

# ***Development proposals of national significance : The call-in power of the Resource Management Act***

Martyn Taylor \*

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*This article explores the legal nature of the "call-in" power of the Minister for the Environment ("the Minister") conferred by sections 140 to 149 of the Resource Management Act 1991 ("the RMA"). In particular it compares the call-in with the conventional consent procedure and suggests methods for enhancing transparency and accountability. This article was written while awaiting the report of the Board of Inquiry into the Taranaki Combined Cycle proposal.*

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## **I THE CALL-IN POWER IN CONTEXT**

The Resource Management Act creates a legal framework to promote the *sustainable management* of natural and physical resources.<sup>1</sup> Local authorities, in achieving this objective, are required to develop and maintain policies and plans for their corresponding regions or districts.<sup>2</sup> Under Part III of the Act, legal authorisation is required for any use of land contrary to rules in District Plans, or for any activity with effects on air or water not expressly permitted by rules in Regional Plans. This legal authorisation is provided in the form of a *resource consent*.

A resource consent is obtained by following the specific process outlined in Part VI of the Act. Generally an application for a consent will be publicly notified by the consent authority.<sup>3</sup> Any person may then make written submissions with a public hearing held if necessary. Under sections 104 and 105 the consent authority must decide whether to grant the consent by considering the effects of the activity and the principles, purposes and policies of the Resource Management Act and its instruments.<sup>4</sup>

Sections 140 to 149 allow any development proposal to be *called-in* by the Minister. A call-in allows resource consent applications to be taken out of the hands of the local authority and determined by the Minister on the basis of the recommendations

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1 See s 5(1) of the Resource Management Act 1991. See also *Brooker's Resource Management* (Brooker & Field, Wellington, 1991) A5.06.

2 Sections 60(1), 64(1), 72(1).

3 Sections 88, 93, 94.

4 *Reith v Ashburton DC* [1994] NZRMA 241 demonstrates that a consent authority must now give substantial weight to the purposes and principles of Part II when deciding whether or not to grant a resource consent.

of an independent Board of Inquiry. The Minister's decision may be appealed to the Planning Tribunal and beyond.<sup>5</sup>

## II THE ORIGIN OF THE POWER

In 1986 the Fourth Labour Government commissioned an eminent barrister, A Hearn QC, to review the existing Town and Country Planning legislation with a view to comprehensive reform.<sup>6</sup> His subsequent recommendations included a special procedure for major development proposals involving matters of national importance:<sup>7</sup>

Where the Minister is satisfied that a proposal involves a matter of national or regional importance and that it is desirable that the matter should proceed without delay, the Minister should have the power to "call-in" any planning proceeding at any stage by giving notice and referring it to the Planning Tribunal or a Special Planning Tribunal. The Minister should also be given the power to give directions as to any matters of national or regional importance on the basis that they must be recognised and provided for by the Special Tribunal in its consideration. The function of the Special Tribunal would be to decide, not to report or recommend. I recommend accordingly.

Hearn adopted the call-in power from the Environmental Planning and Assessment Act 1979 (NSW).<sup>8</sup> The New South Wales Act empowers the Minister for Planning to intervene in various stages of the planning process. These powers include a discretion to "call-in" development proposals considered to be of state significance.<sup>9</sup> By exercising his or her discretion the Minister assumes personal responsibility for the decision to grant planning consent. The Minister must also appoint a public Commission of Inquiry to assist decision-making.<sup>10</sup> This procedure has worked with a considerable degree of success.<sup>11</sup>

Many of Hearn's recommendations were endorsed when drafting the Resource Management Bill.<sup>12</sup> A call-in procedure was formulated that featured clear lines of

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5 Sections 149(3), 120.

6 See Sir Geoffrey Palmer "Sustainability - New Zealand's Resource Management Legislation" in M Ross and JO Saunders (eds) *Growing Demands on a Shrinking Heritage: Managing Resource-use Conflicts* (Canadian Institute of Resources Law, Calgary, 1992) 410.

7 See A Hearn, QC *Review of the Town and Country Planning Act 1977* (Department of Trade & Industry, Wellington, 1987) 7, 55, 219, 220.

8 Above n 7, 188, 219.

9 See s 101(1) of the Environmental Planning and Assessment Act 1979 (NSW).

10 Section 101(5).

11 See D Farrier "Environmental Assessment in New South Wales" (1984) 1 *EnvPlanLJ* 151. See also "Environmental Inquiries in New South Wales" (1984) 1 *EnvPlanLJ* 317. See also D Robinson "Public Participation in Environmental Decision-making" (1993) *EnvPlanLJ* 320.

12 Although given the political legacy of the National Development Act 1979, modifications were required. The National Development Act 1979 was a notorious and highly controversial statute. When drafting the Resource Management Bill there was

Ministerial accountability and reflected the integrated principles of the new Resource Management regime. On 22 July 1991 the Resource Management Act received the royal assent and the call-in procedure was incorporated into New Zealand law.<sup>13</sup>

### III THE POWER TO CALL-IN A PROPOSAL

#### A Power : *Proposals of National Significance*

The exercise the call-in power requires the Minister to make two distinct decisions: Is the call-in power *available* for the particular proposal? If so, should the power be *used*? To determine the availability of the power the Minister must look to section 140(1). The test to be satisfied is whether or not the proposal is of *national significance*.

When will a particular proposal satisfy the test of "*national significance*"? The term *national significance* is not expressly defined within the Resource Management Act. Instead section 140(2) provides limited guidance in the form of relevant factors the Minister *may have regard to*. These matters are not exhaustive as the Minister still retains the statutory discretion to *have regard to any relevant factor*. The listed factors thus become indicative in nature and assume the legal character of discretionary relevant considerations. They provide an objective frame of reference within which the particular proposal may be assessed.

The matters of national *importance* defined in section 6 of the Resource Management Act are distinct from the matters of national *significance* outlined in section 140. The matters of national importance are exclusively defined and are granted a superior statutory status. When determining whether or not to call-in a proposal, the Minister must *recognise and provide for* the matters of national importance as a person *exercising a power or function under the Act*. They are mandatory relevant considerations which must be taken into account when decision-making. In contrast, the matters of national *significance* are considerably wider in their scope. They encompass subjective matters

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a fear that Hearn's proposed "call-in" power could be perceived as the re-enactment of the National Development Act in another guise. Modifications were therefore made to achieve a superior standard of Ministerial accountability. Despite these attempts, the call-in power was targeted for much political criticism. During the first reading of the Resource Management Bill, R Storey MP stated: "Never has there been a Bill before the House with provisions which allow the Minister to have a look at what is happening in the regions and districts and, if something that is occurring there is not in the national interest, call that matter in.....This is a very powerful weapon in the hands of the Minister for the Environment who might decide he is into the management of natural resources in a big way". See 503 NZPD, 14165, 5 December 1989.

13 A similar call-in power has now been drafted within the Hazardous Substances and New Organisms Bill [cls 60-65]. At the time this article was written the Bill was still before a select committee.

such as the extent of public concern or interest in a proposal; the strategic role of a proposal in Government policy; or the precedent value of a call-in for deciding subsequent similar consent applications.

*B The Use of the Power : Ministerial Discretion*

When the Minister is satisfied that a particular proposal is of national significance, he or she retains a residual discretion under section 140 to direct whether or not a call-in should proceed. This becomes the second decision for the Minister : should he or she *use* the call-in power? No factors in the Act guide the exercise of this discretion. The statute simply states the Minister *may* direct.<sup>14</sup> This second ingredient of the decision to exercise of the call-in power is therefore highly subjective. The Minister is not constrained by the statute and is allowed a considerable degree of flexibility and freedom. The use of the call-in power becomes governed more by economic and political matters than by legal considerations.

However, this means there are many factors influencing the call-in decision not revealed within the Act. The Minister's decision loses transparency and becomes extremely difficult to supervise. This creates considerable uncertainty for applicants.<sup>15</sup> Listed strongest to weakest, it is suggested hidden influential factors would include:

1 *The budget of the Ministry.* The cost of the call-in procedure is probably *the* most prohibitive factor to its use. A Ministerial briefing paper of 26 November 1993 estimated likely expenses to amount to at least \$60,000 per call-in, these were described as "substantial and in addition to the costs of making a submission.....additional funding would need to be sought and current work programmes would need to be curtailed, and in some cases dropped".<sup>16</sup> A call-in requires Government funding and ultimately this is a matter of political priority.

2 *Previous commitments outlining when the call-in power would be invoked.* In July 1992 the Minister for the Environment made a commitment to call-in "proposals which could significantly affect the Government's CO2 reduction objectives".<sup>17</sup> This call-in policy originated from Cabinet and was heralded by the Minister as demonstrating the Government's commitment to reducing greenhouse gas emissions by

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14 Section 140(1).

15 See RJ Somerville *A Strategy for ECNZ for Gaining Resource Consents Under the RMA* Unpublished, confidential legal opinion prepared for the Electricity Corporation of New Zealand, 1 October 1993 (*Part 1*), 20 October 1993 (*Part 2*), 16.

16 See RB Chapman *Oral Item Note and Background - Proposed Stratford Combined Cycle Power Station : Government's Involvement under the Resource Management Act 1991* Released under the Official Information Act, briefing paper to the Minister for the Environment, 26 November 1993.

17 See NZPD, Ministerial Question lodged by Mr Pete Hodgson MP to Hon Rob Storey MP (Minister for the Environment), 11 March 1993. See also S Allan *Draft Climate Change Protocol* (Ministry for the Environment, Wellington, 1993) 1.

the year 2000.<sup>18</sup> The Minister later found himself morally and politically bound to honour his commitment and called-in the Electricity Corporation's proposed Taranaki Combined Cycle Power Station on the 9th of December 1993.<sup>19</sup> This was the first call-in to be made under the Act.

3 *The quantity of public and political pressure bearing on the Minister.* Lobbying and political pressure proved critical to the Minister's decision to call-in the Taranaki Combined Cycle proposal. The Minister clearly wished to avoid exercising his power and even contemplated invoking section 13(1)(a) of the State Owned Enterprises Act 1986 to direct the Electricity Corporation to delay consent applications.<sup>20</sup> Yet intense lobbying by political and environmental groups prevented the Minister escaping his previous call-in commitment.<sup>21</sup>

4 *Whether the proposal requires initial consents or the renewal of existing consents.* In exercising his discretion the Minister has emphasised the difference between granting initial resource consents and simply renewing the existing ones. This distinction has provided the Minister with a means to distinguish the Taranaki Combined Cycle proposal from other similar consent applications thus mitigating its precedent value. In turn this has allowed the Minister to escape much of the efficacy of his previous carbon dioxide commitment.<sup>22</sup> The Methanex Motunui Synthetic Fuel

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18 See Cabinet Paper CAB (92) M20/13a [CO<sub>2</sub> Reductions : Action Programme], 25 May 1992, Released under the Official Information Act, which stated: "Cabinet....(j) agreed that proposals which have significant impacts on New Zealand's ability to achieve its carbon dioxide objectives will be considered to be of national significance under section 140 of the Resource Management Act until adequate policy responses to carbon dioxide emissions are in place".

19 On the 5th of November 1993, the Electricity Corporation of New Zealand ("ECNZ") made eleven applications to the Taranaki Regional Council under section 88 of the Resource Management Act 1991 for resource consents to construct and operate the proposed Taranaki Combined Cycle Power Station ("TCC") at Stratford. This new thermal power station was to be fuelled on Maui gas with a 400MW generation capacity (roughly one third the size of Huntly Power Station). On the 9th of December 1993, the Minister for the Environment exercised his discretion pursuant to section 140 of the Act and directed that he would decide Application Number 1. This was an application for a permit to discharge aerial contaminants into the air. See RJ Somerville Opening Submissions of Counsel for the Applicant : In the Matter of the Board of Inquiry into an Application by the Electricity Corporation of New Zealand for a Permit to Discharge Contaminants into the Air From the Proposed Taranaki Combined Cycle Power Station, Stratford, 11 July 1994, 2.1.1.

20 See B Arthur *Memorandum: Shareholders of SOE's* Released under the Official Information Act, 29 November 1993.

21 See "Greenpeace Starts National Campaign to Stop Power Station" *Evening Post*, Wellington, New Zealand, 28 November 1993. See also "Greenpeace Challenges Upton on Power Station" *Daily News*, New Plymouth, New Zealand, 4 December 1993.

22 See "Huntly Emissions Raise Permit Doubts" *Daily News*, New Plymouth, New Zealand, 18 December 1993. See also "CO<sub>2</sub> Emission Inquiry May Have to Look at Huntly" *The Evening Post*, Wellington, New Zealand, 15 March 1994.

plant and the Huntly Power Station were not called-in despite being considerably less efficient and producing significantly greater quantities of CO<sub>2</sub>.<sup>23</sup> The Minister stated in response to lobbying :<sup>24</sup>

Nothing would be gained by changing the consent agency for renewal of an existing consent for only one aspect of an activity.....the call-in power has the potential to drastically impact on the consent procedure and the issues can be adequately addressed through the existing submission process.

5 *The symbolic and strategic nature of the proposal.* A high element of political self-interest is certain to be present in any call-in decision including considerations of furthering overall Government policy. The Taranaki Combined Cycle call-in largely symbolised the Government's commitment to its climate change programme.<sup>25</sup> Similar political factors were central to the use of analogous provisions in the National Development Act 1979.<sup>26</sup>

6 *The plans, policies and competence of the local authority.* Local plans and policies may be considered unsatisfactory, especially if they differ markedly from the ideals of the Ministry. A call-in mitigates the effect of these local instruments and may effectively coerce their revision. The competence of the local authority may also prove an influential factor, including its ability to withstand local political influences.<sup>27</sup>

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23 The Minister's decision not to exercise the call-in power was considered a relevant factor by the consent authorities in both the Huntly Power Station and the Methanex Motunui hearings: "It is noted particularly in this case that the Minister for the Environment has chosen not to exercise his right of "call-in" for this application under section 140 of the RMA, despite his power to do so if it were 'of national significance'." See Taranaki Regional Council Report of the Taranaki Regional Council Hearings Committee : In the Matter of an Application under the Resource Management Act by Methanex New Zealand Ltd for an Air Discharge Permit for the Motunui Synthetic Petrol Plant, Stratford, 23 March 1994, 11 (para 84). See also Waikato Regional Council Report of the Waikato Regional Council Hearings Committee : In the Matter of an Application under the Resource Management Act by the Electricity Corporation of New Zealand Ltd for an Air Discharge Permit for the Huntly Power Station, Hamilton, 16 December 1993.

24 See Hon Simon Upton *re: Request to call-in the Methanex Motunui Synthetic Petrol Plant* Ministerial Response, Released under the Official Information Act, 7 February 1994. See also Hon Rob Storey *re: Request to call-in the Huntly Power Station* Ministerial Response, Released under the Official Information Act, 25 June 1993.

25 See "Carbon Dioxide Emission Control : Linda Rose Interviews Environment Minister Simon Upton" *YA Morning Report Transcript*, Radio New Zealand, 8.44am 16 April 1994. See also "Environmental Groups and ECNZ Prepare for Power Station Battle" *The Stratford Press*, Stratford, New Zealand, 8 July 1994. See also "ECNZ-Upton Set for Eco-Political Showdown in Stratford" *The Independent*, Auckland, New Zealand, 8 July 1994.

26 Below n 31.

27 See K Cronin *National Policy Matters in Resource Management : Resource Management Law Reform Working Paper 31* (Ministry for the Environment, Wellington, 1988).

7 *The applicant's involvement in prior consultation processes.* The Minister may take into consideration the extent of prior consultation by the applicant and whether further opportunities for public participation would prove useful. This became a key reason for rejecting a request to call-in consent applications for the diversion of the Waiau River into Lake Manapouri in 1992. The Electricity Corporation and Southland Regional Council had already established a working party with wide representation from farmers, local authorities, the local community, recreational and conservation groups, and iwi.<sup>28</sup>

### C *The Precedent Value of the National Development Act 1979*

The National Development Act 1979 provides an insight into situations in which the call-in procedure is likely to be invoked.<sup>29</sup> However, as both RJ Somerville and the Rt Hon Geoffrey Palmer MP have noted, any analogy between section 140 of the Resource Management Act and the "fast-track" procedure of the National Development Act must be drawn with caution.<sup>30</sup>

The National Development Act 1979 was a unique and highly controversial statute passed largely to allow rapid implementation of the "think-big" development policies of the day.<sup>31</sup> It was designed to identify public and private works of national importance. Then to take these works and allow them swift passage through the extensive planning controls.<sup>32</sup> The essence of the Act was a streamlined "fast-track" hearing procedure focused on a consolidated public inquiry before the Planning Tribunal.<sup>33</sup> The Tribunal's

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28 See Hon Rob Storey *re: Request to call-in the Manapouri Power Station* Ministerial Response, Released under the Official Information Act, 11 September 1992.

29 The National Development Act 1979 was repealed by s 2(1) of the National Development Act Repeal Act 1986.

30 The Rt Hon Geoffrey Palmer MP stated at the first reading of the Resource Management Bill: "The call-in procedure is not a successor to the National Development Act. It does not give central government the power to make decisions of substance. It is not a short cut. It will ensure that projects of national significance can be considered properly, and that all of the necessary inputs can be made. The same public processes have to be followed for all resource consents under the Bill, whether or not they are subjected to the call-in procedure. Even after the call-in procedure is completed the whole project is subject to Planning Tribunal scrutiny. It is important that the call-in procedure should not be misunderstood, that false analogies should not be made, and that it is not considered as some pernicious, sinister, central government power. It is not." See NZPD, vol 503, 14165, 5 December 1993. See also above n 15, 9.

31 See DAR Williams "Legal Developments in Approval Processes : The National Development Act 1979 of New Zealand" in LawASIA *Energy Law in Asia and the Pacific* (LawASIA, New York, 1992) 391.

32 The long title of the National Development Act 1979 provided : "An Act to provide for the prompt consideration of works of national importance by the direct referral of the proposals to the Planning Tribunal for an inquiry and report and by providing for such works to receive the necessary consents".

33 Sections 4 to 9.

report was forwarded to the Governor-General-in-Council who passed an Order-in-Council conferring planning consent.<sup>34</sup>

Judicial supervision of this procedure was also regulated by the Act. Only the Court of Appeal could review the process, and only then within strict time frames.<sup>35</sup> The ultimate decision remained overwhelmingly *executive* in character. In the words of MJ Minogue (MP), one of the most vocal critics of the Act, it created "enormous potential for the unaccountable exercise of political power".<sup>36</sup> The process of the National Development Act seems draconian when compared to the current call-in procedure of the Resource Management Act. Under the Resource Management Act the ultimate decision is substantially *judicial* in character.

By section 3(3) of the National Development Act 1979, the Act was intended to apply to the largest, most urgent and most essential of new developments. The considerations involved were principally *economic development* oriented.<sup>37</sup> It is submitted the call-in procedure will be used at least in similar instances. Experience suggests the Government will desire control over the decision-making processes for the most politically contentious of proposals, especially where a proposal is perceived as critical to economic policy or vital to the national interest. But it is also clear the call-in power may be invoked in much wider circumstances. It is submitted that the extent to which this will occur will depend on the policies of the Government of the day.

The National Development Act focused on public and private "works".<sup>38</sup> The word "works" was interpreted as relating to new developments.<sup>39</sup> It therefore seems that the use of the term "proposal" in section 140 of the Resource Management Act reflects a Parliamentary intention to sever any statutory relationship between the two Acts. It is submitted that "proposal" takes a wider meaning than "works". "Proposal" can be applied not just to development proposals, but to any proposed use of resources causing effects within the ambit of the Resource Management Act. This interpretation would allow the call-in procedure to be applied to the renewal of existing resource consents.<sup>40</sup>

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34 See J Hannan "The National Development Act 1979" (1980) 9 NZULR 200. See also DE Fisher "Environmental Policy Developments in New Zealand" (1984) 1 EnvPlanLJ 387.

35 Section 17.

36 See T Black "The National Development Bill" [1979] NZLJ 433.

37 In 1980 the Act was applied to a methanol plant proposed by Petralgas Chemicals New Zealand Ltd in Waitara. In 1981 an Order-in-Council was made for New Zealand Synthetic Fuels Corporation Ltd in respect of a larger gas-to-methanol-to-gasoline plant at Motunui. In 1981 the Act was invoked by South Pacific Aluminium Ltd for an aluminium smelter at Aramoana. In 1982, planning consents for the Motunui plant were awarded by the Minister of National Development pursuant to the Act. The Act has also been used to amend these Orders.

38 Section 3(3).

39 Above n 31.

40 Ministerial replies have not ruled out this possibility and have implicitly confirmed the wide scope of the call-in power. Yet it is apparent the Minister would be highly reluctant to invoke the power in such circumstances, above n 24.



By section 3(1) of the National Development Act, *any person* was allowed to apply to the Minister for the provisions of the Act to be applied. This is not the case with the call-in procedure. Under section 140 of the Resource Management Act, the call-in is activated solely on the Minister's own initiative. Yet clearly this does not preclude Ministerial lobbying. Anyone may still make representations to the Minister seeking that a particular proposal be called-in.<sup>41</sup> In doing so they should frame their requests in terms of the considerations outlined above.

#### *D Judicial Supervision of the Call-in Power*

Although ultimately the decision to exercise the call-in power is discretionary, limited scope exists for the courts to compel the Minister to exercise the power *reasonably*. Under the Judicature Amendment Act 1972, judicial review may be sought of the decision to call-in (or not to call-in) a proposal.<sup>42</sup> This review would be concerned with the procedural rather than substantive merits of the decision. The fundamental question would be whether the Minister acted within the scope of the power and both reasonably and fairly.<sup>43</sup>

*CREEDNZ Inc v Governor-General* suggests the large political content of any call-in decision will militate against judicial supervision:<sup>44</sup>

The larger the policy content and the more the decision-making is within the customary sphere of elected representatives the less well-equipped the courts are to weigh the considerations involved and the less inclined they are to intervene.

For example, if the Minister made no procedural errors when deciding to initiate a call-in, what ground could we use to review the Minister's decision? We would have to argue overall *unreasonableness* and the Court would be required to determine whether the Minister's decision was so unreasonable that no reasonable Minister, having regard to the facts and directing him or herself properly on the law, could properly have reached

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41 Six requests have been made already : *Manapouri Power Station*, Southland (11 September 1992); *Huntly Power Station*, Waikato (25 June 1993); *Marsden Point Port Development*, Northland (10 September 1993, 20 December 1993 - two requests); *Taranaki Combined Cycle Power Station*, Taranaki (5 December 1993); *Methanex Motunui Synthetic Petrol Plant*, Taranaki (10 January 1994). Of these requests only one was successful: the Taranaki Combined Cycle proposal was called-in by the Minister for the Environment (Hon Simon Upton MP) on 9 December 1993, above n 19.

42 See section 4(1) of the Judicature Amendment Act 1972.

43 See Crown Law Office "The Judge Over Your Shoulder : Judicial Review of Administrative Decisions" in Sir Geoffrey Palmer and M Chen *Public Law in New Zealand* (Oxford University Press, Auckland, 1993) 930.

44 [1981] 1 NZLR 172, 197.

it.<sup>45</sup> This is a test of extremely high threshold. In practice this ground would rarely succeed.<sup>46</sup>

Assuming the Minister did make clear procedural errors, would judicial supervision then prove successful? The threshold would be considerably lower with the applicant required to prove on the balance of probabilities that a procedural error occurred.<sup>47</sup> Although the Court would remain reluctant to intervene due to the political content of the Minister's discretion, judicial review could plausibly succeed. Yet would the applicant gain anything? Typically the Minister would simply be informed of his or her error and instructed to reassess the decision. There is no guarantee the decision would change.

Can the principles of natural justice be invoked to supplement section 140? It seems sensible that affected parties should be afforded the opportunity to make representations to the Minister before a call-in decision is made. The approaches of *Daganayasi v Minister of Immigration* and *Duryappah v Fernando* can be followed.<sup>48</sup> And the main precedent, *CREEDNZ Inc v Governor-General*, can be distinguished.<sup>49</sup>

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45 See *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223; *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130; *Council of Civil Service Unions v Minister for Civil Service* [1985] AC 374. Lord Diplock described manifest unreasonableness as the "irrationality" head of judicial review. A head which applied to "a decision so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it".

46 Above n 43.

47 Above n 44.

48 Cooke J (as he then was) stated in *Daganayasi*, above n 45, 141, that "the requirements of natural justice must depend on all the circumstances of each case, and the subject matter under consideration". *Durayappah v Fernando* [1967] 2 AC 337 had earlier provided four factors to determine the relevant quantum of natural justice for each particular case: the type of body, the type of power, the nature of the rights affected, and the nature of the resulting detriment. These factors were applied both expressly and implicitly in *Daganayasi* and *CREEDNZ*.

49 Three ways in which *CREEDNZ* could be distinguished from the present situation are: (i) The decision-making body in *CREEDNZ* was the Cabinet (Governor-General in Council). The argument was that Cabinet decisions are very broad in nature and it would be impracticable to allow all affected parties the opportunity to be heard. The present facts can be distinguished as the Minister's decision is specific in nature and the class of persons affected is considerably smaller. Widespread consultation would therefore be feasible. (ii) The express purpose of the National Development Act 1979 was to streamline the consent process. The Court of Appeal perceived natural justice as an obstacle likely to "do violence to the purpose of the Act". The present situation is distinguishable as the Resource Management Act promotes consultation and specifically allows affected parties the chance to be heard. Further such opportunities would benefit the purpose and procedure of the Act. (iii) In *CREEDNZ* the Court of Appeal reasoned that section 3(4) of the National Development Act (requiring that the local authority be consulted) codified the extent of natural justice the legislature had intended to exist within the application procedure of the Act. The

Can judicial supplementation occur without frustrating the legislative purpose? It seems that although section 140 allows the Minister considerable freedom, the dearth of natural justice contradicts the scheme of fairness and widespread consultation generally promoted within the Act. On balancing the factors it seems the case for judicial supplementation is clearly favoured.

This view is challenged by the Australian case *Medway v Minister for Planning*.<sup>50</sup> In *Medway*, judicial supervision was sought of a similar call-in provision in the Environmental Planning and Assessment Act 1979 (NSW).<sup>51</sup> The court held that before making a direction to call-in a proposal it was not necessary for the Minister to formulate the case for each relevant affected party, or to furnish these parties with any materials placed before the Minister, or to allow these parties the opportunity to make representations. The reasons given by the New South Wales Supreme Court focused on logistical impossibility, the emphasis of the statute on political factors rather than substantive individual rights, and the focus of the section on the subjective opinion of the Minister. These factors remain pertinent to New Zealand's section 140. There is considerable similarity between the call-in provisions of the two Acts.

In conclusion, it is submitted that section 140 leaves *limited* scope for judicial supplementation. A Court would probably find that the Minister has a positive duty in law to consult an applicant if the Minister was requested by a third party to call-in that applicant's proposal. The court may also hold that the Minister must consult with the relevant local authority if requests were made to call-in proposals within that authority's jurisdiction. It is submitted section 140 should be amended to clarify these matters.

The call-in power could also be supervised by utilising the provisions of the Resource Management Act itself. Under section 311 declarations may be sought from the Planning Tribunal. The scope of these declarations is extremely wide.<sup>52</sup> Section 310(a) allows the Tribunal to determine the existence of any function, power or duty under this Act. And by section 310(c) the Planning Tribunal may direct whether or not an act or omission is likely to contravene this Act. It is submitted that the Tribunal

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present case can be distinguished as no codification of natural justice has occurred within section 140. There remains considerable scope for judicial supplementation.

50 (1993) 30 NSWLR 646.

51 See section 101(1) of the Environmental Planning and Assessment Act 1979 (NSW). In *Medway v Minister for Planning* a quarry owner applied to have a direction by the Minister for Planning calling-in his planning consent application overturned. The quarry owner argued that the Minister for Planning: (i) took irrelevant matters into consideration, (ii) violated the principles of natural justice by not allowing the applicant a chance to make his case, and (iii) made a manifestly unreasonable decision. The three appellate judges held that judicial review of the call-in power was not possible due to the overwhelmingly political nature of the Minister's discretion.

52 Although declarations must be founded on one of the grounds outlined within s 310. See *Stop CRA Pollution (SCRAP) Inc v New Zealand Refining Co Ltd* (1993) 2 NZRMA 586. See also *Brooker's Resource Management* which notes that section 310 is considerably wider in scope than the analogous section 153 of the Town and Country Planning Act 1977, above n 1, A310.01.

could, in some circumstances, declare that the Minister has a duty in law to call-in (or not to call-in) a particular proposal. Alternatively, an enforcement order could be requested under section 314(1)(b)(i) requiring the Minister to do something that, in the opinion of the Tribunal, is necessary in order to ensure compliance with this Act.

While judicial remedies are theoretically available in both these situations, it seems that at this stage the Planning Tribunal would be loath to fetter the broad statutory discretion of the Minister. The Resource Management Act is still in its infancy and it is submitted a fairly radical step of this nature would most likely prove unpalatable.

#### IV THE BOARD OF INQUIRY

##### A Section 146 : The Constitution of the Board

The Board of Inquiry is appointed by the Minister. It contains between three and five members selected to *represent any national, regional, territorial, and iwi interests in the application concerned*.<sup>53</sup> These interests are not otherwise stated as factors the Board should consider. This suggests Parliament intended each member to implicitly give weight to their representative interest within the Board's ultimate report and recommendations.<sup>54</sup>

The Minister appointed *three* Board of Inquiry members for the Taranaki Combined Cycle hearing.<sup>55</sup> This seems indicative of the Minister's intention to keep the call-in low in profile. Politically contentious matters of high public interest will presumably necessitate a five member board. The Taranaki Combined Cycle Board's membership reflected *legal, technical* and *local* expertise.<sup>56</sup> Mr DAR Williams QC, was appointed

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53 Section 146.

54 The composition of the Board also seems to reflect an intention that the hearing be held in the context of broader national values transcending those of the local community. Local consent committees typically reflect only the values of the local electorate so it seems the Board's constitution was designed to remove these local prejudices and mitigate likely irregularities in regional policy and approach. The express inclusion of a Board member representing Iwi interests also suggests Parliament intended Treaty of Waitangi issues to be given a greater degree of prominence, above n 15, 13.

55 In appointing the Board, the Minister consulted with a wide range of parties including the relevant local authorities, the applicant, the main submitters, the relevant Government Ministries, and Cabinet. This was in line with the intention of s 146(2)(a). See S Veart *Board of Inquiry Members* Briefing Note, Released under the Official Information Act, 10 December 1993.

56 This spread of experience and specialisation worked extremely well in practice. DAR Williams QC handled the legal issues, many of which were of considerable complexity. Professor D Elms took care of the technical issues - again of considerable complexity. While HN Johnston JP was able to ground the Board of Inquiry in the reality of the consent process. Johnston also had an excellent grasp of the various economic and local issues. See also Hon Simon Upton "Minister Names Board to Consider Power Station Proposal" Ministerial Press Release, Embargoed

chairperson. As a barrister experienced in planning and environmental law, even briefly a High Court judge, he was superbly qualified for this role.<sup>57</sup> Professor D Elms, a professor of environmental engineering at Canterbury University, was appointed for his technical expertise. Mr HN Johnston JP, a Taranaki Regional Councillor and chairman of the Taranaki Regional Council consents and regulatory committee, was appointed for his local and practical knowledge. No account was taken of Iwi interests in the composition of the Board.<sup>58</sup>

What situation is therefore encountered by applicants facing a Board of Inquiry? As RJ Somerville predicted, the expansive nature of the Board's constitution resulted in a dramatic escalation of issues. The potential scope of the Taranaki Combined Cycle Inquiry thus became considerably greater than a conventional consent hearing.<sup>59</sup> Essentially, the consent process under the Board of Inquiry became more formalised while the range of potential issues broadened.

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until 900 hrs, 8 March 1994. See also "Upton Names Three for Power Station Inquiry" *Daily News*, New Plymouth, 9 March 1994.

57 Including a role as legal counsel in many of the National Development Act cases and writing a leading text on environmental law in New Zealand. He resigned from his position as High Court judge early in 1994.

58 This fact was highlighted during the pre-hearing meeting when a member of the local Iwi stood up and vehemently criticised the constitution of the Board. Subsequently, at the hearing itself, Mr S Pivac tabled a formal objection to the lack of Iwi representation on the Board stating that the Minister had not complied with his duty under s 146(2)(a). Pivac charged that therefore the Board was not properly constituted. The chairperson (DAR Williams) overruled this objection [jurisdictional ruling No.3] and stated: "In the absence of evidence signifying the Minister failed to consider Iwi interests we are obliged to proceed on the assumption that the Minister did consider such representation. It may reasonably be inferred that the Minister took the view that there was no particular need apparent in relation to this specific matter to have Iwi representation on the Board....We should stress however that if in the course of this hearing it became apparent that Iwi interests were directly in question, this Board would have no hesitation in seeking expert assistance from these interests and the Board does have the power to commission investigations of that kind". See Taranaki Regional Council Transcript of the Board of Inquiry Under Section 146 of the Resource Management Act 1991 to Report on the Proposed Taranaki Combined Cycle Power Station, Stratford, 11 July 1994, 3.

59 A similar broadening of issues is likely to result from the national notification of a call-in. This publicity will generally attract a greater number and variety of submissions, and a wider range of interest groups. At the Taranaki Combined Cycle hearing the scope of the Inquiry rapidly became a major issue. The Electricity Corporation submitted that only the environmental effects of the specific CO2 volumes to be emitted by the proposed power station were relevant. In contrast many of the opposing parties took a broad focus, challenging the general need for the power station, the Government's failures in energy efficiency and the greenhouse effect in general, above n 15, 14.

### B Section 147: The Conduct of the Inquiry

In considering an application, the Board of Inquiry is referred to three separate tiers of operation of the Resource Management Act. First, under section 147(3), the Board is required to assess the matters of section 104 *as if the Board of Inquiry were a consent authority*. Secondly, under section 147(4), the Board must consider relevant factors from section 140 and the Minister's official reasons for calling-in the application. Thirdly, the Board must have regard to the overriding purposes and principles of Part II of the Act.

Is the Board of Inquiry a *consent authority*? Section 147(3)(a) directs the Board to apply the matters of section 104 as if it were. This infers it is not. Section 2 clarifies the matter, a "*consent authority*" is defined as the *Minister of Conservation, a regional council, a territorial authority, or a local authority*. The Board of Inquiry is not included. *The Board of Inquiry is therefore not a consent authority for the purposes of the Act.*

This means the Board of Inquiry is not expressly subject to sections 105 to 114 of the Resource Management Act which place various restrictions on the grant of resource consents.<sup>60</sup> Instead the Board is expressly referred by section 147(3) to section 104. Section 104 defines the factors to be weighed when determining whether or not to grant a particular consent.<sup>61</sup> The Board of Inquiry is essentially required to take a broader than usual approach to these factors and may avoid local policies, rules and plans.<sup>62</sup>

The second tier of relevant considerations for the Board is outlined by section 147(4)(b). The Board is directed to *have regard to* the Minister's reasons for calling-in

60 At the Taranaki Combined Cycle hearing, RJ Somerville, Counsel for the Applicant (ECNZ) submitted: "It appears that the most significant aspect of the Board's reporting function is that it is not expressly subject to a number of the sections in Part VI of the Resource Management Act that would normally apply to consent authorities, including the limitations on decisions in section 105", above n 19, 2.8.14.

61 *Brooker's* notes "*THIS IS ONE OF THE KEY SECTIONS OF THIS PART OF THE ACT*", above n 1, A104.02.

62 In *Donnithorne v Christchurch City Council* [1993] NZRMA 97, 103, the Tribunal held that the words of s 104(1)(c) impose a duty on the decision-maker to give weight to the instruments as is considered appropriate in the circumstances. Normally this would make little difference as the consent authority must give effect to Regional Policy Statements by s 84(1). But the Board of Inquiry is not bound in this manner [neither the Board nor the Minister are bound by s 84(1) which provides: While a policy statement or a plan is operative...every consent authority, shall observe and...enforce the observance of the policy statement and plan]. It is submitted this means that because of its wider national perspective, the Board effectively escapes much of the influence of regional policy. But although neither the Board nor the Minister are bound to observe Regional and District Policy Statements and Plans, the Minister must still have regard to them [by s 149(1)(b) the Minister must have regard to s 104(1)(d), below n 73]. It seems regional policy is still relevant to the ultimate consent decision of the Minister, but its relative weight is severely reduced.

the application and all relevant factors under section 140. The matters of section 140 significantly expand the Board of Inquiry's terms of reference.<sup>63</sup> It is submitted that while section 104 provides the critical framework for decision-making, section 140 mandates a wider national perspective which the Board should adopt in its approach. At the Taranaki Combined Cycle hearing the Secretary for the Environment submitted:<sup>64</sup>

The call-in under section 140 does not change the statutory tests for dealing with the application except in one respect. Section 147(3) places the Board of Inquiry in the shoes of the Taranaki Regional Council, but section 147(4) broadens the scope of the Inquiry from the usual section 104 considerations, to include all relevant matters under section 140 and the Minister's reasons for making the direction under section 141.

The third tier requires consideration of the principles of Part II of the Resource Management Act. Yet, as RJ Somerville reasons, the section 5(2) endorsement of the *social, economic and cultural well-being of people and communities* will take on a *national* as well as regional dimension. Similarly, the cumulative safeguards of sections 5(2)(a), (b) and (c) will be interpreted with reference to the wider *national* environment rather than in rigid compliance with the existing regional and district policy statements and plans.<sup>65</sup>

It therefore seems apparent that the Board of Inquiry has a completely different set of powers and functions to a conventional consent authority. The Board does not make the ultimate decision but by section 148(2) its critical function is to report to the Minister. This report must outline for the Minister the principal issues, findings of fact and recommendations concerning the final decision. It may also recommend changes to national or local policy statements and plans. In holding an Inquiry and writing this report the Board may give effect to the various factors and instruments as it deems appropriate. Where instruments are incompatible with the Board's own findings it need not follow them, but may bring the attention of the Minister to the inconsistencies it has discovered.

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63 At the Taranaki Combined Cycle hearing, RJ Somerville, Counsel for the Applicant (ECNZ) stated: "It is submitted that the factors the Minister may have regard to in section 140(2) are value neutral in the sense that they do not favour either the grant or refusal of the application in question. Rather they are factors which indicate that the appropriate community of interest to address the application is national, as well as local. The direction of the Minister to call-in the application was made in accordance with grounds 140(2)(a) and (e). Nevertheless, we submit the Minister's rationale does not predetermine the application in any way, but merely recognises the national interest in the hearing of the application and its outcome", above n 19, 2.8.6. The term "have regard to" is discussed below n 72.

64 Below n 66, 2

65 Above n 15, 16.

C *The Role of the Board Within the RMA : A Policy Function?*

What is the role of the Board of Inquiry within the Resource Management Act? It seems the Board is free of the encumbrances binding conventional consent authorities. A consent application may be considered independently on the basis of its substantive individual merits; in relation to the matters of *national significance*; and with greater conformity to the overriding purposes, principles and philosophy of the Resource Management Act.<sup>66</sup>

The Board's autonomy allows it the limited ability to "step outside" the Resource Management framework to objectively assess the operation of the Act. RJ Somerville comments "where planning and policy instruments are inconsistent with an appropriate decision, its role of recommending to the Minister the issue, change or repeal of these instruments will be triggered".<sup>67</sup> The Board may recommend altering the emphasis of the Act in relation to certain activities if this is considered necessary. It is submitted this means the Board has an implicit role of assessing and addressing the adequacy and efficiency of Resource Management policy. It is not simply inquiring whether a consent should be granted, but may inquire into and recommend the resolution of major flaws it encounters in the daily working of the Act.

What is the extent of this policy function? There are clear constraints placed on the ability of a Board of Inquiry to suggest policy.<sup>68</sup> The Board is a quasi-judicial body and is not mandated to make purely political decisions. Policy recommendations must be of a very general nature such as indicating the relative merit of various statutory instruments, rather than detailing their specific content. At the Taranaki Combined Cycle hearing, Board member Professor D Elms stated:<sup>69</sup>

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66 See *Jurisdictional Submissions on Behalf of the Secretary for the Environment : In the Matter of a Board of Inquiry Appointed under Section 146 of the Resource Management Act 1991 to Consider an Application by the Electricity Corporation of New Zealand Ltd for a Permit to Discharge Contaminants into the Air from the Proposed Taranaki Combined Cycle Power Station*, Stratford, 18 July 1994.

67 Above n 15, 16.

68 During the Taranaki Combined Cycle hearing, RJ Somerville, Counsel for the Applicant (ECNZ) in response to questioning by the Board during his opening submission, stated: "Its our submission the Board of Inquiry is placed in an invidious position.....Before a policy on carbon dioxide emissions could be formulated there would need to be a comprehensive section 32 analysis of costs and benefits and a determination of which policy is the most suitable for combating this greenhouse gas.....The Board simply does not have the resources to deal with fiscal matters of this nature. Its not only unfair but virtually impossible for the Board of Inquiry to gather sufficient information to undertake the work of formulating policy.....you haven't been provided with sufficient information from either the applicant or the other parties to even allow you to commence formulating policy under section 32 which is the procedure normally followed", above n 58, 12.

69 This comment was made in the context of a discussion on National Policy Statements, above n 58, 13.



I might be wrong. But my interpretation of what the Act allows us to do is that it states we can recommend policy. That's not to say we should say what the policy says in fact. As I recollect it, what the Act says is that once there is a recommendation, the Minister must establish another Board of Inquiry. In other words, its quite clear to me that we might not be the people intended to put such a policy together. We simply recommend.

This policy function may be beneficial. For example, Auckland may have critically low reservoirs and may be seeking a resource consent from the Waikato Regional Council to draw large volumes of water from the Waikato River. This could be designated a *non-complying* activity within the Waikato Regional Plan.<sup>70</sup> A call-in will ensure greater weight is given to effects outside the immediate jurisdiction of the Waikato Regional Council. In this situation a call-in would emphasise the social and economic benefits of alleviating a severe Auckland water shortage. It would avoid a myopic and jealous focus on the detrimental effects of water extraction from the Waikato River. The Board of Inquiry could also scrutinise the rules and policies of the Waikato Regional Plan and *may recommend the non-complying activity be reclassified*. Auckland may be permitted to withdraw water in times of drought in a *controlled* manner.

In the event of such a recommendation, the Minister may achieve changes to Regional Policy Statements and Plans in one of two ways. Firstly he or she may suggest to the local authority that a change should be made. But this method would depend on the agreement of the local authority as under section 19 the local authority must *publicly notify* changes to give them legal effect. The second of the two methods does not require the consent of the local authority but is more cumbersome.<sup>71</sup> Under sections 46 and 53 of the Act the Minister may issue a *National Policy Statement* directing that the local authority make the required changes. Under section 55(1)(b)(ii) the local authority must then comply.

## V THE MINISTERIAL DECISION AND APPEALS

### A *The Ultimate Decision : Political or Judicial?*

Under section 149 the resource consent application is decided by the Minister after considering the report of the Board of Inquiry and the matters of section 104. But by section 149(1) the Minister is not bound to uphold the findings and recommendations of the Board, he or she need only *have regard* to them.<sup>72</sup> The Board's report takes the legal

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70 Section 105(2)(ii).

71 See Hon Rob Storey "Policy Statement Mechanism is Cumbersome, Costly and Slow" (1993) 32 Environment Update 1.

72 At the Taranaki Combined Cycle hearing, RJ Somerville, Counsel for the Applicant (ECNZ) submitted: "We submit that the Minister is not bound by the recommendations of the Board or the matters in section 104, nor is he expressly limited to the consideration of only those materials. Provided that the Minister gives 'genuine attention and thought' to the report of the Board and the matters in section 104, and does not take into account irrelevant considerations, section 149 appears to

character of an express mandatory relevant consideration. In law the Minister must give the Board's report and recommendations *genuine attention and thought*.<sup>73</sup>

But unlike the Board of Inquiry, the Minister remains bound by sections 105 to 114 of the Resource Management Act.<sup>74</sup> This means the restrictions placed on the ability to grant resource consents for certain activities will remain binding. The Minister is also bound to follow the classification of these activities within the relevant Regional or District Plan. For example if an activity is expressly prohibited by a regional plan the Minister cannot grant a consent despite the fact a Board of Inquiry may find it is in the national interest to do so. Although this would clearly not prevent the Minister initiating changes to the relevant plan if the Minister believed changes were necessary.

Any judicial supervision of the Minister's decision must occur via an appeal to the Planning Tribunal within the procedure outlined in the Act. By section 296 of the Resource Management Act, *if there is a right of appeal to the Tribunal against a decision of any person under this Act then no application for review under the Judicature Amendment Act 1972 may be made*.<sup>75</sup> In terms of the call-in procedure this right of

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give the Minister wide powers to consider extraneous material in reaching his decision. The statutory function to 'have regard to' a particular matter in the context of a decision-making discretion is purely a deliberative function. The matter in question may be rejected, or accepted only in part. It need not influence the outcome of the decision", above n 19, 2.9.6.

73 The phrase "have regard to" has been considered in a number of cases. In *New Zealand Co-operative Dairy Co Ltd v Commerce Commission* [1992] 1 NZLR 601,612, Wylie J stated: "We do not think there is any magic in the words 'have regard to'. They mean no more than they say. The Tribunal may not ignore the statement. It must be given genuine attention and thought and such weight as the Tribunal considers appropriate. But having done that the Tribunal is entitled to conclude it is not of sufficient significance either alone or together with other matters to outweigh other contrary considerations which it must take into account in accordance with its statutory function". Previously, in *NZ Fishing Assn v Minister of Agriculture and Fisheries* [1988] 1 NZLR 554, 551 the Court of Appeal had stated (per Cooke P): "The phrase is 'have regard to' not 'give effect to'. The relevant matters may in the end be rejected, or accepted only in part. They are not, however, to be rebuffed at outset by a closed mind to make the statutory process seem idle". And at 566 McMullin J stated "They require an open and receptive mind which is nonetheless free to disregard the submissions made if other relevant considerations require it". In *R v CD* [1976] NZLR 436, Somers J noted that the words "have regard to" do not fetter the discretion of the decision-maker. It is submitted that case law indicates it is sufficient that the Minister give the report and recommendations of the Board "genuine attention and thought", and accord them such weight as the Minister considers appropriate in the circumstances, above n 19.

74 Section 149(3).

75 Brooker's states "The pattern of the legislation is that where possible the jurisdiction of local council's and the Planning Tribunal should be self-contained...section 296 is an indication of a statutory view that the High Court should not interfere until appeal rights have been exhausted, and that the Tribunal should have priority", above n 1, A296.05. Authority supporting this view is provided by *St Mary's Bay Association v*

appeal is created by section 149(3) which expressly refers to the appeal provisions of section 120. But the decision of the Planning Tribunal may still be appealed to the High Court and Court of Appeal in the conventional manner.<sup>76</sup>

It is extremely unlikely the Minister would decide an application contrary to the Board of Inquiry's recommendations despite having a legal discretion to do so. Under section 148(3)(d) the Board's report is published. This means the Minister's decision becomes highly transparent and would be subjected to close political and public scrutiny. A decision contrary to the Board's recommendations would almost certainly be appealed to the Planning Tribunal with the Minister risking acute public embarrassment if his or her decision was subsequently overturned.

It seems likely that if a matter is contentious enough to result in a call-in, the losing party would appeal the Minister's decision under section 149(3) in a tactical attempt to gain a rehearing *de novo*. It is submitted that the Minister's role becomes almost symbolic. The ultimate decision is not political, but substantively *judicial* in character.

## B Security of Consent Conditions

Section 128(1) of the Resource Management Act 1991 specifies three grounds on which consent authorities may review the conditions of a resource consent: (i) review conditions incorporated within the resource consent itself; (ii) changes made to regional rules; and (iii) information vital to the grant of the consent later found to be materially inaccurate.<sup>77</sup> The grant of a resource consent does not therefore confer an indefeasible right to the resource.

Although section 128(1) bestows a high degree of flexibility on local authorities, it simultaneously introduces considerable uncertainty to the terms of consents and thus the

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*Auckland City Council*, Unreported, 9 February 1981, High Court, Auckland Registry, A9/81.

76 Section 299(1). In *Minister of Conservation v Christchurch City Council* (1993) 2 NZRMA 593,596, the High Court held that the earlier case law of the Town and Country Planning Act 1977 is still applicable on this matter. The High Court has no general appellate jurisdiction on questions of fact and it is considered inappropriate for it to re-examine the merits of each case. An appeal to the High Court is thus restricted to an inquiry into whether the correct test had been applied by the Planning Tribunal, and whether or not the Planning Tribunal had taken all proper matters into consideration. See also *Manukau City Council v Trustees of Mangere Lawn Cemetery* (1991) 15 NZTPA 58,60, where Chilwell J stated : "The [High] Court has no general appellate jurisdiction on questions of fact in this area...this is because the Tribunal is seen as an expert jury on matters of fact and policy, and questions of reasonableness and public interest as far as relevant to the planning powers. It is not therefore appropriate for the Court to enter into a re-examination of the merits of the case".

77 Section 128(1).

future of activities allowed by them. In turn this increases risks for investors and adversely affects the economic viability of proposed developments.<sup>78</sup>

But the potential effects of section 128(1) can be largely avoided where the consent has been determined by way of a call-in. Although section 150(1) confers powers on the local consent authority to change or review conditions imposed by the Minister, section 150(1)(a)(i) prohibits a consent authority from doing so unless the prior written permission of the Minister is obtained. The local consent authority must also *comply with any conditions imposed by the Minister* when exercising their powers of review.<sup>79</sup>

Resource consents determined by way of a call-in therefore have increased security. The Minister retains control and may prevent or restrict the local authority's ability to modify the terms and conditions of a consent. The situations in which the Minister would withhold approval are presently uncertain, but it is unlikely approval will be granted where the modification of a consent would be detrimental to the national interest. Undoubtedly a political element will exist in this decision but, as RJ Somerville observes, "this power represents an important bulwark against the erosion of consents granted under a call-in".<sup>80</sup>

## VI REFINING THE POWER

### A *The Strategy of the Ministry*

To date the Government has only seriously considered invoking the call-in power in respect of its *CO<sub>2</sub> Reduction Programme*.<sup>81</sup> Under the *United Nations Framework Convention for Climate Change (FCCC)* New Zealand has international obligations to mitigate carbon dioxide emissions.<sup>82</sup> These obligations are expected to be progressively tightened and will impact on both future and existing development activities.<sup>83</sup> Proposals emitting substantial volumes of carbon dioxide are therefore *matters of national significance* under section 140(2)(c) of the Resource Management Act as *affecting New Zealand's international obligations or the global environment*.<sup>84</sup>

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78 See MRG Christensen "Review of Consent Conditions : A Legal Perspective" Unpublished, New Zealand Planning Institute Annual Conference 1994, Nelson, 27 April 1994.

79 Section 150(a).

80 Above n 15, 19.

81 Above n 18.

82 See *United Nations Framework Convention on Climate Change (Final Text)* (1992) 31 ILM 849. New Zealand signed the "FCCC" in June 1992 and ratified it on 16 September 1993, the 34th country to do so. The FCCC entered into force on 21 March 1994, three months after the 50th ratification. By Article 4(2)(a) : "*Each of the parties shall adopt national policies, and take corresponding measures to mitigate climate change, by limiting its emissions of greenhouse gases...*"

83 Above n 16.

84 In the direction under s 140 given by the Minister for the Environment on 9 December 1993, the Minister gave as one of his reasons "That the proposal is likely to affect

Yet the current Government seems reluctant to use resource consent's to control greenhouse gas emissions. The preference is for economic instruments such as carbon taxation.<sup>85</sup> The correct vehicle for introducing Government policy into the Resource Management Act is the National Policy Statement. However, none have been promulgated. In a submission to the Taranaki Combined Cycle hearing, Dr RWG Blakeley explained:<sup>86</sup>

The use of the National Policy Statement under the Resource Management Act has been considered. Because of the global nature of the problem, and the national nature of the commitments this does not seem the most efficient mechanism to implement policy. National climate change commitments on greenhouse gas emissions do not lend themselves to being specifically subdivided for regional application. Flexibility across regions is important to the Government's overall strategy. Also, the Resource Management Act would not apply to non-point source emitters, such as motor vehicles - yet 38% of New Zealand's CO2 emissions come from the transport sector.

The lack of a National Policy Statement engendered considerable confusion. Under the Resource Management Act local authorities are required to decide applications involving large scale emissions of carbon dioxide.<sup>87</sup> But what action were they to

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New Zealand's ability to meet its obligations under the United Nations Framework Convention on Climate Change", below n 91, 16 (para 5.6).

85 On 21 July 1994, Hon Simon Upton, Minister for the Environment, announced a new package of policy measures to reduce New Zealand's CO2 emissions. Measures included: voluntary agreements by industry; an energy efficiency strategy; and the threat of a low-level carbon tax in 1997 if CO2 emissions were not then on track with the Government's objectives. See Hon Simon Upton "Industry Challenged to Reduce Carbon Dioxide Emissions", Press Release, Minister for the Environment, 21 July 1994. See also Ministry for the Environment *Exploring the Options for Reducing Net Emissions of Carbon Dioxide : A Consultation Document* (Ministry for the Environment, Wellington, March 1994).

86 See Dr RWG Blakeley *Evidence of RWG Blakeley in the Matter of an Application by ECNZ for an Air Discharge Permit for the Proposed TCC Power Station, Stratford*, 17 July 1994, 16 (para 4.20). At the hearing the Board questioned: "You pour cold water on the idea of a National Policy Statement and it seems to be on the footing that it wouldn't cover the field and therefore it should not be done?" Blakeley replied: "I'm submitting that the RMA would only have an effect on proposals with consents, which may be less than 32% of total New Zealand CO2 emissions. Hence it may not pass the s32 tests as an economically efficient way of dealing with the issue", above n 58, 151.

87 Under s 15(2) "no person may discharge any contaminant into the air...in any manner that contravenes a rule in a regional plan...unless the discharge is expressly allowed by a resource consent." Emission of carbon dioxide into the air would be a "contaminant" within the definition of s 2 as carbon dioxide is a gas that when discharged into the air would change the chemical condition of the air into which it is discharged.

take?<sup>88</sup> Without the guidance provided by a National Policy Statement, they were effectively required to decide resource consent applications in a policy vacuum. In an attempt to remedy this situation the Ministry for the Environment developed a three-part interim carbon dioxide strategy. This involved:

1 *The participation of the Minister in local consent hearings by making submissions.* Ministerial submissions have proved a reasonably successful alternative to the issue of a National Policy Statement. Submissions have allowed the Minister a direct input into consent decisions with the advantage of additional flexibility<sup>89</sup> However, Ministerial submissions *carry no greater legal weight than any other submission.* This means the Minister does not always get what is requested. A Ministerial submission runs the risk of possible rejection:<sup>90</sup>

There seems to be an expectation that once the Ministry for the Environment have expressed their views then industry or the council will take this into account under

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88 Regional authorities face two issues : should they permit large scale discharges of carbon dioxide by providing for such discharges in their Regional Policy Statements and Plans? If not, then what weight should they give to carbon dioxide discharges when deciding resource consent applications? The legal and political issues involved are of considerable complexity. For example, in the Taranaki Combined Cycle hearing, RJ Somerville, Counsel for the Applicant (ECNZ) submitted : "The most significant discharge from the proposed TCC Power Station is the emission of carbon dioxide. The plant is likely to produce between 1400 and 1500 kilotonnes of the gas per year. The effect of this discharge is not regional or national, but global. There are no potential adverse effects associated with the discharge of carbon dioxide from the site that fall directly and exclusively on the region. The discharge of carbon dioxide from the station will nevertheless contribute to world-wide anthropogenic emissions of Greenhouse gases. Emissions of carbon dioxide from the proposed TCC Power Station are estimated to be in the order of 0.007% of total world emissions. There is some scientific consensus that the cumulative effect of world-wide greenhouse gas emissions is giving rise to an enhanced Greenhouse effect, and artificially leading to climate change and global warming. Nevertheless, there is still significant debate amongst members of the scientific community about the current extent and future patterns and degree of that effect. We reinforce our earlier submission that the nature and extent of the Greenhouse effect is not relevant to this application, except to the extent that the effects of global warming can be attributed to the proposed discharge. We submit that the potential effect of the discharge of carbon dioxide from the proposed power station on the environment can not be quantified by reasonably probative evidence. See *Re Erebus Royal Commission; Air New Zealand v Mahon* [1983] NZLR 662 (PC)", above n 19, 5.2.

89 The Minister is currently advocating review conditions, the best practicable option and the monitoring of emissions, as conditions for the grant of these consents. Refer to the submissions of the Minister to the Edendale Dairy Factory, Tiwai Point Smelter, Huntly Power Station, Motunui Synthetic Petrol Plant, Taranaki Combined Cycle Power Station.

90 See Waikato Regional Council *Report of the Waikato Regional Council in the Matter of an Application by ECNZ for a Discharge Permit (Air) in Respect of the Huntly Power Station* Hamilton, 16 December 1993.

threat of appeal. In the absence of a policy statement presumably they have no more rights than any other interested party.

2 *The publication of a document known as the "Climate Change Protocol".*<sup>91</sup> This document, issued by the Minister, was advocated as establishing national policy in the absence of a National Policy Statement. But what effect should local authorities give to the Protocol? It has no statutory basis within the Resource Management Act and no other legal standing.<sup>92</sup> This uncertainty has led to wide variations in response.<sup>93</sup> Although local authorities welcomed guidance on the carbon dioxide issue, they remained critical of the Protocol approach. Complaints highlighted insufficient consultation, a disregard for the structure of the Resource Management Act, confused objectives, and contradictions in approach:<sup>94</sup>

The information in the Climate Change Protocol essentially instructs Regional Councils to take no action on limiting emissions, and to take action on limiting effects only if such actions have benefits additional to those related to the greenhouse effect.....the question arises.....why not simply ignore the greenhouse effect altogether?

It is submitted that the Protocol is essentially a means of avoiding a National Policy Statement. It seems largely based on the *hope* that local councils will adopt it into law via Regional Policy Statements and Plans. This is reprehensible. It compromises the clearly defined structure of the Resource Management Act. It creates considerable uncertainty for both applicants and local authorities and thus increases overall economic costs. It thrusts an unequivocally national issue into the hands of those with insufficient expertise and resources to address its satisfactory incorporation within the Resource Management regime.<sup>95</sup>

3 *The use of the call-in power.* The Government currently supports participation in the conventional consent process and even appealing unfavourable resource consent

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91 See S Allan *Climate Change Protocol: Information for the Guidance of Local Authorities in Addressing Climate Change* (Ministry for the Environment, Wellington, 1993).

92 Taranaki Regional Council listed their difficulties with the protocol in their response document, below n 94. But no criticism should be directed at S Allan who has produced a comprehensive and clearly laid out document in difficult circumstances, above n 91.

93 On writing to all the Regional Councils in New Zealand I discovered: (i) Taranaki Regional Council and Auckland Regional Council both prepared detailed response documents, then incorporated their findings into Regional Policy Statements. (ii) Wellington Regional Council and Canterbury Regional Council both attempted to directly give effect to the recommendations of the Protocol within their respective Regional Policy Statements; (iii) Northland Regional Council, Bay of Plenty Regional Council and Hawkes Bay Regional Council made no response.

94 See Taranaki Regional Council *A Taranaki Response to the Enhanced Greenhouse Effect* (Taranaki Regional Council, Stratford, 1993) 36.

95 Above n 94, 35.

decisions to the Planning Tribunal.<sup>96</sup> The call-in procedure has clearly become an instrument of last resort. It is submitted that its inclusion within the carbon dioxide strategy seems to have been aimed more at placating local authorities and enhancing the public credibility of the *CO<sub>2</sub> Reduction Programme*.<sup>97</sup> Reasons given for the extreme reluctance to utilise the call-in procedure include a "desire to emphasise policy development", and a belief that the carbon dioxide panacea lies with some "ultimate carbon dioxide policy based on economic instruments" lying outside the framework of the Resource Management Act.<sup>98</sup>

### *B Defining the "Call-in" Power in National Policy Statements*

There seems to be an underlying dissatisfaction with the present formulation of the call-in power based on a view that it is arbitrary and ad hoc.<sup>99</sup> The current subjective nature of the Minister's discretion also tends to politicise the process to an unnecessary extent. It is submitted a means of adding certainty, transparency, and further public credibility to the exercise of the call-in power would be to include express criteria for the use of the power within a National Policy Statement. These criteria would have no legal standing but would have moral and political force.<sup>100</sup> It is submitted they would remove much of the subjectivity currently tainting the use of the power.

There is considerable scope within section 45 of the Resource Management Act for the Minister to cover a broad array of policies within National Policy Statements. These policies must be in line with the overriding function of the instrument *to state policies on matters of national significance*.<sup>101</sup> The factors guiding the Minister's discretion to produce National Policy Statements, or to call-in a proposal, are closely related. Both are expressed in terms of analogous considerations of *national significance*. Arguably there is at least an inferential relationship between them.

The Minister should therefore be persuaded to include within National Policy Statements specific criteria indicating circumstances in which the call-in procedure will be used. For example, in 1992 the Minister made an assurance to call-in "proposals which could significantly affect the Government's CO<sub>2</sub> reduction objectives".<sup>102</sup> A National Policy Statement would have provided an ideal vehicle for introducing this commitment into the framework of the Resource Management Act. At law the Minister's discretion regarding the composition of National Policy Statements appears

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96 See S Allan *Draft Climate Change Protocol* (Ministry for the Environment, Wellington, 1993).

97 Above n 16, n 17.

98 Above n 86, n 87.

99 This is the view of the writer acquired by discussing the call-in power and procedure with the various people involved in the Taranaki Combined Cycle hearing.

100 They would also still leave the call-in discretion of s 140 open in the event of an unforeseen contingency.

101 Section 45(1).

102 Above n 16, n 17.



relatively unfettered. It is submitted such an action would have been well within the bounds of the National Policy Statement regime.<sup>103</sup>

### C *Amending the Call-in Power*

Another means of refining the call-in power would be via legislative amendment. A new subsection may be included within section 140 allowing anyone to formally and publicly request the Minister to call-in a proposal. RJ Somerville notes this would be in line with section 3(1) of the National Development Act 1979 which allowed any person to apply to the Minister of National Development for the provisions of the Act to be applied.<sup>104</sup>

Conceptually, such a subsection could state:

- (a) Any person may request in writing that the Minister call-in an application. These requests shall be supported by reasons, including reasons framed in terms of section 140 of this Act.
- (b) The Minister shall furnish these requests on other relevant affected parties. These other parties shall be given [a defined time] to respond.
- (c) On the request of the Minister, the applicant shall provide further details of the proposal including further copies of consent applications.
- (d) The Minister shall have regard to these materials when making the call-in decision then shall publish his or her decision including reasons why, or why not, the call-in power was invoked.

The benefits of such a request procedure would be considerable: *(i)* it is a cogent method of focusing attention on a specific proposal and its environmental effects; *(ii)* the Minister's decision would become more informed; *(iii)* a clear code of natural justice would be created allowing proposals to be considered uniformly and fairly; *(iv)* a request to call-in a proposal would become a matter of public record, thereby increasing overall transparency; *(v)* most importantly, the decision would become more amenable to judicial oversight, this would considerably increase the Minister's accountability.<sup>105</sup>

## VII CONCLUSION

The exercise of the call-in power is governed by the test of *national significance*. This test is satisfied by a wide range of proposals. It seems the call-in power may be available to the Minister for proposals possessing the requisite degree of salience that have effects extending beyond the immediate region and into the national or international arena. The residual discretion of the Minister effectively narrows this

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103 Above n 15, 27.

104 Above n 15, 40.

105 The current lack of a formal application procedure for use of the call-in power also seems anomalous to the general tenor of the Resource Management Act 1991. The Act advocates controlled rather than purely political decisions and emphasises formal public participation. It is submitted both aspects would be strengthened by this suggested revision to s 140.

range. It seems likely that the call-in will only be invoked by the Minister for proposals significant in a political sense.

This outcome may be inappropriate in some circumstances. The exercise of the call-in power appears to become overly political and somewhat *ad hoc*. It is submitted this arbitrariness could be reduced by increasing the transparency of the Minister's decision. Further criteria governing the exercise of the power could be incorporated within National Policy Statements. Alternatively, a measure of natural justice could be codified within section 140 via legislative revision.

The Board of Inquiry differs from a conventional consent authority. The Board has a wider advisory and inquisitorial function and is not permitted to grant resource consents. The principal function of the Board is to assist the Minister with decision-making. In fulfilling this ambition the Board is mandated to apply a wider national perspective to the instruments and procedures of the Resource Management regime. It may momentarily sweep away regional policy to lay bare the essence of sustainable management. The Board may then adopt a selective approach to Resource Management policy, highlighting incompatibilities as it proceeds. The Board of Inquiry also has an additional policy function the extent of which is presently unclear. This paper was completed while awaiting outcome of the Taranaki Combined Cycle hearing, so is not yet apparent if the Board adopted the submissions of legal counsel that this policy function is fairly limited in its scope.

The Minister's consent decision has a high degree of transparency and may be appealed to the Planning Tribunal and beyond. On appeal it seems likely the Tribunal would rehear the matter *de novo*. The Minister's decision therefore seems to become almost symbolic in nature. In direct contrast with the National Development Act 1979, the ultimate decision is substantially judicial in character.

The Resource Management regime is still in its infancy with many policies and approaches remaining unsettled. In this context the Electricity Corporation applied for a permit to discharge large volumes of carbon dioxide from a proposed thermal power station in Taranaki. The legal and political issues raised were of considerable complexity and the situation was exacerbated when Greenpeace vowed they would "fight the proposal all the way". Succumbing to intense lobbying the Minister announced the first call-in under section 140 of the Resource Management Act. The subsequent hearing was taken extremely seriously by all parties. This paper was written before the whole procedure was complete so it is currently premature to proclaim it successful. Suffice to say that in many respects it has worked flawlessly and with a considerable degree of success.

Presumably those at the Ministry will pass judgement on the merits of the Taranaki Combined Cycle call-in and make appropriate recommendations to the Minister as to the effectiveness of the process in achieving its purpose. It seems likely these recommendations will be favourable and may determine how often the power will be invoked in the immediate future. Ultimately, in the longer term, the use of the call-in power will be determined by the policies, values and priorities of the government of the day.