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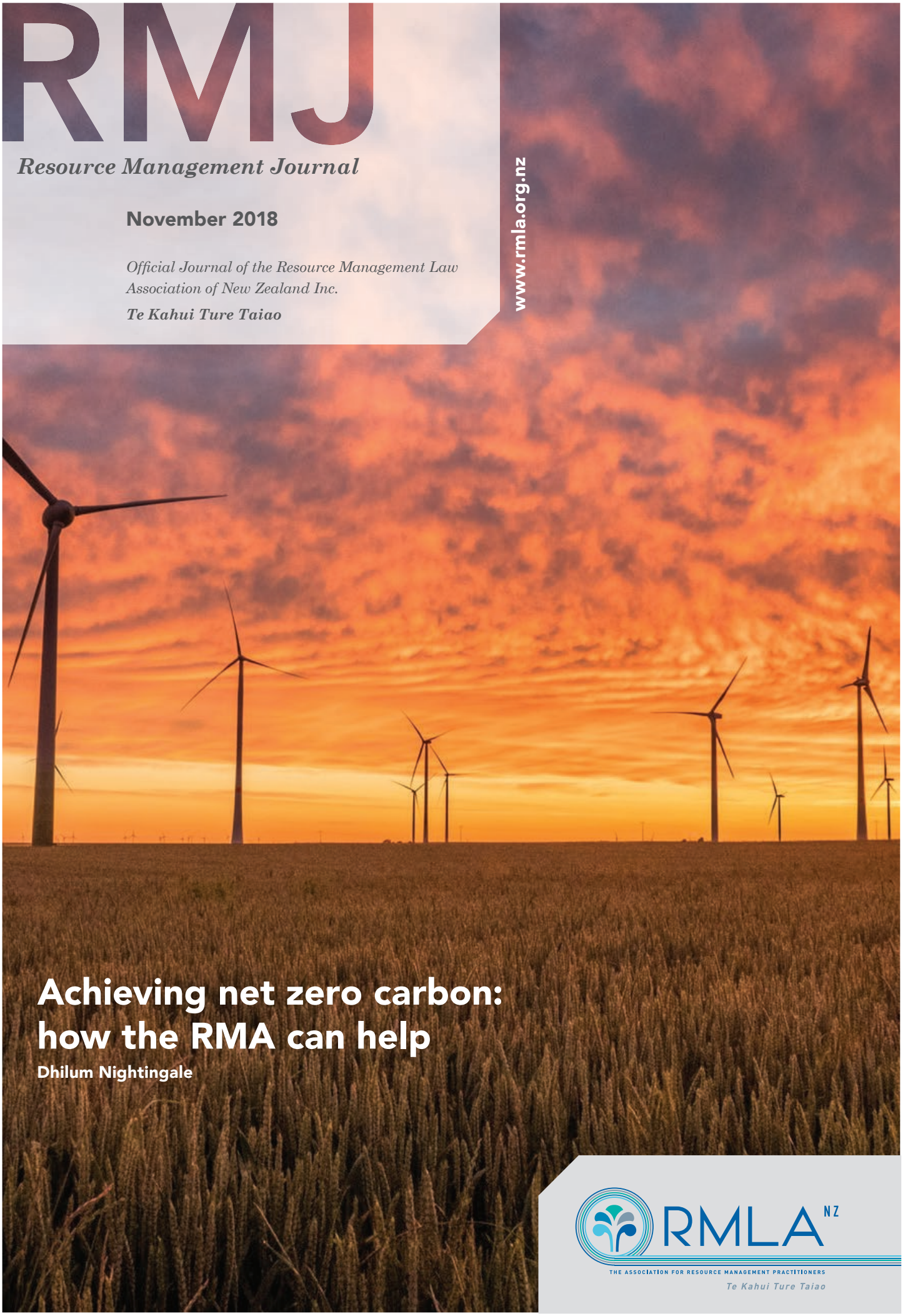

Achieving net zero carbon: how the RMA can help

Dhilum Nightingale

RMLA NZ

THE ASSOCIATION FOR RESOURCE MANAGEMENT PRACTITIONERS

Te Kahui Ture Taiao

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Achieving net zero carbon: how the RMA can help

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It could be argued that the energy sector created the climate change challenges we face today. I would argue the energy sector can also be the solution, provided urgent Resource Management Act (RMA) policy reform occurs.

Global temperature is currently 1°C warmer than pre-industrial times and increasing at a rate of about 0.2°C each decade (Intergovernmental Panel on Climate Change *Global Warming of 1.5°C* (Special Report 15, 8 October 2018) [the Report]).

In the Report, the world's top climate scientists predict ecosystem collapse, widespread devastation and rapid decline in economic growth if global temperature increase is not capped at 1.5°C within the next 12 years and CO^2 emissions do not halve from 2010 levels by 2030 and reach net zero around 2050.

Half a degree means the world

There is a stark difference between 1.5°C and 2°C. The IPCC scientists predict an additional half a degree of warming will significantly worsen the risks of drought, floods, hurricanes, biodiversity loss, extreme heat and poverty for hundreds of millions of people.

A 1.5°C increase in temperature would see extreme heatwaves experienced by 14 per cent of the world's population at least once every five years. But if global temperatures rise to 2°C, extreme heatwaves will be experienced by more than a third of the planet. At 1.5°C, arctic sea ice would remain during most summers. But at 2°C, ice-free summers are 10 times more likely, leading to major habitat losses for polar bears, whales, seals and sea birds. A 1.5°C increase would see the world's coral reefs decline by 70–90 per cent. A 2°C increase would see almost complete destruction of coral reefs.

The predictions in the Report continue and they are sobering. And these are not just the views of a few. The Report reflects the views of over 100 climate experts from nearly 40 countries, including New Zealand, and includes more than 25,000 review comments. It would be fair to say the science is sound.

So, how do we achieve the "rapid and far-reaching" change that is called for in the Report? How do we limit global warming to 1.5°C?

There is significant scope for change within the energy sector.

DECARBONISATION THROUGH ELECTRIFICATION OF THE ENERGY SECTOR

Energy powers our homes and our lives. However, traditional forms of energy from fossil fuel sources, such as coal and oil, contribute more than 70 per cent of global greenhouse gas emissions (World Resources Institute "CAIT Tools" (2017) CAIT Climate Data Explorer <cait.wri.org>).

New Zealand has a world-leading renewable electricity sector that can play an important and influential role in helping decarbonisation.

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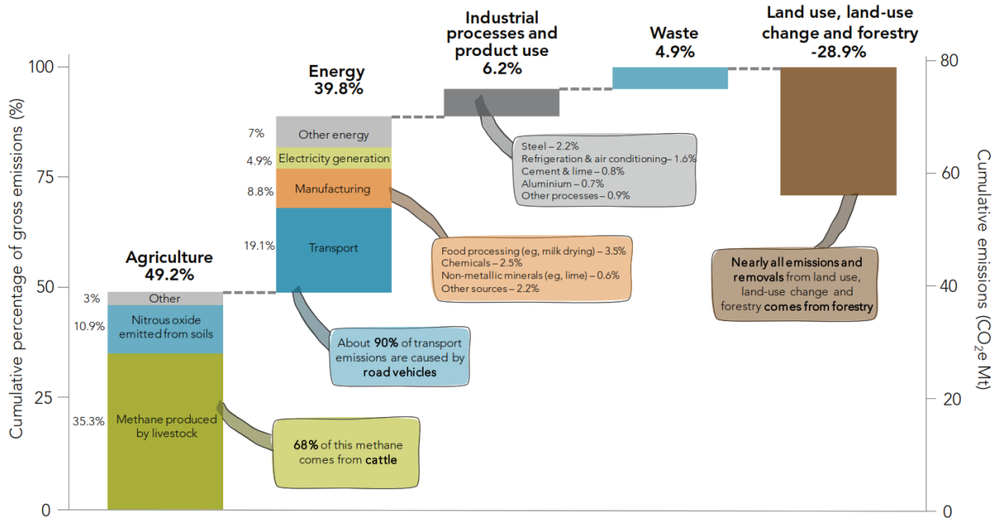
In New Zealand, 40 per cent of our CO^2 emissions come from the energy sector. Industrial processes, such as steel manufacturing, account for a further 6 per cent. The technology now exists to electrify most, if not all, of these emissions. Electrifying these sectors using renewable generation sources would almost halve our existing CO^2 profile, enabling us to meet our Paris Agreement commitments.

The graphs on page 5 show total energy demand and estimated electricity demand by sector to 2050. This is predicted to decrease over time due to the increased efficiencies of electricity compared to petrol, diesel, coal and other fossil fuels.

Transpower's base case scenario assumes the decommissioning of existing fossil fuel plants, a



Source: New Zealand Productivity Commission *Low-emissions economy: Final Report* (August 2018) at 30, Figure 2-6.

The Productivity Commission's recent investigation found electrification of transport and process heat, in particular, is critical for achieving our climate change targets (*Low-emissions economy: Final Report* at 11).

Electrifying the energy sector does not require the lifestyle or business shifts needed in other sectors. As Chris Stark, CEO of the United Kingdom's Committee on Climate Change recently stated, it makes no difference to consumers whether electrons come from coal or wind (Interview with Chris Stark, Chief Executive of the UK's Committee on Climate Change, (Nine to Noon, Radio New Zealand, 15 October 2018).

Transpower's white paper (Transpower *Te Mauri Hiko – Energy Futures* (White Paper, August 2018)) forecasts current electricity consumption to double by 2050, due largely to increased demand for electric vehicles (*Te Mauri Hiko – Energy Futures* at 20). The report's base case modelling estimates Electric Vehicles (EVs) will reach 85 per cent market share by 2050.

material amount of solar generation (both utility-scale and distributed solar), some demand side response management, grid-scale and residential battery capacity and other technology developments, such as hydrogen production and storage, to meet daily peaks and winter and dry-year shortages.

To meet a potential doubling of electricity demand, New Zealand would require over 60 TWh of new generation, roughly equivalent to four and a half wind farms of about 60 turbines each, built every year for the next 30 years (*Te Mauri Hiko – Energy Futures* at 24).

Even if electricity demand increases by 45–63 per cent by 2050, as forecast in the Productivity Commission's report, we would still require existing renewable generation to increase by potentially 65 per cent (*Low- Emissions Economy,* September 2018, pages 99 and 385).

The scale of this challenge is huge. Under the existing

Exhibit 3: **Estimated delivered electricity demand by sector**

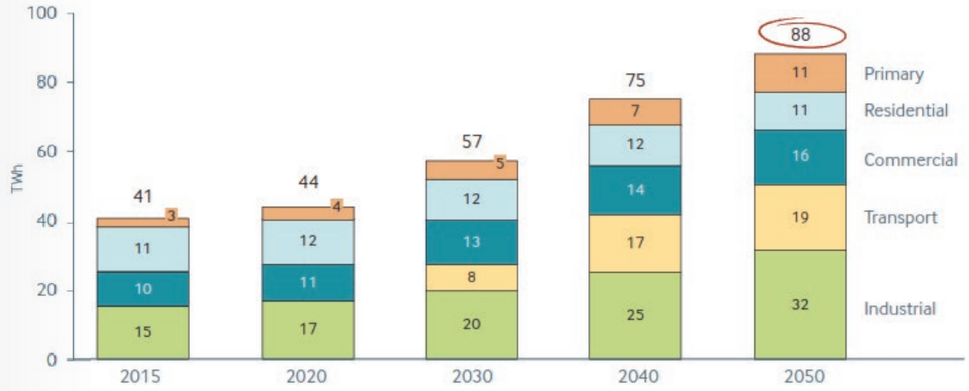
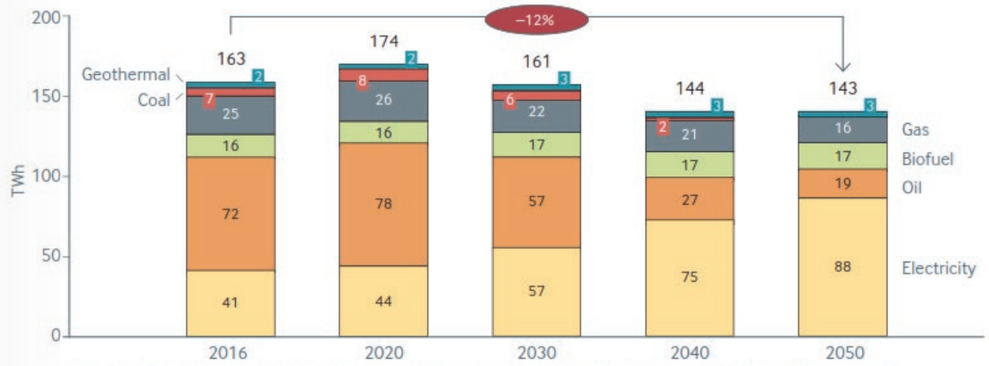


Exhibit 7: **Estimated delivered energy demand by sector and type – 2016 to 2050**



Note: Overall energy reduction is the result of electrical energy more efficiently converting into transportation and heating; Coal and biofuels not modelled closely.

Source: *Te Mauri Hiko – Energy Futures*, Transpower White Paper, 2018.

Resource Management Act 1991 (RMA) framework, it will be exceptionally difficult, if not impossible, to secure the resource consents required to build this amount of additional generation and the associated transmission connections. But without it, we will put New Zealand's energy security at risk and be unlikely to meet our Paris Agreement commitments, let alone our net zero carbon targets.

RMA CHALLENGES

At the Resource Management Law Association (RMLA) conference this year, Humphrey Tapper from Meridian Energy Ltd and I, had the privilege of bringing together a diverse and knowledgeable panel of speakers to discuss

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whether the RMA hinders or enables New Zealand's transition to a low-emissions energy future.

Bridget Irving, partner at Gallaway Cook Allan and counsel for *Blueskin Energy* [2017] NZEnvC 150, discussed how a community wind farm project for a single turbine, not in an outstanding natural landscape or the coast, was declined for visual amenity reasons. A member of the audience, an experienced RMA barrister, observed it is currently easier to consent new gas-fired thermal generation than a wind-farm. This is because the visual and noise effects of a wind farm (even if only an issue for a comparative few) can outweigh the project's benefits (including its role in helping to decarbonise our economy) and result in consent being declined.

So, what needs to change? Here are some of the key ideas that came out of the panel's discussion:

- climate change effects and mitigation need to be included in pt 2 and s 104 of the RMA to discourage fossil fuel generation and incentivise and support renewables;
- stronger national direction is needed to support and enable renewables and associated new grid connections and to give increased weight to national priorities over local, adverse impacts;
- the policy framework needs to provide more certainty to encourage innovation and investment in renewable generation;
- New Zealand's biodiversity is at crisis point and cannot be compromised in the fight to reverse global warming;
- overarching direction, strong leadership and mandatory spatial planning is needed, with clear statements regarding where infrastructure can go, rather than where it can't;
- more useful spatial planning is needed to provide better investment and delivery certainty; and
- the ability for local input, in some form, needs to be retained.

The panel commented on the lack of strong direction and other deficiencies with the National Policy Statement for Renewable Electricity Generation (NPSREG). These issues also have been picked up by the Productivity Commission (*Low-emissions economy*), as well as MfE and MBIE in their Report of the Outcome Evaluation of the NPSREG (Ministry for the Environment and Ministry of Business, Innovation and Employment *Report of the Outcome Evaluation of the National Policy Statement for Renewable Energy Generation* (December 2016)).

The directions in the NPSREG need to be stronger to support and encourage investment in new renewables and the renewal of existing consents. Many existing but unimplemented wind farm consents lapse within the next five years. Technology is moving at a fast pace, so any replacement applications or new applications will need to incorporate the latest technological changes – including increased turbine heights.

IMPROVED SPATIAL PLANNING AND A MORE SUPPORTIVE POLICY FRAMEWORK

One of the most important points from the RMLA panel session was the need for better spatial planning to encourage and enable the consenting and building of renewables infrastructure, associated transmission, distribution connections and upgrade work. In addition, planning processes need to provide more investment certainty for the development and use of renewables infrastructure, including distributed energy resources, such as commercial facility solar PVs, mini wind turbines and solar-powered lighting installations. Unnecessary policy barriers that could prevent a balanced, merits-based assessment, need to be removed if we want to realise our decarbonisation goals.

I agree with Sally Gepp from Forest & Bird who was on the RMLA panel: biophysical limits have to be recognised. I would add to this mana whenua and other important values. This leads to the point made by Dr Greg Severinsen from the Environmental Defence Society (EDS): the policy framework needs to say where crucial renewables and transmission infrastructure *can* go, not just where it *can't*.

The Proposed Queenstown Lakes District Plan is a case in point. Ninety-seven per cent of the district is an outstanding natural landscape under the decisions-version of the plan. The district's landscapes are a critical feature and tourism drawcard – but sometime within the next 15–20 years, it is likely the single transmission line into the district will not be of sufficient capacity to keep the lights on and offer a secure electricity supply. The shortfall will occur much sooner if large scale tourism developments happen, such as ski field expansions or rental car services using EVs.

It is not possible to support both electrification of our economy using clean energy and also require the necessary infrastructure to "avoid" locating in 97 per cent of the district. If we target where renewables infrastructure can go, as well as where it can't, we will be much closer to unlocking our clean, green energy future. While this does not, of course, excuse infrastructure providers from appropriately managing the effects of their activities, we need to be pragmatic. Wind-turbines and grid assets are large and will have visual effects.

Policy direction: "avoid" vs "seek to avoid"

The National Policy Statement on Electricity Transmission (NPSET) requires new national grid infrastructure to "seek to avoid" outstanding natural landscapes and other sensitive environments (policy 8). This is not an "easy-ride" for the grid. It still needs to demonstrate a robust route site selection process, management of effects and that technical and operational constraints limit its location (Ministry for the Environment *National Policy Statement on Electricity Transmission* (January 2010) at 10–11, policies 3 and 4).

In the multi-criteria assessments (MCAs) I have been involved with at Transpower, constraints mapping is one of the first things that happens. Outstanding natural landscapes, identified biodiversity areas and other sensitive environments are removed from the assessment at the start. In these projects, the presumption has been that other locations should be found for any new grid assets. There will come a time where there are no other locations available and this is when the "seek to avoid" policy would allow a merits-assessment rather than the strict policy bar that would occur with an "avoid" direction. It would be beneficial to require all renewables-related infrastructure (including utility-scale solar and battery plants) to follow a similarly robust MCA process.

Implementing the NPSET's "seek to avoid" policy throughout the country is not without its challenges. The policy conflicts with 'avoid' requirements in both the New Zealand Coastal Policy Statement (e.g. policies 11 and 13) and many regional policy statements in the country. Transpower submits on, and frequently appeals, plan changes and policy reviews in virtually every district and region in the country (the grid is located in all but three districts) in an attempt to reconcile conflicting policy directions. The processes are time-consuming and have uncertain outcomes. The climate change challenge we are facing needs faster and better results.

We can gain insight from other proposed and current national direction.

LEARNING FROM OTHER NATIONAL POLICY STATEMENTS (NPS) TO ENABLE PROACTIVE PLANNING

Report for the draft NPS for Indigenous Biodiversity

The recently released Background Report for the draft National Policy Statement for Indigenous Biodiversity prepared by the Biodiversity Collaborative Group (Biodiversity Collaborative Group *Report of the Biodiversity Collaborative Group* (25 October 2018)) is to be commended for attempting to reconcile the policy tensions between competing NPS'. The report recognises the urgent need for nationally consistent criteria to identify Significant Natural Areas, not just for their protection and management, but to also provide some certainty to landowners and the community of where these areas are (*Report of the Biodiversity Collaborative Group* at 21–22 and the proposed draft policy 4). It is inefficient and a roadblock to investment if biodiversity values are assessed only at the consenting stage for a renewable project or associated transmission connection.

The draft NPS proposed in the Report protects biodiversity while also recognising the functional or operational needs of infrastructure identified in the NPSREG and NPSET (see *National Policy Statement on Electricity Transmission* proposed draft policy 7(1)(g) and (h)). The framework rightly sets a high threshold, which must be satisfied on a case-by-case basis. Although there was not complete agreement by the Biodiversity Collaborative Group on the extent to which this could occur, the draft framework in the Report requires renewables and transmission infrastructure to avoid effects on biodiversity attributes where practicable, and otherwise remedy, mitigate, offset or compensate those effects. While the framework is obviously not settled, it is positive that it attempts to reconcile competing policy tensions and strike a balance between protecting our natural environment and providing for infrastructure, rather than leaving these complex issues solely to the plan development or consenting stage.

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The National Policy Statement on Urban Development Capacity (NPSUDC)

The NPSUDC provides some useful policy insights. In a similar way to housing demand and capacity, a revised NPSREG could direct regional councils to work with generators, Transpower and New Zealand Wind Energy Association to identify where the renewable resources are in their regions. Based on electricity demand predictions, the government could then set mandatory targets. For example, a region with good wind resource would be required to grant resource consent for three windfarm applications of at least 120MW (approximately 40 turbines) within the next five years.

A new National Environmental Standard (NES) for Renewables (a policy initiative recommended by the Productivity Commission) could specify the activity status for turbines. Activity classification could vary depending on size and whether turbines were locating in a sensitive environment. Larger-scale projects may require discretionary consent, but a less onerous activity classification could be appropriate for small-scale generation. The national priorities and benefits could then be assessed and fairly weighed against local considerations through a consultation, submission and hearing process.

A PATHWAY TO ACHIEVING OUR CLIMATE CHANGE GOALS

> *"Climate change is moving faster than we are … The concentration of carbon dioxide in the atmosphere is the highest in 3 million years – and rising. … We need greater ambition and a greater sense of urgency … Governments need to be courageous and smart."*

(António Guterres, United Nations Secretary-General's Address to the General Assembly, 25 September 2018)

We need bold, innovative and, most importantly, urgent policy reform to decarbonise our economy.

The RMA is seen as a mystery to most. It is up to us as resource management practitioners to identify the RMA's opportunities and pathways to allow New Zealand to consent and build the renewables infrastructure needed to transition to low-emissions energy while also ensuring other important values are respected and upheld. Others will have different ideas, but here are my suggestions for reform:

1. Either through an RM Bill or possibly the Zero Carbon Bill, bring climate change into the RMA by:
   (a) amending s 6 and s 104 of the RMA to include the effects of activities 'on climate change'; and
   (b) giving large scale renewable generators "requiring authority" status. Renewable generation is essential and is in the public interest in a similar way to wastewater and electricity distribution.
2. Use the streamlined process in s 46A of the RMA to issue Energy National Direction that achieves the following:
   (a)strengthens the NPSREG to allow a balanced debate at the consenting stage – this should include proactive spatial planning for renewable generation;
   (b) strengthens the NPSET;
   (and within both of these NPS', resolve the competing policy tensions with the NZCPS (e.g. "avoid" vs "seek to avoid" directions. Off-shore wind-farms will remain a pipedream if this does not happen);
   (c) a new NES for Renewable Energy for both large-scale and smaller scale generation that provides an efficient and transparent process for obtaining and renewing resource consents (allowing existing consents to be updated on the basis of technology developments).
3. Take a broader look at pt 2 of the RMA to ensure its principles and values reflect where we are in 2018 and the climate change challenge.

While these are just some suggestions, others in the RM profession will have other bold and innovative solutions about how to reach our net zero carbon targets. Let's start urgently sharing these ideas so we can limit temperature rise to 1.5°C and show New Zealand's leadership on addressing climate change.

As one speaker at the RMLA conference said, if New Zealand doesn't, the world can't.

EDITORIAL

Bronwyn Carruthers, Partner, Russell McVeagh

Welcome to the November 2018 issue of the Resource Management Journal.

At September's Reform Transform conference in Wellington, a diverse and knowledgeable panel of speakers was brought together by Humphrey Tapper (Meridian Energy Ltd) and Dhilum Nightingale (Transpower) to discuss whether the RMA hinders or enables New Zealand's transition to a low-emission energy future. Dhilum has helpfully pulled together the threads of that discussion, captured the key ideas coming out of the discussion and offered some suggestions for reform. Building on Minister Parker's address to the conference, she challenges us all to share ideas and help show New Zealand's leadership on addressing climate change.

Another reform-based article in this edition is from Sustainable Seas, with a focus on implementing eco-system based management (EBM) principles for New Zealand. As Sustainable Seas explain, if EBM is to be successfully implemented, it is essential that the principles are well understood, debated and some consensus gained. The aim of their article is to begin this debate.

Nicola Wheen, Otago University provides a comprehensive analysis of the Court of Appeal's decision declaring shark cage diving with attractants an offence under the Wildlife Act 1953 and initial comment on the swiftly introduced Shark Cage Diving (Permitting and Safety) Bill 2018 two days later. Jill Gregory and Tayla Crawford, Bell Gully discuss the Regional Fuel Tax with a focus on its limitations, the possibilities for changes to the regime, and the alternative funding sources in the event it is removed with a change in Government. Dr Claire Kirman, Ellis Gould, reviews the second edition of Environmental Law in New Zealand (Salmon and Grinlinton) concluding it is an excellent revision of the first text, with this issue's case summaries provided by Thomas Gibbons, McCaw Lewis and myself (with excellent assistance from Kate Mackintosh, Russell McVeagh).

Enjoy reading this issue and good luck getting to the end of the year! As always, we are keen to hear from you if you are interested in contributing an article for consideration for publication in this journal or a case summary, or indeed have any ideas or suggestions as to content.

Proposed ecosystem-based management principles for New Zealand

SUSTAINABLE SEAS (SS)

Supported by the Sustainable Seas Director and Science Leadership Team: Julie Hall, Chris Cornelison, Conrad Pilditch, Janet Stephenson and James Whetu

Ecosystem-based management (EBM) is not a new concept. It surfaced decades ago in international literature. It has been applied internationally and websites on the subject are numerous. Despite all of this attention, there is a general belief that the term is not well defined and that this prevents its use.

In New Zealand, the term has been increasingly used in the last decade, although mainly as a concept for marine management. In December 2015, the marine science community and the government of the day recognised its crucial role in sustainable management by agreeing that the focus of the Sustainable Seas National Science Challenge should be EBM.

The Sustainable Seas Science Leadership Team believe that if EBM is to be successfully implemented, it is essential that the principles on which it is based are well understood, debated and some consensus is gained. Here we offer our starting principles for EBM, with an explanation of where they came from, to begin this debate. The principles, with one exception, have been stated in various international documents; the one exception being to specifically incorporate the role of the Treaty of Waitangi. While the principles make specific reference to the marine environment, they can be generalised to terrestrial or freshwater environments.

Authors:
Judi Hewitt, Linda Faulkner, Alison Greenaway and Carolyn Lundquist

EBM PRINCIPLES OVER TIME

One of the first most widely promulgated set of EBM principles were developed during North American workshops on wildlife management (Sidney J Holt and Lee M Talbot "New Principles for the Conservation of Wild Living Resources" (1978) 59 WM 3) and utilised during the development of UNCLOS (United Nations Convention on the Law of the Sea) (Mark F Forst "The convergence of Integrated Coastal Zone Management and the ecosystems approach" (2009) 52 OCM 294). Holt and Talbot put forward four major principles:

> *"1. The ecosystem should be maintained in a desirable state such that*
>
> *"a. consumptive and non-consumptive values could be maximized on a continuing basis,*
>
> *"b. present and future options are ensured, and*
>
> *"c. risk of irreversible change or long-term adverse effects as a result of use is minimized.*
>
> *"2. Management decisions should include a safety factor to allow for the facts that knowledge is limited and institutions are imperfect.*
>
> *"3. Measures to conserve a wild living resource should be formulated and applied so as to avoid wasteful use of other resources.*
>
> *"4. Survey or monitoring, analysis, and assessment should precede planned use and accompany actual use of wild living resources. The results should be made available promptly for critical public review".*

These four principles contain many of the EBM principles in use today. In 1996, Christensen (Norman L Christensen and others "The Report of the Ecological Society of America Committee on the Scientific Basis for Ecosystem Management" (1996) 6 Ecological Applications 665) published eight principles:

> *"a. Long-term sustainability as a fundamental value*
>
> *"b. Clear, operational goals*
>
> *"c. Sound ecological models and understanding*
>
> *"d. Understanding complexity and connectedness*
>
> *"e. Recognition of the dynamic character of ecosystems*
>
> *"f. Attention to context and scale*
>
> *"g. Acknowledgement of humans as ecosystem components*
>
> *"h. Commitment to adaptability and accountability".*

Principles and sources quickly proliferated. In 2004, NOAA (National Oceanic and Atmospheric Administration *New Priorities for the 21st Century: National Marine Fisheries Service Strategic Plan, Updated for FY 2005-FY 2010* (September 2004)), noted that consideration of cumulative effects was required and acknowledges five main principles, summarised at "What is Ecosystem Based Management?" NOAA https://ecosystems.noaa.gov as major headings:

> *Adaptive and flexible, responsive to monitoring and research results*
>
> *Place-based with geographic areas defined by ecological criteria*
>
> *Cross-sectoral, considering interactions between sectors of human activity*
>
> *Proactive, incorporating tradeoffs to manage the marine and coastal environments.*
>
> *Inclusive and collaborative, encourages participation from all levels of government, indigenous peoples, stakeholders.*

In 2015, Long (Rachel D Long, Anthony Charles and Robert L Stephenson "*Key principles of marine ecosystem-based management*" (2015) 57 MP 53) conducted a study of EBM principles and selected 15 as key principles based on the number of times they were stated:

> *Ecosystem Connections,*
>
> *Appropriate Spatial & Temporal Scales,*
>
> *Adaptive Management,*
>
> *Use of Scientific Knowledge,*
>
> *Integrated Management,*
>
> *Stakeholder Involvement,*
>
> *Account for Dynamic Nature of Ecosystems,*
>
> *Ecological Integrity & Biodiversity,*
>
> *Sustainability,*
>
> *Recognise Coupled Social-Ecological Systems,*

Continued

Decisions reflect Societal Choice,

Distinct Boundaries,

Interdisciplinarity,

Appropriate Monitoring, and

Acknowledge Uncertainty.

In 2006, the CBD (Convention on Biological Diversity) recognised a set of 12 "ecosystem approach" principles for both terrestrial and marine systems (http://www.biodiv.org/programmes/cross-cutting/ecosystem/principles.asp), which contained three principles not referred to above.

(a) Management should be decentralised to the lowest appropriate level.

(b) Ecosystem managers should consider the effects (actual or potential) of their activities on adjacent and other ecosystems.

(c) Conservation of ecosystem structure and functioning, in order to maintain ecosystem services, should be a priority target of the ecosystem approach.

This is probably the most comprehensive reference, in international agreements, to principles that overlap with EBM principles. UNCLOS requires nations not to over-exploit living resources through ensuring that proper conservation and management measures are in place [Article 61]. Article II of CCAMLR (Convention for the Conservation of Antarctic Marine Living Resources 1980) makes it clear that its focus is management of the effect of harvesting, e.g. Article II 3b "maintenance of the ecological relationships between harvested, dependent and related populations of Antarctic marine living resources".

AOTEAROA NEW ZEALAND

NOAA and others have noted the role of indigenous peoples in EBM. Such references have largely resulted from indigenous cultural and political revitalization, as well as the growing recognition of the value of traditional ecological knowledge and practice. Indigenous peoples tend not to exclude themselves from the interactions and relationships within the environment, and their respective knowledge systems are, in fact, founded on those relationships and dependencies (Thompson *Ecosystem-Based Management over the Marine Environment Globally and in Aotearoa New Zealand* (2018) Draft research report for SS).

In the context of Aotearoa New Zealand, any successful consideration of EBM needs to reflect the interests and knowledge of Māori as indigenous people and as Treaty of Waitangi partners alongside the Crown and its representatives. There are clear similarities between an EBM approach and the Māori practice and knowledge of kaitiakitanga (Viktoria Kahui and Amanda C Richards "Lessons from Resource Management by Indigenous Māori in New Zealand: Governing the Ecosystems as a Commons" (2014) 102 EE 1 and Anne-Marie Jackson and others *Hui-te-ana-nui: Understanding kaitiakitanga in our marine environment* (2017) Research report for SS). However, retaining consideration of them as separate and distinct is important to avoid the role of Māori as kaitiaki being inappropriately applied or dulled by policy and misinterpretation (Thompson).

We have the opportunity to be global leaders by establishing an EBM approach that places kaitiakitanga and Māori involvement at its heart while preserving the integrity of both and providing for mātauranga Māori and tikanga. Such an approach would reflect good faith, provide an improved environment for effective partnership and governance and enable Māori to take a more proactive role in the management of the coastal and ocean environments that are core to their identity.

NEW ZEALAND MARINE MANAGEMENT LEGISLATION AND POLICY FRAMEWORKS

Management of New Zealand's oceans is challenging due to the fragmentation of management and governance across 25 statutes that govern 14 agencies, operating across seven spatial jurisdictions. Agencies vary in both mandate and sectoral focus (e.g. Ministry for Primary Industries; the Department of Conservation).

At present, there is no coordinating national 'oceans policy'. Instead, case law is evolving with respect to conflicting responsibilities between regional council and central government. Recently, the High Court confirmed that the Resource Management Act (1991) and Fisheries Act (1996) "envisage parallel, complementary and overlapping management of fishing and the effects of fishing" (Sally Gepp and Madeleine Wright "Marine biodiversity and taonga species: slipping through the cracks" November 2017 RMJ at 18) and that regional councils can manage the effects of fishing that are not directly related to biological sustainability of the aquatic environment as a resource for fishing needs. This was further clarified by Gepp and Wright in 2018 (Sally Gepp and Madeleine Wright "A New Weapon in the Battle for Marine Biodiversity: Environment Court Approves First Example of Regional Coastal Plan Controls on Fishing" August 2018 RMJ at 27-28) summarising the findings of *Trustees of the Motiti Rohe Moana Trust v Bay of Plenty Regional Council* [2018] NZEnvC 67.

OUR SUGGESTED EBM PRINCIPLES FOR AOTEAROA NEW ZEALAND

Considering the principles discussed above, the fragmented nature of management jurisdictions and the essential role of Māori in New Zealand society and law, we suggest seven major principles.

1. Governance structures provide for Treaty of Waitangi partnerships, tikanga and mātauranga Māori.
2. Place and time-specific ecological complexities and connectedness and present cumulative and multiple stressors, as well as those that might occur with new uses, are considered.
3. Humans, along with their multiple uses and values for the marine environment, are considered as part of the ecosystem.
4. Healthy marine environments, and their values and uses, are safeguarded for future generations.
5. Collaborative, co-designed and participatory decision-making processes are used, involving all interested parties from agencies, iwi, industries, whānau, hapū, and local communities.
6. Decisions are based on science and mātauranga Māori and are informed by community values and priorities.
7. Flexible, adaptive management, appropriate monitoring and acknowledgement of uncertainty are promoted.

With the exception of the first principle, which provides specifically for Treaty of Waitangi partnership, the above encompass most of the principles used around the world. We have not included Christensen's principle b "Clear, operational goals", Holt and Talbot's principle 3 "Measures to conserve a wild living resource should be formulated and applied so as to avoid wasteful use of other resources" and CBD "Management should be decentralized to the lowest appropriate level" as we consider these to be general to all good management. We have also not included some very specific principles, related to the use of trade-offs and ecosystem services, believing that these should be decided upon by the participants involved in specific EBM projects.

While some of these principles could be split, for example, principle seven could be split into adaptive management and appropriate monitoring, we consider that adaptive management cannot occur if appropriate monitoring does not take place. Similarly, we argue that to base decision-making on knowledge without acknowledging uncertainty increases the risk of decisions not providing the desired goals. The place and time specificity of EBM (principle two) forces the acknowledgement of ecosystem complexity and connectedness as well as the need to understand the multiple uses and the potential for cumulative impacts in that place. The words "ecosystem complexity and connectedness" taken together with the focus of principle four on safeguarding "healthy marine environments", we believe evokes the need to not just to maintain present ecological functioning and biodiversity but to ensure that it is in a healthy state (Steve Urlich and others "What it means to 'maintain' biodiversity in our marine environment" April 2018 RMJ), and thus incorporates concepts of ecological integrity and health.

WHERE TO NOW?

Within New Zealand, there are many management examples that use some of these principles, for example, Fiordland (Te Moana O Atawhenua) Marine Management, Sea Change Hauraki Gulf (Tai Timu Tai Pari), Kaikōura (Te Tai ō Marokura) marine management area and the Integrated Kaipara Harbour Management Group. Generally, most of the principles are encapsulated, although they are not always explicitly mentioned and the importance of the underlying principles is variable.

However, explicit acknowledgement of the underlying principles from the start would help guide the use of the principles and strengthen the role of EBM. In particular, principles two and five (invoking the need to understand "place" and "cumulative effects" and to involve all interested parties) increase the likelihood of removing institutional silos. We feel present central and local government initiatives, such as the creation of the marine hub and the Hawke's Bay Marine and Coastal Group, offer important examples on which to build.

The New Zealand examples listed above are often created by communities to voice their aspirations. In contrast, international examples vary from local and regional scales to national and international scales enacting government voices, for example, HELCOM and the OSPAR Commission Marine Spatial Management Working Group.

We suspect that as marine management in New Zealand explores EBM, methods to recognise or develop national strategies and principles related to them may be needed.

CONCLUSION

By explicitly voicing these principles we hope to begin a debate about their content, whether they are all required, whether they are sufficient, and the degree to which all principles should be integrated into EBM processes while still allowing for place-based flexibility.

Shark cage diving and hunting, killing and catching wildlife under the Wildlife Act 1953

Shark cage diving is a recreational activity involving viewing sharks (in this case, great white sharks, lured by attractants) from inside cages lowered into the water. Commercial cage diving had been operating off the coast of Rakiura/Stewart Island since 2008, until the Court of Appeal declared in September that the activity is an offence under the Wildlife Act 1953.

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The Court's decision upset the commercial operators but satisfied the original concerns from local commercial pāua and kina fishing quota holders that cage diving in the area had heightened the risk of shark attack for their divers, due to the strong association the use of attractants created for sharks between vessels and divers in the water. In order to get some rules in place to protect the pāua and kina divers, PauaMAC5 (an organisation representing commercial fishing interests) initially made representations to the government supporting the development of a regulatory framework for commercial cage diving. PauaMAC5 argued that the Wildlife Act 1953 provided a means for legally achieving such regulation, which was indeed required because cage diving operators would otherwise be committing an offence of hunting or killing sharks without express authorisation from the Department of Conservation (DOC), in breach of the Wildlife Act. In order to regulate the activity, PauaMAC5 went on to suggest that the Minister of Conservation could issue permits under s 53(1) of the Act, which allows the Minister to authorise any "catch alive or kill" of protected wildlife, and that in so doing, the Minister should consider the safety of other water users. Section 53(1) reads (with emphasis added):

> "53 Director-General may authorise taking or killing of wildlife for certain purposes
>
> "(1) The Director-General may from time to time in writing authorise any specified person to *catch alive or kill for any purpose* approved by the Director-General any absolutely protected or partially protected wildlife or any game or any other species of wildlife the hunting or killing of which is not for the time being permitted."

Apparently persuaded by PauaMAC5's representations, the Minister announced in February 2014 that commercial cage diving operators would henceforth be required to obtain permits, similar to whale, dolphin and seal watching operators. In December 2014, the Minister granted each of the Rakiura cage diving operators a permit pursuant to s 53(1). Neither these permits nor the Minister's earlier announcement addressed the safety of other water users,

and so PauaMAC5 filed proceedings seeking a declaration that public safety was legally relevant to decisions about permits but had not been considered. However, at the outset of the hearing, Collins J advised the parties that there was a real issue in whether or not s 53(1) covers shark cage diving at all. If not, the Minister had no power to issue the permits. This is the issue that came before Clark J in *PauaMAC5 Inc v Director-General of Conservation* [2017] NZHC 1182, where it was decided that cage diving does not involve wildlife being caught alive or killed, so the activity cannot be regulated under the Wildlife Act.

Clark J's reasoning was that the words "catch alive or kill" in s 53(1) should be given their ordinary meaning, which clearly does not extend to shark cage diving as this activity is not "undertaken with an intent to catch alive or kill sharks" but rather involves attracting sharks to a vessel, platform, or cage in order to view or film them ([66] and [67]). Left undisturbed, the consequence of Clark J's decision (as counsel for the Director-General of Conservation pointed out) would be that "less invasive interactions with wildlife [will not be able to] be regulated so as to ensure its overall protection" ([37]). This is indeed a clear concern but is arguably less worrisome than another aspect of Clark J's decision: the discussion on the meaning of "hunt(s) or kill(s)" in the Act's offence provisions, ss 63 and 63A. These two sections read (with emphasis added):

> "63 Taking protected wildlife or game, etc
>
> "(1) No person may, without lawful authority,—
>
> "(a) *hunt or kill* any absolutely protected or partially protected wildlife or any game:
>
> "(b) buy, sell, or otherwise dispose of, or have in his or her possession any absolutely protected or partially protected wildlife or any game or any skin, feathers, or other portion, or any egg of any absolutely protected or partially protected wildlife or of any game:
>
> "(c) rob, disturb, or destroy, or have in his or her possession the nest of any absolutely protected or partially protected wildlife or of any game.
>
> "…
>
> "(2) Nothing in subsection (1) applies in respect of any marine wildlife.
>
> "63A Taking of absolutely or partially protected marine wildlife
>
> "Every person commits an offence against this Act and is liable on conviction to the penalty set out in section 67(fa) who without lawful authority (the proof of which shall be on the person charged)—
>
> "(a) *hunts or kills* any absolutely or partially protected marine wildlife; or
>
> "(b) buys or processes for sale or sells or otherwise disposes of or has in his or her possession any absolutely or partially protected marine wildlife or any part thereof; or
>
> "(c) robs, disturbs, or destroys, or has in his or her possession the nest of any absolutely or partially protected marine wildlife."

PauaMAC5's unsuccessful argument that cage diving fell under s 53(1) rested on importing the meaning of the phrase "hunt or kill" from s 63 into the words "catch alive or kill" in s 53(1). (Note that while s 63A reads "hunts or kills", this does not seem to matter in the cases.)

The phrase "hunt or kill" in s 63 has been given a very wide meaning, covering a wide range of activities, both by Parliament and the Courts. According to s 2 of the Wildlife Act, "hunt or kill" in relation to wildlife includes taking, trapping, capturing, pursuing, disturbing and molesting wildlife. To "take" wildlife is also defined, and includes "taking, catching, or pursuing [wildlife] by any means or device". According to Mallon J in *Solid Energy New Zealand Ltd v Minister of Energy* [2009] NZRMA 145 (HC) at [86], one of the series of cases about state-owned enterprise Solid Energy's West Coast coal mines and *Powelliphanta*, the absolutely protected land snail, "hunt or kill" "is intended to capture deliberate actions in relation to wildlife (whether well intended or not) that interfere with the natural and ordinary activities of the wildlife and that may harm the wildlife or carry with them that risk". Even though "hunt or kill" would not cover walking through the bush and accidentally stepping on a bug or startling wildlife (because neither of these activities involve any deliberate action in relation to the wildlife) or following wildlife that "remains free to carry out its activities as it wishes", the phrase was held to cover the actions of Solid Energy in removing snails (by hand or mechanically)

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from their existing habitat on the proposed mine site, and relocating them to a new habitat (at [83]-[85] and [87]). Following *Solid Energy*, the wide interpretation of "hunt or kill" would also cover shark cage diving, and so PauaMAC5 sought to persuade Clark J to import it into "catch alive or kill" in s 53(1), arguing largely that the Act's offence and permit provisions should be read together to achieve, as the Court of Appeal would later put it, "a tidy symmetry" (*PauaMAC5 Inc v Director-General of Conservation* [2018] NZCA 348 at [50]).

Neither Clark J nor, subsequently, the Court of Appeal were persuaded by PauaMAC5's argument, with all judges ultimately agreeing that "catch alive or kill" is "logically … a subset of 'hunt or kill'" (at [39] in the High Court and [50]–[51] in the Court of Appeal). Clark J, however, went on to discuss the meaning of "hunt or kill", insisting that the activities included in the definitions of "hunt or kill" (taking, trapping, capturing, and so on) do not broaden the meaning of the phrase "hunt or kill" as much as might at first appear. Rather, Clark J perceived these activities as mere incidences of hunting and killing, which "are not to be viewed in isolation from the core activity which is hunting or killing" (at [42]). On this approach, such activities "will only constitute an offence under s 63A(a) if they involve the hunting or killing, or an intention to hunt or kill, protected marine wildlife" (at [68]). This approach is consistent with *Kirkby v Ngamoki* HC Rotorua M172/84, 11 July 1985, which is discussed in *Solid Energy*, but it seems likely it would *not* have covered the actions of *Solid Energy* in moving the snails had it been applied in that case.

Clark J's comments about the scope of "hunt or kill" mattered because the importance of the breadth of the Wildlife Act's offence sections should not be underestimated. Although the Act presumes that all wildlife is absolutely protected unless stated otherwise (s 3) and authorises the creation of sanctuaries where all wildlife is declared to be absolutely protected (ss 9 and 10), it does not then create any positive obligations on anyone to do anything to protect "protected" wildlife or its habitat (the focus is rather on prohibiting or restricting activities that might harm wildlife or wildlife sanctuaries). In *Royal Forest and Bird Protection Society of New Zealand Inc v Minister of Conservation* [2006] NZAR 265, the *Powelliphanta* case preceding *Solid Energy*, MacKenzie J explained that the extent of the protection offered by the Wildlife Act "is contained in" the offence provision s 63 (at [6]). So, absolute protection actually (just) means protection from being "hunt[ed] or kill[ed]." Given this, the meaning of "hunt or kill" in s 63 effectively determines the extent of protection for wildlife (and the phrase "hunts or kills" in s 63A effectively determines the extent of protection for marine wildlife) under the Act. The narrower these offences are, the less the protection afforded to wildlife by the Act. Arguably, Clark J's judgment unnecessarily emphasises the limits of "hunt or kill."

On appeal, the Court of Appeal preferred the approach in *Solid Energy*, finding that Clark J had erred in her approach, and that "hunt or kill" is intended to include both the ordinary meaning of 'hunt' and 'kill', as well as having a wider meaning including "the taking of eggs and the trapping of kiwi for conservation purposes", and "fishing, or diving for or otherwise gathering" or "pursuing, disturbing or molesting" protected marine wildlife whether or not the wildlife is killed, and irrespective of whether or not the person concerned intended to hunt or kill the wildlife "in the ordinary sense of pursuing for the purpose of catching or killing" (at [40] to [42]). The Court acknowledged the limits to "hunt or kill", and that deciding what fits and what does not fit within the scope of the phrase will always be a question of fact "to be determined by reference to the Act's primary purpose which is to facilitate the protection (in this case) of protected marine species against harmful or potentially harmful interaction with humans" (at [43]). The Court thought it likely that requiring a fish to "deviate momentarily from its path to avoid a swimmer" would not be a "hunt or kill", but that accidentally standing on a fish could be, and that following a protected fish "as it swims naturally" would likely not be covered, "but active pursuit, causing the animal to feel it necessary to evade or outrun the pursuer may well" be an offence (at [44]). Therefore, shark cage diving, using attractants in the same way as "a bait or a fly to draw a fish to the angler's hook" amounted to "hunt[ing] or kill[ing]" the sharks, as did using attractants designed to "cause the animal to deviate significantly from its natural swimming pattern" (at [45]). The Court felt "fortified" in its conclusions by evidence from DOC that shark cage diving posed a potential risk of harm to the sharks. Despite the commercial cage diving operators' denials of any such risk, the Court determined that the mere "existence of potential for such harm is sufficient to satisfy the extended definition [of "hunt or kill"]. Its relatively low threshold is consistent with the Act's absolute protection purpose" (at [46]).

Having decided that shark cage diving, at least as carried out by the commercial operators in this case, is an offence under the Wildlife Act, the Court of Appeal went on to hold that it is, however, an activity that cannot be authorised under s 53(1), because it does not involve catching or killing sharks. The ordinary meaning of "catch alive or kill" in 53(1) is narrower than the extended meaning of "hunt or kill" in the offence provisions – it is not a simple matter of permits being intended to authorise activities that would otherwise be offences: the Act's offence and permits sections "are not mirror images of each other" (at [52]). That the sections are intended to cover different things is, according to the Court of Appeal, made clear in several ways. First, unlike "hunt or kill" in the offence provisions, "catch alive or kill" cannot be intended to cover accidental or inadvertent action. Second, "hunt[ing] or kill[ing]" could be motivated by sport or potential commercial gain, but s 53(1) cannot authorise catching or killing wildlife for these purposes because this would be inconsistent with the Act's overall purpose of wildlife protection. Third, although "kill" is used both the phrases "hunt or kill" and "catch alive or kill", "hunt or kill" is given its own interpretation in s 2, making it clear that the whole, extended, meaning of "hunt or kill" "was intended to be the meaning of the phrase, not of its individual components", whereas the same is not true of the phrase "catch alive or kill" (at [55] and [56]).

According to the Court of Appeal (at [53]):

> *"[w]ithout in any way attempting to be definitive or exhaustive, the focus of authorisation [under s 53(1)] is likely to be primarily scientific research, although it might include capture for the purpose of removal to a safer environment (for the shark), [and] the culling of diseased animals that might threaten the larger population or to address over population."*

Shark cage diving, on the other hand, is a commercial adventure tourism activity which the Court held had "no protective benefit to the shark". Given the Act's purpose ("the protection of absolutely protected wildlife and the careful regulation of human interaction with such species"), the Court decided that there was "no justification for the risk" to the sharks' wellbeing created by including cage diving in s 53(1) – "[t]o the contrary, the Act's purpose can be better achieved if s 53(1) is read to exclude shark cage diving"(at [58]).

Just in case it was wrong, the Court of Appeal added that should shark cage diving be an activity that can be authorised under s 53(1), the possible effects for or on local pāua divers must be considered by the Minister (at [66]). This finding was largely a result of the Court's recognition that catching alive or killing wildlife "can be a dangerous activity involving weapons or traps capable of injuring (or worse) innocent (human) third parties in the vicinity" (at [63]).

Two days after the Court of Appeal delivered its judgment, the Shark Cage Diving (Permitting and Safety) Bill 2018 was introduced to Parliament by the Member of Parliament for Invercargill. If enacted, the Bill would introduce a permitting system for commercial shark cage diving operations. Permits would only be able to be granted where the Director-General of Conservation was satisfied that the operation, inter alia, "will not have any significant adverse effect on the behavioural patterns of the sharks" and "it is in the interests of the conservation or protection of sharks that a permit [is] issued", and that "the potential adverse effects of the ... operation are able to be avoided, remedied or mitigated" (cl 12). Permits could be revoked or suspended in the interests of public safety (cl 14), and the Minister would be required to approve a code of conduct setting out best practice for commercial shark cage diving in New Zealand (cl 18). The purpose of the Act would be to regulate commercial shark cage diving operations by establishing a permitting regime and ensuring that the potential adverse effects "including adverse effects on public safety, are avoided, remedied, or mitigated" (cl 3).

Note that the Bill would define shark cage diving as "diving with the use of an underwater cage for the purpose of viewing sharks" and makes no reference to the use of attractants to bring sharks to the cage. This was the crucial factor in the Court of Appeal's finding that the shark cage diving operations that were the subject of the cases were an offence under the Act. The Bill is not just a response to the Court of Appeal's decision; it aims to establish a regulatory scheme for all shark cage diving operations, along the lines of the one that applies to commercial operations involving viewing or coming into contact with marine mammals under the Marine Mammals Protection Regulations 1992. These regulations were made under s 28 of the Marine Mammals Protection Act 1978. The differences between the marine mammals scheme and the scheme proposed for shark cage

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diving are first, that the marine mammals scheme applies to commercial operations involving all marine mammals (not just whales, for example), whereas the proposed Bill covers only shark cage diving, when commercial activities involving other protected marine wildlife are already being conducted, but either are not being regulated, or should not be (because that would exceed s 53(1)). Second, the marine mammals scheme operates under regulations, whereas the shark cage diving scheme is a proposed Act.

For the sake of avoiding fragmentation of the overall legislative scheme, it seems worth asking whether it would be more efficient to amend the Wildlife Act by directly inserting a scheme for commercial activities involving viewing or contact with wildlife into it, or by amending s 72 (the section in the Act that authorises various regulations, including such regulations as the Governor-General "considers necessary or expedient for the protection or control of wildlife or for the due administration of this Act") so that the section more clearly authorises the promulgation of such a scheme (assuming it does not do so already), or even by revising the scope of the Minister's permitting powers under s 53. The Wildlife Act was enacted in 1953. It is seriously out-of-date, and could really do with being revised and modernised, if not replaced, without losing its presumption of absolute protection for wildlife.

The Auckland Regional Fuel Tax – Funding Transport in Auckland

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INTRODUCTION

Auckland's transport system is failing to adequately meet Auckland's needs due to a combination of rapid growth in the Auckland region and a history of underinvestment in transport infrastructure. With congestion costs estimated at well over $1 billion per year, new funding options are needed to deal with the Auckland transport system.

Addressing Auckland's transport issues has been a major focus for Auckland Transport over the last eight years since the Auckland Council was established, but congestion continues to grow within the Auckland region. Without major new investment, Auckland Transport will be unable to rectify the issues that currently plague Auckland's transport system, let alone the issues that will arise due to the expected population growth in Auckland over the next decade.

In order to get much needed additional funding for investment in transport infrastructure, the Auckland Regional Fuel Tax (the RFT) has been introduced. For the next 10 years petrol and diesel in Auckland will have a tax of 10 cents per litre (plus GST) applied to it. This will allow an estimated total of $1.5 billion to be raised in revenue over the next 10 years, providing additional funding for Auckland Council to realise the Auckland Transport Alignment Project (ATAP) outcomes and start addressing some of Auckland's most pressing transport issues.

This article will discuss what the RFT is and how it came into being, any limitations or restrictions around the RFT, how the RFT may change over its 10-year life span and what would happen if the RFT was to be removed by either the current or a future government.

WHAT IS THE AUCKLAND REGIONAL FUEL TAX?

The RFT applies an extra 10 cents per litre (plus GST) to sales of petrol and diesel by retailers within the geographic boundaries of Auckland Council, excluding Aotea Great Barrier Island. Great Barrier is excluded from the RFT because the residents of Great Barrier rely on fuel for power generation, the price of fuel is already very high on Great Barrier, and Great Barrier will not directly benefit from the proposed transport projects (Land Transport Management (Regional Fuel Tax Scheme–Auckland) Order 2018, s 5(1);

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Proposal For A Regional Fuel Tax (Auckland Council) at 6). The RFT began on 1 July 2018 and expires on 30 June 2028 (Land Transport Management (Regional Fuel Tax Scheme–Auckland) Order 2018, s 5(2)).

The RFT is expected to raise an estimated $1.5 billion over 10 years, or $150–$170 million per annum. The revenue raised from the RFT will be used by Auckland Council, in conjunction with other revenue sources, such as development contributions and New Zealand Transport Agency (the Agency) subsidies, to enable an additional $4.3 billion of transport capital investment (Proposal For A Regional Fuel Tax (Auckland Council) at 6).

The identified projects that will benefit from the RFT revenue are outlined in the ATAP and the Draft Proposed Regional Fuel Tax on which the public were consulted. These projects are:

- bus priority improvements;
- city centre bus infrastructure;
- improving airport access;
- the Eastern Busway, Park and Rides;
- electric trains and stabling;
- downtown ferry redevelopment;
- road safety, active transport;
- Penlink;
- Mill Road Corridor;
- road corridor improvements;
- network capacity and performance improvements; and
- growth-related transport infrastructure.

(Proposal For A Regional Fuel Tax (Auckland Council)).

HOW DID THE AUCKLAND REGIONAL FUEL TAX COME ABOUT?

It was identified that there was a significant funding gap when it came to addressing Auckland's transport issues and so the Government partnered with Auckland Council and Auckland Transport in producing the ATAP in order to align their transport investments. ATAP set priorities for transport and provided a direction for both the Government's and Auckland Council's investments in transport for the next 10 years ("Have your say on the future of Transport: Regional Fuel Tax- proposal information" Auckland Council <https://www.aucklandcouncil.govt.nz>).

The RFT was seen as the fairest option to help raise the necessary revenue to address Auckland's transport issues. This was in comparison to the alternatives which were to either retain the existing targeted rate through the Interim Transport Levy, which was due to expire in 2018, or make general rates higher. The RFT was considered the fairest option because, unlike any other rating option, it ensures that those who use the transport system more will pay more for the additional transport investment.

However, in order to implement the RFT for the Auckland region, legislative amendment of the Land Transport Management Act 2003 was required ("Have your say on the future of Transport: Regional Fuel Tax – proposal information" Auckland Council <https://www.aucklandcouncil.govt.nz>). The Government introduced the Land Transport Management (Regional Fuel Tax) Amendment Bill (the Bill) in March 2018, which provided for the following mechanisms:

(a) the establishment, replacement, variation and termination of regional fuel tax schemes;

(b) the review of regional fuel tax schemes;

(c) the collection of regional fuel tax, the application for and payment of regional fuel tax rebates; and

(d) the administration and enforcement of regional fuel tax schemes.

The Bill was quickly progressed through Parliament receiving Royal Assent on 26 June 2018 despite considerable opposition from the National Party.

ARE THERE ANY LIMITATIONS OR RESTRICTIONS IN RELATION TO THE AUCKLAND REGIONAL FUEL TAX?

The Agency administers the collection of the RFT directly from fuel distributors. All fuel distributors are required to supply the Agency with a monthly tax return with details of the fuel they have delivered. This tax return is then used by the Agency to track and monitor all fuel supplied and investigate any irregularities that may arise, ensuring fair and even application of the RFT ("Regional Fuel Tax Information" NZTA < https://www.nzta.govt.nz>).

The Agency is limited in its use of the RFT revenue in that it must account for all revenue collected, the RFT rebates, funds held for future rebates and administration and enforcement costs. This accounting is done by producing an annual report of these items as well as providing a comparison of actual revenues with forecast revenues and actual administration costs with forecast administration costs (Land Transport Management Act 2003, s 65Y).

Auckland Council is also limited in its use of the revenue from the RFT in that it does not receive the revenue directly. The RFT is collected by the Agency and then forwarded on to Auckland Council, less any rebates paid and a service cost ("Regional Fuel Tax Information" NZTA <https://www.nzta.govt.nz>). Auckland Council, through Auckland Transport, can then only use the revenue it receives from the Agency for those projects that it identified in the Draft Proposed Regional Fuel Tax that the revenue would be used for.

There are also limitations around terminating the RFT scheme early. In order to terminate early, an Order in Council may be made by the Governor-General only in accordance with a proposal prepared by Auckland Council and submitted to the Minister of Finance and the responsible Minister, and on the Minister's recommendation (Land Transport Management Act 2003, s 65K and 65L).

The Minister of Finance and the responsible Minister may, if they have reasonable concerns that the Auckland Council is not duly carrying out, in a material way, the proposal on which the regional fuel tax scheme for Auckland is based, notify the Auckland Council of those concerns and advise the Council that it must, within three months, respond to each of the concerns, stating what action the council has taken, or intends to take, in respect of those concerns. The Minister of Finance and the responsible Minister can then, on their own initiative, recommend an Order in Council for early termination be made if satisfied, on reasonable grounds, that the actions that the Auckland Council has taken or intends to take in respect of concerns notified to the Council are not an adequate response to those concerns (Land Transport Management Act 2003, s 65K and 65L).

These are the only two mechanisms by which the RFT may be terminated earlier than the 30 June 2028 expiry date.

HOW MIGHT THE AUCKLAND REGIONAL FUEL TAX CHANGE OVER THE NEXT 10 YEARS?

The RFT could change in many ways over the next 10 years. First, Auckland's 11.5 cents per litre tax could be applied to other regions in the country after 1 January 2021 under the current legislation. While local councils have been pushing for regional fuel taxes to be implemented in their regions, the Prime Minister Jacinda Ardern has ruled out any extension of the tax under her leadership. In particular, Minister for Transport Phil Twyford has said the Government has explicitly ruled out a regional fuel tax for Wellington (Craig McCulloch "Regional fuel tax off the table: Local government wants alternatives" (25 October 2018) Radio NZ <www.radionz.co.nz>).

Other councils appear to be disappointed by the back down as, like Auckland, they too find themselves in a transport funding deficit. Rates revenue alone is not enough for councils to invest in and renew infrastructure and so if a regional fuel tax is off the table, councils have been asking for an alternative (Craig McCulloch "Regional fuel tax off the table: Local government wants alternatives" (25 October 2018) Radio NZ <www.radionz.co.nz>).

Change may also come from the Productivity Commission and Commerce Commission enquiries that are to be undertaken. While the RFT cannot be increased as it is a legislative requirement that it be set at 10 cents per litre, nor can it be varied, replaced or terminated without the requirements as set out under the Act being followed, the Government has drawn up the terms of reference for a Productivity Commission inquiry into local government funding which will see an inquiry into the RFT conducted as part of the final report due back in November 2019 ("Local government inquiry terms of reference confirmed" (24 June 2018) Productivity Commission <www.productivity.govt.nz>). Parliament has also passed amendments to the Commerce Act giving the Commerce Commission new powers to allow it to investigate the fuel market (Craig McCulloch "Regional fuel tax off the table: Local government wants alternatives" (25 October 2018) Radio NZ <www.radionz.co.nz>). However, the investigations, particularly by the Commerce Commission, are intended to review fuel price increases in New Zealand aside from those increases due to the RFT. It is therefore unlikely these investigations will result in a change in the way the RFT operates.

The other change that may occur is in relation to rebates. The RFT is intended to be applied only where fuel is used on the road. Where fuel has been used for specific non-road purposes, a rebate can be claimed from the Agency by the end-user of the fuel. However, it has been identified that the Government is currently considering possible changes to the rebate entitlement criteria. The rebate entitlement criteria could be made stricter, meaning more revenue is filtered through to Auckland Council from the Agency, or the criteria could be made less strict, meaning less revenue is filtered through. Either change could have a significant impact on the way in which the RFT operates and the way in which the projects that are to be funded under the RFT are carried out ("Regional Fuel Tax" Auckland Transport <https://at.govt.nz>).

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WHAT WOULD HAPPEN IF THE AUCKLAND REGIONAL FUEL TAX WAS REMOVED WITHIN THE NEXT 10 YEARS?

The National Party has made it very clear they are opposed to the RFT. National Party Leader Simon Bridges has welcomed the Prime Minister's back down on other regional fuel taxes and called on her to overturn her excise increases and remove the regional fuel tax imposed on Aucklanders (National Party "National welcomes first forced backdown on fuel tax" (press release, 24 October 2018)).

However, Auckland's transport issues are not going to be resolved without funding. The RFT is a way of ensuring sufficient revenue is available to support Auckland's growth and needs, and to address those transport issues. If the Government were to change and the RFT was to be removed, funding would need to come from another source being either:

(a) tolls and public transport fares;

(b) beneficiaries pay, for example, by putting development levies on new homes to pay for the supporting infrastructure; or

(c) infrastructure providers can sell one asset to invest in another.

(Stephen Selwood, Chief Executive of Infrastructure New Zealand "Fuel tax not the only way to fund transport" (press release, 25 October 2018).

If the RFT was to be removed, one of these methods would have to be employed quickly because the longer Auckland deals with congestion issues, the higher the cost will be on the Auckland region, not just economically, but also in terms of the liveability of Auckland as a whole.

Cross leases and s 218 of the RMA – *Re McKay* [2018] NZEnvC 180

INTRODUCTION

Re McKay [2018] NZEnvC 180 concerned an application to the Environment Court for a declaration that the conversion of cross lease titles to fee simple titles did not constitute a subdivision under s 218 of the Resource Management Act 1991.

The Environment Court declined to grant the declaration, taking the view that the conversion of cross lease titles to fee simple titles would require new lines to be drawn on a survey plan and so was still a subdivision for the purposes of s 218. The key practical implication is that a subdivision consent is required for the conversion of cross lease titles to fee simple.

However, the Court was at pains to point out that a cross lease reflects an existing use, and that in the absence of greater intensification or an adverse impact on infrastructure or other amenities, there may be few (if any) resource management implications. The implication of these comments is that consent authorities should not impose onerous conditions on those seeking conversion.

This short article outlines the decision in *Re McKay* and comments on the importance of legislative reform in this area.

BACKGROUND

Cross leases are a classic New Zealand property law workaround: a reflection of the pragmatism that pervades our property law. Invented in the late 1950s as a way of getting around restrictions on subdivision, they have been extensively criticised, most notably in the Law Commission report *Shared Ownership of Land* (NZLC R59, 1999). The Law Commission observed that the basic problem of the cross-lease system was the "public lack of awareness that there are problems", and the view of the Law Commission was that cross leases should be phased out (at [8] and [14]).

More recently, the Auckland Council's research arm has addressed the matter, highlighting issues with cross leases, such as incorrect flats plans, problems with renovations, management costs, and difficulties in achieving redevelopment and greater intensification of Auckland: see Craig Fredrickson, *Arrested (re)development? A study of cross lease and unit titles in Auckland* (Auckland Council Technical Report 2017/025). Academic research funded by the Building Research Association of New Zealand has recommended that new cross leases be prohibited. See Elizabeth Toomey and others *Revised Legal Frameworks for Ownership and Use of Multi-dwelling Units* (BRANZ Report ER23, 2017) at 111.

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THE APPLICATION

Don McKay, a Fellow of the New Zealand Institute of Surveyors and an experienced surveyor, planner, and engineer, filed an application for the following declaration:

> *"That the conversion of cross lease titles (CFR) to fee simple titles (CFR) do not constitute a subdivision within the meaning of section 218, Resource Management Act 1991."*

The key goal of the application was to enable conversion from cross leases to fee simple titles with the agreement of owners but without needing a resource consent. The application also aimed to bring attention to the significance of the problems with cross leases.

The declaration sought was described as "deceptively simple" (at [17]): there was a "strict legal issue" but also wider practical issues arising from the declaration (at [18]). While the decision was based on the strict legal issue, the Court noted that the practical issues could not be ignored.

By direction of the Court, the application was served on the Ministry for the Environment, Land Information New Zealand (LINZ), Local Government New Zealand, Auckland Council, and the New Zealand Institute of

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Surveyors. To the Court's surprise, and perhaps dismay, only the New Zealand Institute of Surveyors ("the Institute") wanted to be heard. Given the potentially widespread implications arising from any decision on the issue, the Court appointed Associate Professor Kenneth Palmer as amicus, at least partly to put forward a contrary view to the views of the Applicant and the Institute in support of the application.

THE RMA CONTEXT

While property lawyers often understand cross leases in the context of other types of intensive title, the Environment Court considered the RMA dimension of cross leases. The Court referred to a range of provisions in the RMA, including s 2 (definitions of cross lease and survey plan), s 11 (restrictions on subdivision of land), s 218 (definition of subdivision), and s 226 (restrictions upon issue of certificates of title).

Among other points, the Court noted that:

- The RMA provides a complete code for the control of subdivision in New Zealand. See *Waitakere City Council v Kitewaho Bush Reserve Co Ltd* [2005] 1 NZLR 208 (HC) at [80]).
- The text of the RMA was "relatively crystalline", using "transactional language containing precise metes and bounds" (at [30(c)]).
- A cross lease involved the lease of a building, not of land.
- A subdivision involved wither the division of an allotment according to s 218(1)(a), or an application for a separate certificate of title for an allotment, subject to the exclusions under s 226(1).
- There was some circularity in the definitions of "subdivision", "allotment" and "survey plan", but essentially the definition of survey plan related to a plan of division of land. See *Horokiwi Holdings Ltd v Registrar-General of Land* [2007] NZRMA 360 (HC) at [44]-[47]).

PROPERTY LAW PRINCIPLES

Having traversed the RMA, the Court returned to property law principles, noting there was no definition of "fee simple" in the RMA (or the Land Transfer Act or Property Law Act, for that matter). Helpfully, the nature of a fee simple estate had recently been considered in *Clearspan Property Assets Ltd v Spark New Zealand Trading Ltd* [2017] NZHC 277. A fee simple estate was the strongest estate known to our legal system. A leasehold estate was, by its nature, limited by time, and so less than freehold. A fee simple estate, on the other hand, was, in practical terms, unlimited in duration.

Under the definition in the RMA, a cross lease was a title involving first, an undivided share in land, and second, a lease of a building or part of a building: the land under the building was already an allotment. Importantly, the transfer of an undivided interest in land did not involve the disposition of a fee simple estate, and the grant of encumbrances and personal covenants did not create an estate or interest in the land. See *Spark New Zealand Trading Ltd v Clearspan Property Assets Ltd* [2018] NZCA 248.

EVALUATION

In the Court's view, to make an undivided share of an allotment into a separate fee simple title required the division of the allotment into two or more new allotments. It was likely that in many cases, the boundaries on a cross lease plan would be insufficient to meet the definition of survey plan. Any common areas would be undivided areas, and so the creation of new allotments "would require lines to be drawn where none had been before" (at [41]).

This meant there would be a division of a parcel of land shown separately on a survey plan, and this therefore amounted to a subdivision of land within the meaning of s 218(1)(a). As such, a subdivision consent would be required in most circumstances.

The Court considered some counterfactuals. Even where the boundaries of the new areas to be shown on the freehold title would follow the exact boundaries of the cross-lease areas, any creation of new allotments would require lines to be drawn where none had been before. The issue was not whether anything visible on the land would change, but rather whether or not the underlying allotment would be divided. Further, even where there were no common areas, the conversion nonetheless required the division of the underlying allotment. The conversion of a cross lease to a fee simple title therefore "must constitute a subdivision of the allotment on which the leased building sits" (at [43]). As such, there was no avoiding the existence of a subdivision.

OTHER ARGUMENTS

The Institute raised an alternative argument that, as the grant of a cross lease of part of an allotment was a division of that allotment under s 218(1)(a)(iv) of the RMA, there could be an application for a separate certificate of title for that part under s 218(1)(a)(i). The Court considered this to be an argument that as the grant of a cross lease of any part of an allotment is a division of that allotment, that allotment is already divided and no subdivision occurs. This would avoid any contravention of s 11 of the RMA, as a subdivision allowed by a resource consent and shown on a survey plan would already have taken place.

However, the Court's response was that the five methods of subdivision in s 218(1)(a) are not equivalent: there were "discrete and different in kind to one another" (at [46]). Not all types of tenure or subdivision are equal. While separate areas could be identified by leases and shown on a plan, the owner of each cross lease held an undivided share in the freehold allotment, and that allotment would need to be divided to produce separate freehold titles.

The conceptual distinction between freehold and leasehold meant that separating the shares of the cross lease would necessarily involve a subdivision of land under s 218. A conversion of a cross lease title to a fee simple title therefore required an application for resource consent under s 11 of the RMA and an assessment under s 104 of the RMA.

CONSENT REQUIREMENTS

The Court acknowledged there might be subsidiary issues as to the extent to which a consent authority could impose conditions on any such subdivision consent. In particular, building alterations might require upgrading works, changes to structures, access or services might require relocation or upgrading work.

Turning to the practical issues it had foreshadowed earlier, the Court felt it appropriate to comment on the general limits within which an application to convert cross leases into freehold or unit titles should be processed and assessed by a consent authority. Two key issues were the status of what was already occurring on the land (as an existing use under s 10 of the RMA) and the scope of the power to impose conditions on a subdivision consent. Where there was an existing use under s 10, the Court queried as to how far a consent authority could reach in requiring that use to be assessed as a new use. The Court referred to s 108AA of the RMA, which sets out the requirements for resource consent conditions, including that they be imposed for an RMA purpose, that they fairly and reasonably relate to the development and that they not be unreasonable.

That is, while the conversion of a cross lease property into separate freehold titles was a subdivision of land and required a subdivision consent, in the Court's view:

> *"the consent authority should generally approach such an application in a way that is mindful of the possibility that there may be few, if any, material environmental implications warranting a full-scale assessment of the proposal as if it were a new development" (at [55]).*

With these pointed comments to local authorities, the Court reiterated that it declined to make the application sought.

COMMENT

Cross leases continue to be subject to criticism. They also remain a valid form of title that, even if originally designed as a workaround, record and protect property rights. *Re McKay* highlights an attempt to show that a conversion from cross lease titles to fee simple titles is not a subdivision, and so to avoid the resource consent process in respect of such conversion. The Environment Court declined to support this view, finding that the conversion process inevitably involves new lines on a survey plan, and so necessarily involves a subdivision of land under s 218 of the RMA.

The volume of recent commentary on cross leases only serves to highlight their many problems, and cross leases will find few supporters in the legal, survey or planning worlds. There is also clearly strong support in this commentary for legislative amendment, although whether or not change will be effected by the legislature remains to be seen. In the immediate future, and given the Court's view that there may be few (if any) resource management implications in the conversion of cross lease titles to fee simple titles, there is room for consent authorities to revisit their approach to granting subdivision consents for cross lease conversions. Consent authorities should enable such subdivision applications to be processed almost 'as of right' or, at least, with few conditions. Improved planning frameworks which encourage and enable conversion from cross lease to fee simple titles as of right may well lead to fewer cross leases, with consequent benefits to land tenure and property rights that extend well beyond the work of planners.

AUCKLAND COUNCIL V AUCKLAND COUNCIL [2018] NZENVC 56

Authors:
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BACKGROUND

This case involved the unusual situation of Auckland Council appealing a decision against itself.

Auckland Council (as the applicant, through its Community Facilities department) sought to appeal for the decline of resource consent to construct a concrete walkway and seawall protection along a portion of the esplanade reserve at Orewa Beach. The Council as applicant submitted that the works were necessary to mitigate the effects of erosion, climate-change, sea level rise and movement of sand in storm events. The application for consent was declined by Independent Hearing Commissioners appointed by Auckland Council to exercise its functions as consent authority.

As a preliminary legal issue, a full Court of Judges Kirkpatrick and Smith considered whether it had jurisdiction to hear an appeal by a council, in its authority as applicant for resource consent, against a decision made by a council via Independent Hearing Commissioners, in its capacity as consent authority.

DECISION

The Court began its analysis by acknowledging that, in simple terms, an applicant does have the right to appeal against the decision of a consent authority under the Resource Management Act 1991. However, in these particular circumstances, that right also had to be weighed against the civil law principle that you cannot sue yourself.

The Court heard from a range of case law examples where a local authority undertook different roles in a single case. These included situations where:

- two parts of the same council were separately engaged in the proceeding but represented a consistent position;
- one part of the entity challenged the decision of another part of the entity to clarify a technical error; and
- the council had prosecuted itself, and pleaded guilty in the proceedings.

The Court considered that there was no analogous case to the present facts, and no determinative precedent to indicate that a council, in its role as applicant for resource consent, could not appeal against the decision of the consent authority.

To assist in its determination, the Court sought to understand the delegations held by various Council employees to determine where the ability to appeal and defend decisions by the Council lay. It found that both of these powers fell to the Director of Legal and Risk. The Court noted that it was unusual for a council to appeal its own decision and queried why there was no documentation outlining the decision for the appeal on the basis that the Council should not have made this decision lightly.

The Court remedied the tension between the two competing concepts in this case by reference to a decision of the United States Supreme Court. In that case, the Attorney-General was the named party on both sides of the dispute, for two different agencies. The Supreme Court held in that case that "courts must look behind names that symbolize the parties to determine whether a justiciable case or controversy is presented." Courts can only adjudicate justiciable controversies (which prima facie do not result from proceedings brought by an entity against itself).

At that point, the Court determined that it did not need to reach a final conclusion on the role of the Council. It looked instead to the various parties who had joined on either side of the debate as s 274 parties. It referred to evidence from one of the supporters of the proposal that, if the Council could not appeal the decision, it would have had to considered whether it would stand in the original applicant's shoes and assume the burden of challenging the decline of consent. As such, it found there was a real controversy, which parties other than the Auckland Council sought to resolve.

The Court acknowledged the possibility that in other circumstances the issue of whether it is lawful or appropriate for a council to appeal against its own decision may need to be decided. That may particularly be so where there is no other party involved, or there is otherwise no party to act as a contradictor to the council's case.

COMMENT

This careful decision of the Court reflects one of the more unusual issues presented by the dual roles of local authorities as both regulators and (on occasion) applicants. Parliament has given powers of general competency to local authorities to act as any other person could. That makes sense when you consider the vast array of responsibilities borne by local authorities for matters such as storm water, roading, community parks and facilities, and environmental protection. It gets tricky when those powers of general competency appear to run into conflict with its statutory role as a regulator (in this case, as consent authority under the RMA).

In our view, Auckland Council cannot be criticised for (a) seeking consent to address an issue within its purview; (b) running that consent through its usual regulatory processes, before exercising its power to delegate the final decision-making to an independent body; and (c) considering and lodging an appeal where it is consistent with its strategic directions and mandate. What it does demonstrate, in such circumstances, is the need for careful thought to be given to the appropriate boundaries of a council's role(s), the delegations for making decisions on such matters and any division of responsibility for progressing the case before an appeal is lodged with the Court. Doing so, in this case, may have alleviated the concerns of the Court regarding the potential for a lack of a real contradictor.

BOOK REVIEW

ENVIRONMENTAL LAW IN NEW ZEALAND, 2ND EDITION

Peter Salmon and David Grinlinton, General Editors

Thomson Reuters

2018

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The recently published second edition of *Environmental Law in New Zealand* continues to provide a comprehensive overview of environmental law in New Zealand. This edition follows the same format as the first edition, with updates to reflect recent changes to the Resource Management Act 1991 and to include recent case law.

The book is divided into 19 chapters and moves from the general to the specific. The initial chapters set the wider context and describe the conceptual underpinning and theoretical influences guiding the evolution of environmental law. It then covers New Zealand specific topics, such as the application of Te Ao Māori and the role of central and local government in environmental law. The remaining chapters address discrete topics with more direct, practical orientation, such as the purposes and principles of the RMA, land-use, water management, the protection and conservation of ecosystems and species and heritage protection.

This book covers a broad range of topics and provides a thoughtful discussion and analysis of key issues, as well as useful summary of the case law and other relevant statutes. It addresses a number of topics not explored in detail by other resource management texts, such as the doctrine of waste and concepts of environmental justice and intergenerational equity. The consideration of the future direction of the law in most chapters, such as the detailed discussion on the future of freshwater management in Chapter 13 and questions regarding the extent to which any written constitution should incorporate substantive and procedural environmental rights in Chapter 7, compliment the more technical aspects of the topics otherwise addressed. The international context provided throughout the book (both by individual chapters and elsewhere) is also worthwhile and a useful inclusion, and helps set the concept of environmental law within a wider legal framework and aids in the understanding of its enforcement both in New Zealand and internationally.

An excellent addition to the second edition is the section addressing the development and application of the concept of bestowing legal rights and personality on natural objects (i.e. the Whanganui River and Te Urewera National Park). This ties in well with earlier sections in the book, which address the traditional development of legal norms and the extent to which the rule of law can and should be grounded in nature. Another useful addition is the detailed discussion of the development of co-governance and other arrangements between Māori, regional and local government and central government decision-makers as part of Treaty of Waitangi settlements. The new edition also incorporates useful commentary and contextualisation on the numerous recent legislative changes, such as the development of special legislation for specific planning processes, the development of national planning standards, and the differing tracks now available for promulgating plans.

It is well set out and easy to follow, with each chapter structured so that the basic principles of each topic are explained before examining the more complex concepts of an issue. The contents list and structure of the headings within each chapter assist with this ease of reference, as do the indexes at the end of the book which have been separated out into statutes and regulations, table of cases and a subject index.

This second edition provides an excellent revision of the first text and I consider it will continue to provide a useful and accurate reference for practitioners, students and others working in the wider resource management and environmental fields.

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	Copy Deadline
April 2019	15 January 2019	1 March 2019
August 2019	15 May 2019	1 July 2019
November 2019	15 August 2019	1 October 2019

The Resource Management Journal is published three times a year: April, August and November. Articles should generally be no more than 2,000 words (this is at the Editor's discretion) and written in accordance with the *New Zealand Law Style Guide* (3rd ed) by Alice Coppard, Geoff McLay, Christopher Murray and Jonathan Orpin-Dowell, 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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