigated before Boards of Inquiry specially constituted to make recommendations on how submissions should be decided. Comparison with other common law jurisdictions indicates that a suite of NPS will be required. For example, in the United Kingdom the Secretary of State for the Environment has prepared 25 planning policy guidance notes. It will therefore take some time before the suite of NPS required to administer the RMA has been prepared and notified and is fully operative.

By nature NPS and NES are high-level documents. Comparison with national planning guidance in other jurisdictions indicates that they may either provide policy guidance that will be directly applicable on all persons exercising functions, powers and duties under the relevant statute including landowners and developers; or provide guidance that merely has direct effect on councils and will not have immediate effect against other persons. Where national guidance merely has direct effect on councils there will inevitably be a time delay while subordinate documents in the planning hierarchy are prepared or changed to give effect to the national guidance. Given the critical need to provide greater central government direction on resource management within a reasonable time period there is a strong argument that NPS should be drafted in a way that ensures they will be directly applicable on all persons exercising functions, powers and duties under the RMA without the need for further subordinate action by councils.

Various methods have been used in the United Kingdom to prepare national and regional planning policy guidance notes. For example, the regional planning policy guidance note ("RPG") for East Anglia was prepared by a standing committee of all councils in the region with each council being represented by an elected councillor and an expert member of staff. This collaborative method removed the need for the consultation before the RPG was notified and avoided litigation risk after notification because relevant stakeholders were involved in the process and reached consensus agreement on the RPG submitted to the Secretary of State for approval.

A similar approach could be adopted regarding preparation of NPS and NES. Relevant stakeholders would include representatives from all councils, local authority associations, network utility operators and requiring authorities, professional bodies (eg RMLA), business and industry associations, and non-governmental associations. The Land and Water Forum is an example of collaborative governance, but that model was only designed to produce issues and options for consultation and therefore does not have the same streamlining advantages as the United Kingdom experience in East Anglia.

For the 11 regions in New Zealand where a two-tier system of local government remains in place, a similar collaborative approach could be adopted regarding preparation of RPS to replace the current process under sch 1 of the RMA. Natural justice could be safeguarded by providing persons excluded from the process with a right of appeal on questions of law. Currently, the RMA provides a framework in Schedule 1 for councils to agree on consultation regarding RPS

preparation or change, but the framework does not guarantee that a collaborative approach will emerge from the consultation process. More importantly the consultation process is limited and does not provide for wider stakeholder engagement.

District plans

The majority of resource consents granted (69 per cent) are land use consents. The RMA takes a permissive approach to land use activities and resource consent is not required unless the proposed activity is contrary to a rule in a plan. As a result landowners and developers will be keenly interested in the plan preparation process. They will be concerned about any adverse effect on their property rights. In the absence of any statutory entitlement to compensation in relation to the adverse effect of restrictions on private property, the provisions in s 32 which require plans to be soundly based on good evidence and Schedule 1 that provides for submission, hearing and appeal rights are important constitutional guarantees against the abuse of discretionary power.

Generally, the RMA provides a litigation-based method of environmental conflict resolution. Disputes regarding notified plan provisions and notified resource consent applications are generally resolved via formal hearings before decision-makers, and alternative methods of environmental conflict resolution are optional. For example, in the context of council decisions on resource consent applications provision is made in the RMA for prehearing meetings to assist in resolving submitter concerns regarding the effects of proposed activities, but uptake of prehearing meetings is low (34 per cent). Experience before the Environment Court is similar with mediation occurring in relation to 39 per cent of appeals filed with the Court.

While the right to be heard is deeply engrained in the common law approach to administrative decision-making, it is clear from a public law perspective that the right to be heard can be guaranteed by a variety of methods. The Minister has indicated a preference that collaborative methods of environmental conflict resolution should be used as an alternative to formal litigation. When drafting legislation the Government makes a deliberate policy choice about how natural justice will be guaranteed and the methods that will be used to provide hearing rights. As a result there is an opportunity when considering RMA reform to select alternative methods of environmental conflict resolution as the primary method for hearing submissions. Internationally, a variety of alternative methods are used. For example, the United States EPA has developed negotiated rule making, a mediation-based method that encourages stakeholders to arrive at consensus on how regulations should be drafted. Negotiated rule making is also gaining some traction in Australia and is promoted by ELRANZ as a good example of collaborative decision-making.

Negotiated rule making normally works in the following way. Before the negotiated rule making commences ground rules are prepared setting the deadline for completion of the process, the objectives of the process, the responsibilities and commitments of participants, and providing a definition of "consensus". A list of issues is identified for discussion, and participants are provided with relevant background materials. The mediator provides focus and manages the process, and participants discuss each issue. When participants have agreed on a conceptual solution the regulator provides a draft regulation for review. Draft regulations are subject to further discussion and review by the participants until consensus agreement is reached. Typically, the negotiated rule making process takes six to 12 months to complete and involves monthly multi-day meetings.

Giving effect to the preference for collaborative methods of environmental conflict resolution will require a change from voluntary mediation. It would also require investment in further commissioner training to ensure that all mediators would be appropriately qualified and experienced to manage the negotiated rule making process. But it will not provide resolution of all issues in all cases, as a result formal hearing before a decision-maker will remain as a secondary method for environmental conflict resolution.

Adopting negotiated rule making should however provide consensus on the plan provisions required to address most issues. Where consensus cannot be achieved on a particular issue the process should identify the provisions in disagreement, the regulatory options discussed, and the reasons for disagreement. That would provide foundation for a focused hearing to decide any outstanding issues.

Whether any formal hearing that may be required to resolve any outstanding issues should be conducted before the relevant council or the court is a secondary policy consideration. But where alternative methods of environmental conflict resolution have narrowed the scope of any outstanding issues there would not appear to be any overriding public law reason why the issues should not be decided by the court.

Adopting negotiated rule making could reduce the time taken by councils to make decisions on submissions, and reduce the number and scope of any appeals. It is however for note that Schedule 1 of the RMA was amended in 2009 as part of the streamlining and simplifying reforms. But the reforms did not prescribe any statutory timetable for completing specific stages in the Schedule 1 process (eg public notice of submissions) apart from an overall requirement to complete the process from notification to giving notice of decisions on submissions within a two-year period. Prescribing a statutory timetable for submissions to be referred to negotiated rule making within a period of six months from notification of the plan could assist in meeting this requirement. While improving practice is laudable, previous research commissioned by the Ministry indicated that the time taken to prepare plans and designate infrastructure projects in New Zealand was similar to the timeframes experienced in other OECD jurisdictions. As a result current processes under the RMA do not appear to place the New Zealand economy at a comparative disadvantage.

Harmonising laws

There are 67 councils exercising territorial jurisdiction in New Zealand via preparation and administration of their district plans. The issues that they encounter when drafting objectives, policies and rules for a residential zone will be similar. The same position will apply regarding other land use zoning provisions found in district plans.

Economic activity and infrastructure however does not necessarily fit neatly within the administrative boundaries of councils. There has been considerable debate in Australia at both federal and State level about the harmonisation of environmental laws to reduce barriers for economic activity and streamline and simplify process.

Attention has focused on Victoria where a two-stage approach is used for land use planning. Under the Victoria Planning Provisions ("VPP") the Department of Planning and Community Development is responsible for preparing a template from which district plans are sourced and constructed. The VPP provide a menu of zone provisions that can be applied to any block of land or any specific site. They provide of a range of residential, business, industrial and rural zones. For example, they provide for six different types of residential zone. Each set of zone provisions defines the purpose of the zone, contains an activities table, and sets out subdivision standards and development controls.

The menu of zoning provisions is supplemented by a menu of overlays that provide additional controls that can be applied in the context of any of the zones. For example, in the context of any one of the residential zones it may be appropriate to apply overlays dealing with vegetation protection, heritage, design or neighbourhood character.

Other menus supplement these provisions and provide requirements for specific uses and developments (eg advertising signs, car parking and home occupations), general information on the administration of the plan, definitions and documents to be incorporated by reference.

Councils are responsible for preparing district plans using provisions taken from the VPP. Based on site-specific information about land use suitability they decide which zone is most appropriate for any particular block or site in their area. The same factors determine whether any overlays or particular provisions (or any combination of them) should also apply to the subject land. The basic rules that apply to any Residential 1 Zone land in Victoria will therefore be the same, and the differentiating factor between one site and another will be any overlays or particular provisions that also apply to the site. While the combination of overlays and particular provisions will vary from site to site, the rules that apply in relation to a specific overlay or particular provision will also be the same throughout the State.

Adopting the VPP approach in New Zealand could provide a number of advantages. It would provide for a single debate about drafting objectives, policies and rules. It would reduce complexity by providing uniform provisions capable of consistent interpretation by a variety of decision-makers. It would enable councils to focus more specifically on land use suitability and zoning issues based on site-specific information, and simplify and streamline the plan preparation process. Overall, adopting the VPP approach would allow city and district councils to engage in a collaborative approach with other stakeholders and prepare template provisions for approval by the Minister as NES.

Statutory disconnection

Another concern recorded in the consultation document is the disconnection between the various environmental statutes under which planning documents are prepared and consents and permits

are required for development. There appear to be three broad points that underlie this concern.

First, environmental law in New Zealand is governed by over 35 statutes but planning documents prepared by councils focus almost exclusively on the exercise of functions, powers and duties under the RMA. There is no express statutory direction for councils to prepare policy statements or plans in an integrated and holistic way that give effect to their environmental management functions under all relevant statutes. While the RMA will remain as the cornerstone for environmental management, broadening the scope of planning documents may assist in reducing disconnection between different statutory regimes.

Secondly, the relationship between planning documents prepared under the Local Government Acts 1974 and 2002 ("LGA") and the RMA is blurred. For example, city and district councils have a broad range of non-RMA functions regarding community wellbeing, environmental health and safety, infrastructure, and recreation and culture. The focus of LGA plans will therefore be much wider than environmental planning and will coordinate council functions generally. Providing a clearer distinction (or statement of relationship) between planning required for different council functions would avoid the risk that environmental management will be become subordinate to other local government objectives. For example, spatial planning evolved in the United Kingdom to provide statutory guidance in relation to land use planning in a similar way to RPS in New Zealand. Spatial planning was initially provided for under local government legislation relating to establishment of the Greater London Authority but was subsequently provided for under the Planning and Compulsory Purchase Act 2004. As a result there will be a need to clearly define whether spatial planning in Auckland has a wider local government management objective, or a more focused environmental management objective.

Thirdly, integrated management of natural and physical resources is a key feature of the RMA. Providing for environmental planning and land use planning in a single statute was groundbreaking in 1991. Some jurisdictions (eg United Kingdom) still manage these functions under separate legislation. While the RMA was designed on the premise that multiple consents may be required (in addition to any consents required under other statutes) other jurisdictions have taken the concept of integrated management further. For example, the Integrated Planning Act 1997 and the Sustainable Planning Act 2009 in Queensland provide one system for all development related assessment by central and local government. Providing for a single application system under all 35 statutes listed in the Environment Act 1986 under which consents can be granted (including the RMA) is a matter that demands careful consideration. To date integrated development applications have not featured on the RMA reform agenda.

Conclusion

The time lapse between enactment of the 2009 amendments and the current reform agenda is too short for any conclusions to be made about whether the amendments have been efficient or effective or delivered the desired legislative outcome. Empirical analysis will also be difficult as biannual RMA monitoring and reporting has only covered plan changes and variations since 2005, and no overall monitoring is currently undertaken regarding the Schedule 1 plan preparation process.

If the RMA Phase II reform proposals are to be taken further there will need to be a mind-shift away from voluntary mediation if alternative methods of environmental conflict resolution such as negotiated rule making are to replace the current Schedule 1 process for district plan preparation. Adopting alternative methods may also require councils to relinquish control of the plan preparation process following notification and be bound by the mediated outcome. Natural justice will also require mediators to be appropriately qualified and independently appointed. The Environment Court would remain relevant as a backstop for deciding any outstanding issues. Further simplifying and streamlining could be achieved by adopting the two-stage approach used for preparing district plans in Victoria. But the design of any alternative environmental conflict resolution procedures will require close and careful attention to the rule of law, access to environmental justice and rules of natural justice that underpin our constitutional system.

Overall, the success of any further reform will require national planning guidance and a collaborative approach to regional planning guidance.

Recent cases

■ **Bronwyn Carruthers, Associate, Russell McVeagh**

A recent decision of Justice Dobson in *Reuters Homes Ltd v Wanganui District Council* HC Wanganui CIV-2010-483-278, 14 June 2011 is a reminder of the limits of s 92 requests for further information.

Reuters Homes Ltd owns a relatively large block of land in suburban Wanganui, adjoining two substantial properties owned by Presbyterian Support Services ("PSS") and Hospice Wanganui ("Hospice"). Reuters developed a subdivision proposal for its land, in consultation with PSS and Hospice, that created 35 small residential sites accessed by a cul-de-sac off the main road, Virginia Road. The intention was to create small units for elderly occupants in a quiet and secure living environment.

However, the District Plan showed an indicative road running through the Reuters land, connecting Virginia Road through to Edmonds Drive. Council officers expressed a wish for this connection at the first meeting with the developer post-lodgement. Reuters responded by explaining that the concept plan had been under development for two years in negotiations with PSS, and that providing a through road would require significant changes in design involving yet further negotiations with PSS. Reuters advised that in light of the adverse financial implications and adverse effect on the character that Reuters and PSS were hoping to create, the request for road connectivity was unreasonable.

The Council then followed up with a request for further information under s 92 of the RMA, seeking "a revised roading layout and configuration showing the connections required". Reuters responded, objecting to the request, and explaining why it was neither desirable nor feasible to provide the roading connection. The Council considered it was left with no option, but to fully notify the proposal under s 95C of the RMA.

Reuters judicially reviewed the Council's decision to notify, seeking orders that the request for further information was unlawful, the decision to publicly notify was unlawful, and that the Council had acted in abuse of its powers. In essence, Reuters claimed that the context in which the Council resorted to s 92 as a device to force it to introduce a significant change construed a misuse of the power to request information in relation to an application, leading to an unlawful exercise of the default power under s 95C to require public notification on account of the perceived inadequacy of the information.

The Court agreed. It held at [41], [42]:

> On any view of the proposal, the transformation of the roading servicing it from a relatively small cul-de-sac, to a through road, would substantially transform the proposal. Reuters sought to develop a community that was complementary to two existing uses on its boundaries, with both PSS and Hospice Wanganui supporting the cul-de-sac formation and being opposed to any through road.
>
> WDC's request did not seek information enabling it to better understand the traffic consequences of the cul-de-sac proposed. Rather, WDC sought to require the developer to transform its proposal into one that would address WDC's objectives for a much wider area, in terms of roading development.

The Court agreed at [47] with Reuters' legal analysis that:

> Power will be abused if it is invoked for a purpose that is inconsistent with, or goes beyond, the purpose for which the statute has created the power. A purpose will be "improper" ... if it goes beyond the purposes for which the statute has created the power.

The Court held that Council officers had clearly misconstrued the scope of the power available to them under s 92 as the request required Reuters to recast, in a substantial manner, the detail and scope of its application. This did not constitute a request for information on the application as lodged, but instead sought to transform that application. The Court noted at [48]:

> In other situations, requests for further information that might contemplate rearrangement of details, or inclusion of alternatives for some details, of a proposed development could be justified. Within the present context, the difference is so significant as to require the developer to transform the proposal into a different development.

Reuters was successful, with the Court making declarations at [52] that:

- The Council could not require the provision of an

amended plan addressing its own road connectivity aspirations pursuant to an information request under s 92; and
- The Council had erred in law in treating Reuters' refusal as a sufficient refusal to provide further information for the purpose of the default power to notify in s 95C.

A request under s 92 must be for information that relates to the application, which is required to enable the Council to be satisfied as to the nature, scope and extent of the application and its actual or potential effects. This recent decision of the High Court makes it clear that s 92 requests cannot be for the purpose of "transforming" the application into something else.

Applicants should take care before responding to s 92 requests that appear to be somewhat out on a limb, particularly when the request involves providing a significantly different "alternative" to that applied for. Otherwise, the Council may elect to grant consent to the "alternative" provided in a further information request, instead of to the application before it.

Tradable systems for water: Best use and maximising value

■ **Brent Layton, Senior Fellow, New Zealand Institute of Economic Research**

Introduction

My role in this session of the Conference is to comment upon the proposals in the New Zealand Business Council for Sustainable Development's ("BCSD") report "Tradeable Rights for Commercial Water". My co-speaker in this session, Peter Neilson, the Chief Executive of BCSD, has outlined the proposals, which BCSD refers to as the "Best Use Solutions Model". I will provide a critique of this proposal by drawing upon the general ideas of economists around tradability and what I believe to be lessons that can be drawn from experiences in establishing markets for other commodities.

The scope of the use of markets for allocating resources, including for environmental objectives, has expanded considerably, especially in the last 25 years. New Zealand has shared in this trend. Markets have been developed in or for New Zealand for a number of derivatives — futures, options, swaps and forward rate agreements. Markets have also been developed for a number of financial instruments — the New Zealand dollar, Government and corporate bonds and short-term money market instruments like bank bills. Decisions about which generators to run to produce electricity were formerly decided by a central agency but are now determined from the competitive offering of generators using the New Zealand Electricity Market ("NZEM"). There has been considerable work undertaken on the design of a market for balancing gas in the transmission pipelines in the North Island. The New Zealand Emissions Trading Scheme ("NZ-ETS"), which was recently implemented, is a market mechanism to incentivise parties to reduce greenhouse gas emissions. Variation 5 of the Waikato Regional Plan is another market-based mechanism. Its purpose is to incentivise parties to reduce nitrate discharges into the catchment of Lake Taupo. The allocation and transfer of the rights to use certain radio spectra and to catch fish have also been made market activities.

The trading of water rights for relocation is not new or novel. It is relatively common and well developed in some overseas jurisdictions, including Australia. Transfers within the same catchment (either upstream or downstream) or aquifer are catered for in s 136(2) of the Resource Management Act 1991 ("RMA") provided the transfer "is expressly allowed by a regional plan" or has been agreed to by the consent authority that granted the permit. There is at least one specialist broker for trading water rights active in New Zealand.

As the pressure on the supply of water in catchments and aquifers increases however, so do the calls for increased tradability of water. The BCSD's proposals are not the only call for this: nor are they the latest. The Land and Water Forum very recently released a comprehensive report entitled "A Fresh Start for Freshwater". In this it called for water permits to be able to be transferred more easily. The Waikato Regional Council's Variation 6 to its regional plan ("Variation 6"), which is currently before the Environment Court, includes proposals to allow the more ready tradability of surface water takes downstream. There were calls at the hearings stage for these provisions to be made significantly more liberal than has been proposed.

What lessons for increasing the tradability of water can we draw from our recent experience in creating other markets?

Lessons for water tradability

Lesson 1: Markets and legal frameworks are complements

Markets require a solid legal foundation in order to be acceptable to participants as confidence in the practical enforceability of transactions is essential to the operation of every market.

The New Zealand futures market began operation as a domestic market in 1985. For a couple of years previously greasy-wool futures trading had occurred in New Zealand, but the contracts were registered and cleared in London under English law. New Zealand did not at this time have specific legislation relating to futures trading and the Government was reluctant to provide any; in 1985 the Government was heavily engaged in deregulating financial markets and not at all sympathetic to requests for introducing regulations to support a new market.

The London-based International Commodities Clearing House ("ICCH"), which was engaged by the promoters to provide the software and act as the clearing house for the market, was concerned that, in the absence of supporting legislation, futures

related debts may be treated as gambling debts and be unenforceable. Whether its concerns were well-founded or not, ICCH was initially reluctant to clear New Zealand-domiciled contracts. Its concerns were overcome by the promoters of the exchange agreeing to all contracts being closed and settled every night and accepting a new contract in replacement at the current market price the next day. This, in the eyes of ICCH, capped its potential exposure to one day's movement in prices and it held from its clearing members initial deposits intended to cover this movement. From the point of view of New Zealand participants, there was limited practical effect, but without a satisfactory means to limit its risks relating to enforceability, the ICCH would not have proceeded and there would have been no futures market in New Zealand.

The New Zealand Electricity Market ("NZEM") was also created without any specific legislation as the Government made it very clear that it would not provide legislation to support the development of the market. This was despite its expectation that the parties involved would establish a market and that the State-owned enterprise Transpower would assist its creation.

In this case, the solution to enforceability was achieved by structuring NZEM as a multi-lateral contract. This solution had a number of consequences. It meant that participation in NZEM was voluntary and the market rules had to be agreed by the parties to the multi-lateral contract. It also led the parties to apply for authorisation by the Commerce Commission because of concerns that the multi-lateral agreement could amount to "price fixing" under s 30 of the Commerce Act 1986 and so be not only illegal but also unenforceable. The parties that created NZEM went through complex multi-party negotiations and the trouble and expense of an authorisation hearing to ensure enforceability of transactions.

Market solutions to access to resources and legal frameworks to support access are complementary and not alternatives. The legal framework to support a market approach to determining allocation and exchange is different, however, to a legal framework to determine which parties will have access to resources and how much each will have. The former has to focus on the enforceability of agreements and not the criteria for determining access.

Lesson 2: Clarity about what is being traded

Clear definitions of what it is that is being traded are important for enforcement of transactions and hence for the willingness of parties to participate in trading.

For a market to function well, buyers need to know what rights and obligations they acquire and sellers need to know their rights and obligations as well. What is being traded is usually not difficult to determine in normal circumstances and often will seem a trivial issue: the buyer gets ownership of what they bought and in return is obliged to pay the seller and the seller has to deliver ownership to the buyer and in return will receive payment from the buyer. It is what happens in abnormal circumstances that usually requires time to develop and it is often these features that determine whether parties are willing to participate in the market.

The rights of sellers in the event of a payment default by a buyer were a particularly difficult issue to agree under the multi-lateral contract version of NZEM. As it is physically impossible to track which generators provide electrons to which buyers at any point in time, never mind over the course of a month, it is not possible to assign a default by a buyer to one or more generators or even to work out their proportionate shares of the default. In the end, it was decided to assume each generator participated in providing electricity to a defaulting buyer pro rata with their share of generation during the times the defaulting party consumed electricity. It was also decided that, in the first instance, the shortfall in settlements received would be allocated to generators on this basis and be a deduction from the settlement funds they would receive; generators would be subjected to a pro rata "haircut" in the event of a payment default. This naturally led to the generators trying to impose high credit requirements on participants who buy electricity in NZEM.

Experience in several markets indicates that absolute certainty about the rights and obligations of buyers and sellers is not essential for an effective market to develop, provided the parties have sufficient information to be able to assess the likely outcomes if various contingencies arise and to factor the risks into their assessments of value. For example, the scaling of fish quota in the event of a change in the allowable catch has not stopped trading in fish quota. This is because the rules around determining the allowable catch are sufficiently clear that participants are able to form their own assessments of the risks and impact on the value of quota.

In this regard, fish quota trading is very instructive for the tradability of water rights. The chances that total allowable water takes may have to be adjusted in future as knowledge about the environment and

the size of aquifers is refined seem very high. The lesson from markets elsewhere is that it would be helpful to tradability if the research base and criteria upon which such a decision would be based are set out in advance, together with how any alteration in the allowable water takes impacts on different categories of water permits.

Lesson 3: Tradability and highest-value use

Irrespective of whether an asset or entitlement was obtained gratis as part of some publicly sanctioned allocation or paid for by the holder, if it is freely tradable every holder faces its highest-use value when deciding whether to use or trade it, or leave it idle.

The logic behind this is that instead of using the asset or entitlement, or leaving it idle and unused, the current owner can, if it is freely tradable, sell it to the party willing to pay the most for it because they value it most highly. In other words, the opportunity cost of using or leaving idle a resource is its value in its highest use by another party. For rational economic decision-making about the use of a resource, the cost that matters is the opportunity cost not the original cost when the asset was acquired, or any other value.

A corollary of his point is that the argument sometimes raised against, for example, allocating emissions trading entitlements to firms facing international competition that this will not be as effective at encouraging emissions reductions, is quite wrong. The implicit assumption behind the argument is that people value things on the basis of what they pay for them and not on the basis of what they can sell them for. This is not how a rational economic agent would behave. To them the value of something is what you could buy it for and/or the value of what you could sell it for: not what it originally cost them to purchase. People who inherit property they do not want to retain generally want to sell it at its current market value and not give it away as the critics of gratis allocations effectively assume.

Lesson 4: Tradability and allocative efficiency

Economists recognise three forms of efficiency:

- Productive efficiency, or whether something is being produced at the lowest cost possible, given the technology available and the costs of inputs;
- Allocative efficiency, or whether available resources are being allocated so as to produce the highest value of goods and services possible, given the available technology; and
- Dynamic efficiency, or whether the right investments, including in new technology, are occurring at the optimal time.

Of these three forms of efficiency, regulators and economists usually consider that dynamic efficiency is more important to economic growth and improving economic welfare in the long run. This is because in the long run the appropriateness of investment decisions is more important to economic growth and welfare than whether resources are currently optimally allocated and costs minimised.

If all you are concerned about is whether resources are being used to produce the most valuable outcome for society, ie if your only focus is allocative efficiency, the initial allocation of a resource does not matter, provided the resource is tradable and transactions costs are negligible and no party has market power in relation to the resource.

The logic behind this is that if transactions costs are low (strictly speaking, they should be zero for the result to hold) and no party is able to exercise market power, so the market is competitive, the interaction of buyers and sellers will result over time in the resource moving to the parties who value it most highly, irrespective of the initial allocation. This is the outcome necessary for allocative efficiency.

There are a number of corollaries of this proposition. First, the question of the initial allocation of a resource has no long-term bearing on the (allocative) efficiency of its use, provided there is "ready" tradability, ie provided there are low transactions costs and no party can exercise market power. As a result, you can effectively separate out decisions about initial allocation of say water rights, emission entitlements, fish quota, spectra allocation etc from concerns about efficient use, if there is ready tradability. The problem of initial allocation can be decided with different objectives in mind than ensuring the resource will end up being efficiently used.

Secondly, it is important for the allocative efficiency of outcomes to reduce or eliminate as much as practicable anything that raises transaction costs. This includes reducing where practicable the costs of: finding counter-parties; negotiating prices and terms; and enforcing transactions. In general, the fewer the restrictions on trading the better; the wider the pool of potential participants the better; and the more readily enforceable are rights the better.

Thirdly, care needs to be taken to ensure that in any initial allocation no individual party, or group of parties, is able to exercise market power in relation to the resource or asset. A party with market power is able to restrict supply and raise prices above the value of their benefit to society at the margin. This is inconsistent with allocative efficiency.

New Zealand's Commerce Act 1986 does not make having and exercising market power in itself an offence, nor does it make creating market power an offence, although it does control doing so by merger or acquisition. If market power is granted in an allocation of water rights there is little that can be done about it and the outcome is likely to be allocatively inefficient. Even in this situation, however, tradability may improve the efficiency of the allocation compared with what it would be without trading because the party with market power still has to face the value of the resource to other potential users when making its own decisions.

I note that under Variation 6 it is proposed that Mighty River Power ("MRP") be granted a near monopoly over water in the Waikato River above Lake Karapiro — certainly sufficient to grant it market power — and that there is no proposal that MRP's water rights would be tradable. The outcome of this proposal is very likely to be allocatively inefficient, unless every drop of water in the upper Waikato is more valuable if used for hydro-generation than every other alternative use for the water that would be foreclosed by this decision.

Fourthly, "first-in, first-served" as a basis for initial allocation is not inconsistent with achieving allocative efficiency, or maximising the value of a resource to the country, provided the rights granted under the regime are readily tradable.

Lesson 5: Initial allocations and wealth distribution

The terms and conditions of the initial allocation of a resource do matter for the distribution of wealth in the community. Expropriation of wealth or property rights can have very significant adverse effects on the willingness of parties to invest and hence on dynamic efficiency. Dynamic efficiency is the element of efficiency generally accepted to be the most important to promote in the long run, if economic growth and welfare are to be maximized.

The party granted a right or entitlement is the party that has to be paid by others to sell or lease it and, depending on what it had to pay to apply for and acquire the right in the first instance, it will gain or lose from this transaction. So the initial distribution of rights influences the distribution of wealth in a community. This is fundamentally why the allocation of rights can be so contentious and tends to become very political, especially when the rights are valuable.

Economic historians have documented many instances where insecurity about the ownership of rights due to, for example, a past removal of rights without compensation, has inhibited investment to exploit that right, and more generally from fear that if expropriation occurs in one instance it could occur in others. For a contemporary example one has to look no further than the economic malaise of Zimbabwe.

A consequence is that when a new legal regime relating to rights over resources is created, as often happens when a resource that was previously abundant has become relatively scarce through a growth in demand or the consequences of an adverse environmental effect previously unknown is discovered, it is important not to remove the rights of those that have them without adequate compensation. Care has to be taken, however, to ensure that in this process parties do not claim they possess greater rights than they actually have. The economic incentives on parties to do this are obvious. A right, for example, to use for hydro-generation the residual flow of a river after all other approved water takes have been extracted from it, is not a right to preclude others from having water takes approved.

There are several implications from the dynamic efficiency consequences of expropriation. First, grand-parenting existing rights avoids the negative impact on dynamic efficiency of other initial allocation regimes that involve some form of expropriation of existing rights. Provided the rights are readily tradable, grand-parenting will not negatively affect allocative efficiency, except when it is widely expected that rights will be grand-parented in future so that parties increase their use to increase their future entitlements. However, this problem can be overcome by making allocations on the basis of either historical usage from a period before grand-parenting was expected or a "best practice" measure of what efficient usage should have been, rather than what it actually was.

Secondly, if grand-parenting leads to the allocation of more rights than it is thought appropriate for reasons such as the ongoing environmental impact the level will create or the lack of capacity it leaves to

provide for new entrants, using a tender to buy back rights will assist to produce an efficient outcome. Tendering to buy back rights will result in right-holders who value the rights least highly reducing or eliminating their entitlement by selling them back. There will be no affect on those who value them more highly. A pro rata "haircut" of every party's right will not discriminate between those who value them highly and those who don't and so will tend to produce a less efficient outcome, initially. Provided the rights are readily tradable, however, even if the reduction is done by giving every party a "haircut" subsequent transfers among parties will re-establish an efficient allocation of the now reduced total allocation.

Lesson 6: Broadening the market improves outcomes

Broadening the diversity of the interests of potential participants in trading and increasing their number will tend to reduce search costs, increase the level of transactions and improve the efficiency of prices and resource outcomes achieved.

There are several points to be made. First, speculators can serve a useful economic function lubricating tradability and through this improving the allocative efficiency of outcomes. Rules that encourage participation in the market by as wide and diverse a group as possible will tend to improve the outcomes in terms of allocative efficiency.

Secondly, in the context of water permits, it makes sense to separate the right to take water from the right to use water in order to facilitate greater trading of water rights by opening up the market to parties that do not currently have a right to use the water.

Thirdly, artificial barriers to parties trading water, such as requiring that in order to buy a right to take water you already have to have a right to use water, should be avoided.

Finally, providing separate allocations for different uses of water and not allowing some trading among the different classes of allocation will tend to reduce the allocative efficiency of the eventual outcome. It will do this by precluding water ending up being used in its most valuable use because restrictions are placed on trading between different classes of use. Unless there is a clear hierarchy of values attributed to all water in the various uses ascribed a special ranking in the hierarchy, providing separate allocations and prohibiting trading between them will result in allocative inefficiency.

The BCSD's "Best Use Solutions Model"

Peter Neilson has already outlined in this session of the Conference the BCSD's proposals relating to tradable rights for commercial water. I will not repeat his description of the proposal. I will limit myself to making some comments on it in light of the lessons from establishing other markets I have just outlined.

First, there are several very good features of the proposals:

- They have a strong focus on the need for the rights and obligations of the participants in commercial water trading to be well defined. This is consistent with Lesson 2;
- They propose the separation of the right to take water from the right to use water. This is consistent with an observation made in the context of Lesson 6;
- They propose that there be a minimum of restrictions on trading in water use rights between those with allocations from the consented use pool ("CUP"). This is also consistent with an observation made in the context of Lesson 6; and
- They pay particular attention to the regulatory framework in which trading will be allowed to operate and in the transition from current arrangements to a situation in which trading is possible. This is consistent with Lesson 1 and Lesson 5.

There are also a number of features of the proposals that are not so good:

- Tradability is restricted to rights allocated for commercial purposes within the CUP. There is no ability to trade between the public use (recreation) pool and the CUP, for example. This is contrary to the points in Lesson 6 and is unlikely to result in optimal allocative efficiency in the use of water because there are likely to be occasions when water would yield higher benefits if used for recreation than the CUP purpose to which it is put, and vice versa;
- It is not clear from the proposals how it is intended to ensure that the non-CUP requirements are not set inefficiently high. As Lesson 5 makes clear, initial allocations can and do matter to dynamic efficiency and when rights are not tradable. The BCSD is proposing that its non-CUP allocations not be tradable; and
- It is proposed that if total allocations need to be reduced the CUP entitlements will be scaled pro rata. I have commented on pro rata scaling under

Lesson 5, but the more serious issue is that it is not clear when and how, and by whom, the decisions about scaling will be made. The importance of specifying such details in advance was highlighted in Lesson 2.

Overall, however, the BCSD's "Best Use Solutions Model" is a useful contribution towards a greater understanding of the potential for increased tradability of water rights to help resolve the increasing conflicts in New Zealand between parties for access to water. It also helps identify some of the limitations of tradability as a tool. The BCSD is to be commended for its useful contribution.

The paper presented by Peter Neilson, Chief Executive of the New Zealand Business Council for Sustainable Development, "Best Use and Maximising Value" is now available on the RMLA website: www.rmla.org.nz/past_events/papers_2010.html

RMLA membership

The RMLA was formed in 1992 to provide a forum for all professionals and others interested in resource management and the environment. The objectives of the RMLA are to promote within New Zealand:

- An understanding of resource management law and its implementation in a multi-disciplinary framework;
- Excellence in resource management policy and practice;
- Resource management practices which are legally sound, effective, and efficient and which produce high quality environmental outcomes.

RMLA membership forms may be downloaded from the website www.rmla.org.nz

Annual subscription from 1 October is $155 ($77 for fulltime students) (GST inclusive @ 15%) for 12 months from 1 October. Subscriptions for members joining after 1 April are reduced to $77 ($38 for fulltime students) from 1 April to 30 September. Please make cheques payable to the Resource Management Law Association of New Zealand Inc.

Book review

■ Trevor Daya-Winterbottom, General Editor

Climate Change Law and Policy in New Zealand **Alastair Cameron (general editor) (LexisNexis, Wellington, 2011)**

This book is a welcome addition to the growing Australasian literature on climate change law. The objective of the book is, primarily, to provide a legal text for practitioners advising on climate change in New Zealand. It meets this objective ably.

It is designed to provide detailed guidance on relevant New Zealand law pertaining to the Emissions Trading Scheme, adaptation, corporate and commercial issues, taxation, and the voluntary carbon market. In addition to detailed coverage of these matters, the book also contains five introductory chapters dealing with the science of climate change, the international framework, the nature of the climate change problems faced by New Zealand, economics, and the background to the regulatory and policy choices made by the New Zealand Government before adopting the package of measures currently in force.

Alastair Cameron poses the inevitable question as to why practitioners should be interested in the introductory material in the first five chapters, and considers that the complexity of the regulatory environment and the need to provide well-rounded practical advice underscore the need for background knowledge in this field of environmental law. Context is everything, and in this case it is important.

The team of authors are to be commended for an accessible and easily readable style of presenting the law. The chapter on economics, in particular, will be welcomed by lawyers for its practical exposition of this topic and its role in regulating finite natural and physical resources.

The book is designed to be a first edition, with a second updated edition to follow within a reasonably short timeframe given the policy review of the climate change regulatory framework currently under way by Government. While there will inevitably be changes in the legal detail and policy of administering the law, the authors are firm in the view that the current legal framework is here to stay for some time. This may require practitioners to buy two books on the subject, but the first edition of this book is well worth the investment.

Looking forward to the second edition Alastair Cameron has been bold in asking for feedback about the book. In the reviewer's opinion it is difficult to fault such a well-written and researched book. However, additional comparative emphasis on the growing Australian literature and focus on New Zealand journal writing about the New Zealand regulatory regime would add depth to an already good book.

The book is a must-have for any practice advising in these areas of law or policy.

RMLA Monograph Series

Good books and journals for professionals and others interested in resource management and the environment. Published by Thomson Reuters in association with the Resource Management Law Association of New Zealand Inc.

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Our place in the world

hei whakapae ururoa

RMLA Conference 2011

6-8 October 2011• SKYCITY • Hamilton

The RMLA conference for 2011 is to be hosted in Hamilton at the SkyCity riverside conference centre and casino complex from 6-8 October. ***Our place in the world - hei whakapae ururoa*** intends a broad theme that reflects the diversity of the Waikato Region, together with local and global influences on resource management issues in the 21st century.

The 2011 conference will include keynote and workshop sessions that address the developing co-management regime within the region, particularly with regard to decisions affecting the Waikato River and its catchment. Other sessions will cover geopolitics, spatial planning, land use and change, as well as planning for the many major infrastructure projects being undertaken throughout the Waikato.

From a resource management perspective the conference theme, as with the Waikato Region itself, represents a microcosm of the emerging global challenges we will all have to grapple with this decade and century (whether or not we hold the World Cup in 2012 and beyond!).

Planning is under way to provide an extensive range of field trips that combine significant resource management issues with opportunities to experience (either actively or passively) recreational activities, and to enjoy local scenery within easy reach of Hamilton. The conference dinner is to be held at the Don Rowlands Centre, situated at the Mighty River Power Domain at Karapiro, which forms part of the World Rowing Championships site. A field trip will also be on offer to the site enabling attendees to see firsthand the recreational opportunities that have evolved since the dam's construction.

So, mark these dates in your diary now, and check out the RMLA website for further details (www.rmla.org.nz).

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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**
November edition	16 September 2011
Publishing Date	**Copy Deadline**
November edition	14 October 2011

The word limits for articles are now max/min limits; ie 2,400 words means 2,400 words, not more nor less. Articles should be:

- Single page article = 825 words
- Four page article = 3,300 words
- Six page article = 4,950 words (to be by invitation from the Editorial Committee)

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

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

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